Arriving at an Answer to "The QUESTION OF QUESTIONS": How Lysander Spooner's Legal Education Influenced His (and Frederick Douglass's) Belief that Slavery Was Unconstitutional

HELEN J. KNOWLES-GARDNER*

TABLE OF CONTENTS

* Research Director, Institute for Free Speech; hknowlesgardner@ifs.org. The views expressed in this article are the author's alone, and do not represent the views of the Institute for Free Speech. The author is exceptionally grateful for the comments provided, on an earlier draft of this article, by the other participants in the December 2022 Ninth Annual Salmon P. Chase Distinguished Faculty Colloquium on "Frederick Douglass and Abolitionist Constitutionalism." Particularly helpful feedback was received from Pamela Brandwein, Greg Collins, John Mikhail, and Bradley Rebeiro. The author is also deeply indebted to Randy Barnett for originally introducing her to Lysander Spooner's work.

INTRODUCTION

In May 1851, downtown Syracuse bore witness to many dramatic events that would help to shape the course of slavery from thereon out, not just in that one city in central upstate New York, but also across the nation. Famously, when Secretary of State Daniel Webster took to the balcony of the Frazee Building on Montgomery Street on the 26th of that month, he vowed, among other things, to enforce the Fugitive Slave Act everywhere, even in Syracuse "in the midst of the next anti-slavery convention, if the occasion should arise."[1] He did not have to wait long for this smoldering fuse to ignite a powder keg of abolitionist anger; four months later, on October 1, fugitive slave Jerry (born William Henry) was arrested by U.S. Marshals while the Liberty Party convention was in town. Thus followed the famous rescue of Jerry, an event in which numerous prominent members of the Liberty Party participated in myriad ways. Although the events that unfolded in Syracuse at the *beginning* of May 1851 have received less attention, they should nevertheless be regarded as no less important in the history of

1. Johnathan Croyle, *1851: How the 'Syracuse Standard' Calmed and Rallied the City in the Days Following the Jerry Rescue*, SYRACUSE.COM *at* https://www.syracuse.com/living/2021/10/1851-how-the-syracuse-standard-calmed-and-rallied-the-city-in-the-days-following-the-jerry-rescu e.html?outputType=amp. . . . (Oct. 2, 2021, 8:00 AM), https://www.syracuse.com/living/2021/10/1851-how-the-syracuse-standard-calmed-and-rallied-the-city-in-the-days-following-the-jerry-rescu e.html?outputType=amp [https://perma.cc/R8L3-GYY8].

American abolitionism. This is certainly true of the dramatic events that unfolded when the American Anti-Slavery Society (AA-SS) came to the Salt City for its eighteenth annual meeting on May 7–9, a meeting at which Frederick Douglass made an announcement that shocked the world of abolitionism.[2]

Was the U.S. Constitution pro-slavery? This, as Douglass once stated, was "the QUESTION OF QUESTIONS so far as the Anti-Slavery cause was concerned."[3] It was not the "only barrier between the different Radical Anti-Slavery Organizations of the country,"[4] but it certainly helped to explain why the barriers existed. In January 1850, Douglass continued to publicly align himself with an affirmative answer to the question. "To say that the constitution is Anti-Slavery," he observed during a debate that month, "is an assumption against an overwhelming array of testimony, and against the Constitution itself."[5]

Privately, however, Douglass had already begun to rethink his allegiance to William Lloyd Garrison's view that the Constitution was a "covenant with death, and an agreement with hell."[6] Douglass publicly "announced" his rejection of that view—his "change of opinion"—at the May 1851 meeting of the AA-SS in Syracuse. Douglass's newspaper *The North Star* published that "change of opinion" the following week, for all the world to see, and Garrison's *Liberator* reprinted it eight days later.[7] As discussed in detail below, in this "announcement" and in his subsequent, more detailed articulations of his newfound belief that slavery was actually unconstitutional, Douglass attributed his "change of opinion" to, *inter alia*, "[a] careful study of the writings of Lysander Spooner, of Gerrit Smith, and of William Goodell."[8] There is no doubt that all three of these men, in their own distinct ways, influenced Douglass's constitutional volte-face. However, as this article argues, there are many reasons to believe that Douglass owed his greatest intellectual debt to Spooner as he underwent this change.

---

2. Benjamin Quarles, *The Breach between Douglass and Garrison*, 23 J. NEGRO HIST. 144, 149 n.28 (1938).

3. *Is the Constitution Pro-Slavery? A Debate Between Frederick Douglass, Charles C. Burleigh, Gerrit Smith, Parker Pillsbury, Samuel Ringgold Ward, and Stephen S. Foster (Syracuse, N.Y.), Jan. 31, 1850*, NAT'L ANTI-SLAVERY STANDARD, reprinted in 2 THE FREDERICK DOUGLASS PAPERS, SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS 217, 221 (John W. Blassingame ed., 1979) [hereinafter "Debate"].

4. *Id.*

5. *Id.* at 231.

6. As the Garrison biographer Henry Mayer observes, this phrase was "an example drawn from the prophet Isaiah to show the folly of evading social responsibility with unholy alliances. Faced with an impending attack by the Assyrians, the people of Jerusalem had scoffed at the prophet's warnings and flaunted their wickedness: 'We have made a covenant with death, and with hell are we at agreement.' (Isa. 28:15)." Garrison "would work variations on this passage" throughout his life. "Sometimes he would apply it as a judgment upon the people of the North for remaining morally and politically complicit with slavery; at other times he would characterize the U.S. Constitution itself as the devil's pact. His point remained the same: the necessity of repudiating 'the yoke of bondage' imposed by the Constitution in order to effect 'a revolution . . . through the majesty of moral power.'" HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY 313 (1998).

7. Frederick Douglass, *Change of Opinion Announced*, THE N. STAR, May 15, 1851, *reprinted in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 173–74 (Philip S. Foner ed. 1999).

8. *Id.*

Numerous scholars have examined the other reasons why Douglass shifted his position on the relationship between slavery and the Constitution.[9] The pages that follow build on that existing scholarship—and my own previous writings about Spooner's interpretive philosophy—by examining Douglass's "change of opinion,"[10] Spooner's influence on that change, and why *Spooner* came to embrace the position that Douglass ultimately found so persuasive. Why did Spooner arrive at (and then write an exceptionally detailed two-part treatise[11] explaining) the conclusion that not only was the Constitution anti-slavery but also that slavery itself was unconstitutional? I argue that a detailed analysis of Spooner's legal education helps us to answer that question.

For most of the nineteenth century, in Massachusetts (where Spooner was born and raised) a person seeking to become a lawyer received his training in one of two ways. First (and the option that accounted for the education of a majority of new lawyers), one could work for a fixed period of time (usually between three and five years) as an apprentice in the office of a practicing attorney. The typical legal apprentice, especially in the first half of the century, had little time to indulge in reading (let alone digesting and critiquing) the "great" English and American legal treatises. Rather, his time was occupied by bread-and-butter legal tasks.[12] This was the way in which Spooner learned the law.

The alternative path to a legal education came through attendance at a "law school." The first standalone educational institution devoted to the study of law—the Litchfield Law School—opened in Connecticut in 1784.[13] It did not grant legal degrees, but, until its closure in 1833, Litchfield Law School produced a large number of alumni who became prominent national politicians.[14] When "law schools" affiliated with particular colleges began to open in the early nineteenth century, they were generally unpopular.[15] There was a disinclination to change the established apprenticeship system that "dovetailed nicely with notions of Jacksonian democracy, which had no patience with formal educational requirements for public office or the practice of law."[16] There were certainly not "law schools" as we understand them today. These did not emerge until the 1870s.[17]

In the 1830s, Spooner learned the law as a legal apprentice working under the tutelage of three prominent lawyers (and politicians) in Worcester, Massachusetts:

---

9. One particularly detailed study is Paul Finkelman, *Frederick Douglass's Constitution: From Garrisonian Abolitionist to Lincoln Republican*, 81 MO. L. REV. 1 (2016). *See also* Quarles, *supra* note 2.

10. Douglass, *supra* note 7, at 174.

11. Lysander Spooner, *The Unconstitutionality of Slavery*, *reprinted in* 4 THE COLLECTED WORKS OF LYSANDER SPOONER (Charles Shively ed. 1971); Lysander Spooner, *The Unconstitutionality of Slavery: Part Second*, *reprinted in* 4 THE COLLECTED WORKS OF LYSANDER SPOONER (Charles Shively ed. 1971).

12. Gerard W. Gawalt, THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760–1840 132–33 (1979).

13. Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L. J. 775, 795–99 (2004).

14. *Id*.

15. *Id*. at 798.

16. *Id*. For more general references, *see id*. at 791–98.

17. *Id*. at 800.

John Davis, Charles Allen, and Emory Washburn. Spooner's legal philosophy shows a considerable indebtedness to that legal education. These formative years—and formative experiences—significantly influenced Spooner's arrival at his particular, and subsequently very influential, answer to "the QUESTION OF QUESTIONS so far as the Anti-Slavery cause was concerned."[18]

I. FREDERICK DOUGLASS THE GARRISONIAN

As Mark Graber observes, "[William Lloyd] Garrison recognized slavery as the quintessential constitutional evil."[19] Even if one agrees with Lysander Spooner's assessment that slavery was unconstitutional, some undisputable facts remain that should leave us deeply unhappy with what the Framers produced in 1787:

> The original Constitution failed for numerous reasons to outlaw human bondage. Toleration of slavery was deemed necessary to secure the benefits of a more secure union. Most framers thought that the evil practice of slavery would soon disappear. Many believed states should be free to manage their purely domestic affairs; a few regarded slavery as a positive good.[20]

In short, "[c]onstitutionalists writing two hundred years later may claim they would have bargained better, but historians generally agree that constitutional agreement would not have occurred had most Southerners perceived a genuine threat to their 'peculiar institution.'"[21] These indisputable facts did not lead all abolitionists to arrive at the same conclusion about the relationship between slavery and the Constitution. "Antislavery theorizing and activism were essential . . . to developing a reading of the existing constitutional text that rendered human bondage incompatible with fundamental constitutional principles of liberty, equality, and democracy," observes Dorothy E. Roberts.[22] However, all abolitionists were forced to confront the Constitution's content, and the shadow cast by the serpent of slavery which had lain coiled under the Framers' desks in Philadelphia.

Garrison's reaction, when confronted with the nation's supreme law, was simple. Before a large crowd, sweltering in the Framingham, Massachusetts summer heat and humidity after arriving by rail and horse-drawn carriage, Garrison famously "commemorated" July 4, 1854, by standing on the "platform . . . draped in black crepe,"[23] holding up a copy of the Constitution, and burning it.[24] As he

---

18. Debate, *supra* note 3, at 221.

19. MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 12 (2006).

20. *Id.*

21. *Id.*

22. Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 54 (2019).

23. WILLIAM E. CAIN, WILLIAM LLOYD GARRISON AND THE FIGHT AGAINST SLAVERY: SELECTIONS FROM THE LIBERATOR 35 (1995).

24. He also burned a copy of the Fugitive Slave Act of 1850, as well as a copy of a recent court decision that ordered the free state of Massachusetts to use its facilities to assist in the capture of fugitive slaves. *The Meeting at Framingham*, THE LIBERATOR, July 7, 1854.

did so, he "alleg[ed] that it was 'a covenant with death, an agreement with hell. . . . So perish all compromises with tyranny,' to which the audience uttered 'Amen' as Garrison ground the ashes under his heel."[25] As the Garrison biographer Henry Mayer observes:

> No American before Garrison had so dramatically challenged his government's failure to realize and protect its ideals . . . When a moderate editor condemned the flamboyant protest at Framingham and sourly suggested that Garrison would have been outraged if the chairman of a Free-Soil meeting had burned a copy of *The Liberator*, Garrison demurred. If that person viewed the newspaper in the light he viewed the Constitution, as being hostile to the rights of the enslaved, why of course he would be justified in bearing a testimony against it. One crucial difference ought to be noticed, Garrison said: the Constitution was already destroying itself, but 'The Liberator is fireproof.'[26]

Burning the Constitution was far more than a mere symbolic act; it embodied the Garrisonian condemnation of a document that came into being almost seventy years earlier.

> In an intensely volatile and perplexing time, Garrison welcomed the growing polarization of the sections, insisted that the controversy turned upon a paramount issue of right and wrong, and labored steadily to bring the fundamental law into common contempt as the epitome of bondage. This confident absolutism remained his hallmark, and indeed his strategy, and he would not surrender it.[27]

Quite simply, there was no escaping the "ugly reality"[28] (to use the apt phrase of the Garrisonian Wendell Phillips, about whom we will hear much more below) that the Constitution co-existed with human slavery.

Until 1851, Douglass embraced the Garrisonian condemnation of the Constitution. As Paul Finkelman observes, it is essential that Douglass be viewed as a "constitutional actor and thinker" because, quite simply, "[t]hroughout his life, he interacted with the Constitution, critiqued it, and helped shape it."[29] Douglass's *Garrisonian* interaction with, and critique of, the Constitution can be seen most clearly by examining two of his 1847 speeches.

A. "Farewell Speech to the British People" (London, England, March 1847)

Today, 1-3 Bishopsgate, London—situated about three-quarters of a mile due east of St. Paul's Cathedral—is home to financial institutions, a business

25. CAIN, *supra* note 23, at 36.
26. MAYER, *supra* note 6, at 445.
27. *Id.*
28. WENDELL PHILLIPS, REVIEW OF LYSANDER SPOONER'S ESSAY ON THE UNCONSTITUTIONALITY OF SLAVERY 3 (1847).
29. Finkelman, *supra* note 9, at 4.

management consulting firm, and the very British supermarket Sainsbury's. These businesses are located across the intersection of the A10 and Leadenhall Street from the historic (and architecturally stunning) covered Leadenhall Market. In 1847, the fourteenth-century market did not feature the roof that tourists today gaze up at and photograph. Otherwise, however, the same basic market structure that we see today would have been a prominent part of the urban landscape Frederick Douglass encountered when he made his way to the London Tavern to deliver his impactful speech in March 1847.

"[U]nlike a tavern in appearance," and unlike a tavern in substance because it featured "neither a coffee-room nor a bar," the London Tavern was a "sedate and important" structure, a "temple of gastronomy, where a man hardly dared to say 'he had had his dinner,' but with unctuous respect would tell you 'he had dined.'"[30] The speech upon which Douglass's "invitation only," "elegant and prominent"[31] audience feasted on March 30th was indeed one befitting this elegant location.

In his lengthy "Farewell Speech to the British People," Douglass made numerous different points. As David Blight observes, however, its main theme was one that audiences were accustomed to hearing, because it, in various forms, had been the main theme of Douglass's speeches during his months-long "farewell tour" that had seen Douglass crisscross Britain. It was a tour during which "Douglass was everywhere"[32] and spoke everywhere. The theme "was the plight of the American slave, the deep contradictions of American professions and practices, and the nature of slavery itself. . . ."[33]

As Blight further explains, Douglass:

> dragged his overdressed auditors, sipping elegant drinks, through one 'blood' metaphor after another . . . His own country had become . . . 'one vast hunting ground for men.' Slavery was ensconced in American society, 'interwoven with the very texture—with the whole network' of institutions. Douglass entertained with voices, accents, and mimicry of slaveholding preachers and defenders of the Evangelical Alliance; the crowd roared with hilarity.[34]

In this speech, Douglass made it very clear that the United States Constitution was one of the important reasons why "[s]lavery was ensconced in American society."[35] To great cheers, and exclamations of "Hear, hear," Douglass railed against "the whole system, the entire network of American society," which was

30. Edward Callow, OLD LONDON TAVERNS: HISTORICAL, DESCRIPTIVE AND REMINISCENT, WITH SOME ACCOUNT OF THE COFFEE HOUSES, CLUBS, ETC. 77, 79 (1899).
31. DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM 75 (2018).
32. *Id.* at 175.
33. *Id.*
34. *Id.* at 176.
35. *Id.*

"one great falsehood, from beginning to end."[36] He condemned the hypocritical Framers who "celebrated" the Declaration of Independence and drew up a "democratic constitution" all while "trafficking in the blood and souls of their fellow men."[37] They did this by "disguising"[38] the real pro-slavery nature of their venerated Constitution. In a decidedly textualist and original intent reading of the document, Douglass observed that "[i]n no less than three clauses . . . may be found a *spirit* of the most deadly hostility to the liberty of the black man in that country, and yet clothed in language as no Englishman, to whom its meaning was unknown, could take offence at."[39]

Douglass focused his attention, his ire, and his wrath on two parts of the Constitution. First, he took aim at the fact that the document "required" the President, "at all times and under any circumstances, to call out the army and navy to suppress 'domestic insurrection.'"[40] The phrase "domestic insurrection" does not actually appear in the Constitution, but for reasons explained below we can assume here that Douglass referred to a combination of two clauses: (a) "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,"[41] and (b) "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."[42] Douglass observed that *obviously*—to "all Englishmen"[43]—this language seemed not only perfectly acceptable but entirely understandable. After all, why *wouldn't* you want to task a nation's government with "preserv[ing] the peace, tranquility, and harmony of the state?"[44] Yet, as Douglass explained, while this constitutional language *on its face* seemed innocuous, real interpretive inquiries had to go deeper, and ask "what does this language *really* mean . . .?"[45] And most importantly to Douglass at this point in his life and career: "What is the idea it conveys to the mind of the *American*?"[46] To Douglass, the answer to this question was crystal clear:

> . . . that every man who casts a ball into the American ballot-box—every man who pledges himself to raise his hand in support of the American constitution—

---

36. Frederick Douglass, *Farewell Speech to the British People, at London Tavern, London, England, March 30, 1847*, *in* THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: VOLUME 1 – THE EARLY YEARS 206, 207 (Philip S. Foner ed., 1950).
37. *Id.*
38. *Id.*
39. *Id.* at 208 (emphasis added).
40. *Id.* at 208.
41. U.S. Const., art. I, § 8, cl. 15.
42. U.S. Const., art. IV, § 4.
43. Douglass, *supra* note 36, at 208.
44. *Id.*
45. *Id.*
46. *Id.* (emphasis added).

> every individual who swears to support this instrument—at the same time swears that the slaves of that country shall either remain slaves or die. . . . This clause of the constitution, in fact, converts every white American into an enemy of the black man in that land of professed liberty. Every bayonet, sword, musket, and cannon has its deadly aim at the bosom of the Negro: 3,000,000 of the coloured [*sic*] race are lying there under the heels of 17,000,000 of their white fellow creatures.[47]

"Hear, hear,"[48] responded the audience appreciatively.

The audience's enthusiastic embrace of Douglass was no less wholehearted when he turned to take aim at another clause of the Constitution, namely the Fugitive Slave Clause (FSC), which read as follows: "No Person held to Service or Labour 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 Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."[49] Again, to residents of Great Britain, looking at "the face of this clause," it was difficult, if not impossible, to see any "injustice or inhumanity" in the language. Instead, it "appears perfectly in accordance with justice, and in every respect humane."[50] But if one crossed the Atlantic, one found that nothing could have been farther from the truth:

> . . . what does it mean in the United States? I will tell you what it signifies there—that if any slave, in the darkness of midnight, looks down upon himself, feeling his limbs and thinking himself a man, and entitled to the rights of man, shall steal away from his hovel or quarter, snap the chain that bound his leg, break the fetter that linked him to slavery, and seek refuge from the free institutions of a democracy, within the boundary of a monarchy, that that slave, in all his windings by night and by day, in his way from the land of slavery to the abode of freedom, shall be liable to be hunted down like a felon, and dragged back to the hopeless bondage from which he was endeavoring to escape.[51]

In short, thundered Douglass, the fugitive slave clause "makes the whole land one vast hunting-ground for men."[52]

It was during the eighteen months that Douglass spent in Great Britain that the "foundation for his break from his erstwhile mentor, Garrison," began to take shape.[53]

---

47. *Id*.
48. *Id*.
49. U.S. Const., art. IV, § 2, cl. 3.
50. Douglass, *supra* note 36, at 208.
51. *Id*. at 208–09.
52. *Id*. at 209.
53. PETER C. MYERS, FREDERICK DOUGLASS: RACE AND THE REBIRTH OF AMERICAN LIBERALISM 9 (2008).

It was thanks to his British friends that Douglass (a) became a legally free man when his manumission was purchased by a group led by the British Quakers, Ellen and Anna Richardson,[54] and (b) finally decided to set about publishing an antislavery newspaper of his own.[55] The Garrisonians simply could not accept the first of these two developments, "because it sanctioned making people into property and acknowledged the legitimacy of slavery."[56] As Finkelman explains, "Douglass" had every reason to be "deeply offended that some Garrisonians objected when he acquired freedom through purchase."[57] For,

> . . . by taking that position, the Garrisonians . . . turned Douglass into an object in four ways, much like when he was [a] slave. Without the purchase, Douglass was an "object" of the Constitution's Fugitive Slave Clause and perpetually vulnerable to removal to the South. In addition, by condemning the purchase, the Garrisonians effectively objectified Douglass by making him a living object or example for their own cause. Third, their opposition to the transaction subjected Douglass to a different set of rules than they faced. Free northern opponents of slavery, white and black, were not subject to seizure and were free to travel anywhere in the free states without fear. An unfree Douglass did not have those rights. Finally, the Garrisonian position denied Douglass his own humanity and, in nineteenth century terms, his manhood. Garrison dedicated his life to removing the chains of bondage for all of America's slaves, but he was opposed to Douglass arranging, with the help of wealthy friends, the removal of his own chains so he could become a free man.[58]

Finkelman is also right that "almost as soon as he returned from Great Britain, Douglass began to struggle with the rigidity of the Garrisonians and the logic of their anti-constitutionalism" because, in part, "the circumstances of his life impacted his constitutional theory."[59] For example, he could now take advantage of important constitutional rights and legal freedoms such as the right to vote—which he could exercise in New York—and freedom of the press.[60] However, while Douglass's "new status as a free man impacted his constitutional views,"[61] it would be wrong to over-emphasize the influence of his new-found freedom at the expense of taking seriously the conclusion that Douglass was genuinely convinced of the merits of a non-Garrisonian interpretation of the text of the Constitution. It would be likewise wrong to suggest, as Mariah Zeisberg (most prominently) has, that the "change of opinion" can be explained as an instrumental

54. BLIGHT, *supra* note 31, at 170–73.
55. MYERS, *supra* note 53, at 9; BLIGHT, *supra* note 31, at 176–77; Finkelman, *supra* note 9, at 52.
56. Finkelman, *supra* note 9, at 50.
57. *Id*. at 49; *see generally*, FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM (1855).
58. Finkelman, *supra* note 9, at 50–51.
59. *Id*. at 49.
60. *Id*. at 51–52.
61. *Id*. at 52.

and/or strategic decision.[62] For as Peter Myers explains, "[i]t is beyond doubt that in reconsidering his opinion, Douglass was acutely aware that the issue held 'vast importance' for the abolitionist cause. . . . To spread the word concerning the anti-slavery Constitution was vital to his effort to build an effective political antislavery coalition."[63] However, "*all* parties to the dispute over the Constitution saw practical utility in their readings, and to discover the utility in any one of them is not to discredit its claim to interpretive respect."[64]

Indeed, there is every reason to believe that Douglass sincerely believed in the rules of interpretation—as laid out by Spooner—to which he would eventually profess fidelity. However, as his October 1847 "American Slavery" speech demonstrated, it would be quite some time before Douglass's "break"[65] away from Garrison would extend to rejecting the "covenant with death" interpretation of the Constitution.

B. "American Slavery" (New York City, October 1847)

Six months after returning to the United States, and shortly before moving to Rochester to begin publishing *The North Star* (the first issue of which appeared on December 3) Douglass gave a speech at Market Hall in New York City, on October 22, 1847. Two months earlier he had accepted an invitation, from the Garrisonian American Anti-Slavery Society (AA-SS), to write regular columns for the organization's *National Anti-Slavery Standard*.[66] Like many of his other speeches (and reports of those speeches),[67] he published the text of his 1847 Market Hall speech in that newspaper in the form of a "Letter."[68] Publication came six days[69] after delivery of the speech.[70]

Unlike his "Farewell Speech," this address to his American audience devoted only a small amount of time to the subject of the U.S. Constitution. Nevertheless, the power of Douglass's sharp rhetoric merits devoting some attention to what he said, because in the speech Douglass "reiterated the hardline Garrisonian" position.[71] His audience, Douglass said, was surely "anxious to know in what way" they were "contributing to *uphold*," rather than to abolish, slavery.[72] Putting aside "the outworks of political parties and social arrangements," Douglass zeroed in

---

62. Mariah Zeisberg, Frederick Douglass, Citizen Interpreter 15–16 (Aug. 2010) (unpublished manuscript).

63. MYERS, *supra* note 53, at 89.

64. *Id.* (italics emphasis added).

65. *Id.* at 9.

66. Patsy Brewington Perry, *Before The North Star: Frederick Douglass' Early Journalistic Career*, 35 PHYLON 96, 98 (1974).

67. *Id.* at 98–102.

68. The first speech Douglass published was his "First of August Address at Canandaigua." NAT'L ANTI-SLAVERY STANDARD, Aug. 19, 1847; *id.* at 98.

69. NAT'L ANTI-SLAVERY STANDARD, Oct. 28, 1847; Brewington Perry, *supra* note 66, at 102.

70. Douglass, *American Slavery, Speech Delivered at Market Hall, New York City, October 22, 1847*, *reprinted in* FONER, supra note 36, at 269–78.

71. Finkelman, *supra* note 9, at 46.

72. Douglass, *supra* note 70, at 274.

on the Constitution, "to which," he said, those "present are devotedly attached."[73] That "attachment" was to a document that was "radically and essentially slaveholding, in that it gives the physical and numerical power of the nation to keep the slave in his chains, by promising that that power shall in any emergency be brought to bear upon the slave, to crush him in obedience to his master."[74] The tone intensified. "The language of the Constitution," thundered Douglass, "is you shall be a slave or die."[75]

Although Douglass spent very little time discussing the specifics of the "pro-slavery" Constitution, the space that he did devote to the subject—focusing on the fugitive slave clause— damned the nation (and its supreme law):

> . . . in the clause concerning fugitives—in this you are implicated. Your whole country is one vast hunting ground from Texas to Maine. Ours is a glorious land; and from across the Atlantic we welcome those who are stricken by the storms of despotism. Yet the damning facts remain, there is not a rood of earth under the stars and the eagle of your flag, where a man of my complexion can stand free. There is no mountain so high, no plain so extensive, no spot so sacred, that it can secure it to me the right of liberty. Wherever waves the star-spangled banner there the bondsman may be arrested and hurried back to the jaws of Slavery. This is your "land of the free," your "home of the brave." From Lexington, from Ticonderoga, from Bunker Hill, where rises that grand shaft with its capstone in the clouds, masks, in the name of the first blood that spurted on behalf of freedom, to protect the slave from the infernal clutches of his master. That petition would be denied, and he bid go back to the tyrant.[76]

As Finkelman observes, "Douglass was no longer a fugitive slave at this point—no longer personally subject to being seized and returned to the "jaws of slavery." But he still directly tied the proslavery Constitution to his own life."[77] Douglass, in hewing to this unmistakably Garrisonian, "covenant with death" condemnation of the Constitution, was speaking as the voice of experience.

C. The Garrisonian Inspiration—Wendell Phillips

Scholars have long-since disagreed about which clauses of the Constitution are "pro-slavery." Some clauses garner more agreement about their complicity with the "peculiar institution"[78] than others. For example, as I have detailed elsewhere,[79] it is reasonable to label three clauses as "level one"[80] (i.e., most clearly

---

73. *Id.*
74. *Id.*
75. *Id.* at 274–75.
76. *Id.* at 275.
77. Finkelman, *supra* note 9, at 47.
78. KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956).
79. *See* Helen J. Knowles, *The Constitution and Slavery: A Special Relationship*, 28 SLAVERY & ABOLITION 309, 311–12 (2007).
80. *Id.* at 311.

pro-slavery): the *three-fifths clause*,[81] the *slave trade clause*,[82] and the *fugitive slave clause*. Although Douglass understandably included an indictment of "level one" clauses in both of the speeches analyzed above, what explains his decision to expand his "Farewell Speech" indictment to the suppression of insurrections clause about which there is less agreement regarding its "pro-slavery" nature? There can be little doubt that one of the principal answers to that question is the thought of Wendell Phillips.

1. The Constitution: A Pro-Slavery Compact

When Douglass spent the Spring of 1844 on the AA-SS lecture circuit, he did so under the leadership of Phillips, who assumed the position of general agent for the organization.[83] An abolitionist of Boston Brahmin pedigree, Phillips was a member of the group of prominent Garrisonians with whom Douglass had begun to interact closely as early as 1841.[84] Indeed, it is accurate to describe Phillips as one of the "patricians in the group."[85] It is upon Phillips that the title "Prophet of Liberty, Champion of the Slave" was later bestowed.[86] In 1844, he published (for the AA-SS) *The Constitution: A Pro-Slavery Compact*[87] [hereafter *Pro-Slavery Compact*], a compendium of selections from various historical documents, most prominently James Madison's recently published *Notes of Debates in the Federal Convention of 1787*. Phillips had been publicly denouncing the Constitution—and indeed advocating for its abandonment—for several years. For example, at an 1842 meeting at Faneuil Hall in Boston, he described the Constitution as a "chain which binds you to the car of slavery," making "white slaves" out of its adherents.[88] Additionally, the *Pro-Slavery Compact* brought together in one, easily accessible and widely disseminated form all the documents that Garrison claimed evinced the Framers' pro-slavery guilt. Yes, Stanley Bernstein is absolutely right to describe *Pro-Slavery Compact* as a "scissors-and-paste pamphlet."[89] Nevertheless, there was no ignoring its rhetorical impact; and, indeed,

---

81. U.S. Const., art. I, § 2, cl. 3: "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."

82. U.S. Const., art. I, § 9, cl. 1: "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."

83. BLIGHT, *supra* note 31, at 136.

84. *Id*. at 107–08.

85. LAWRENCE J. FRIEDMAN, GREGARIOUS SAINTS: SELF AND COMMUNITY IN AMERICAN ABOLITIONISM, 1830–1870 56 (1982).

86. The phrase is inscribed on the $20,000 bronze statue of Phillips, dedicated in 1915, and situated on the edge of the Boston Public Garden.

87. WENDELL PHILLIPS, THE CONSTITUTION: A PRO-SLAVERY COMPACT – SELECTIONS FROM *THE MADISON PAPERS* (1844).

88. Wendell Phillips, *Remarks at Faneuil Hall Meeting, October 30*, LIBERATOR, Nov. 11, 1842, at 178.

89. Stanley Burton Bernstein, Abolitionist Readings of the Constitution (1969) (unpublished manuscript).

Myers is right to describe Phillips as an abolitionist who wielded the pen that wrote "the most formidable statements of the Garrisonian reading" of the Constitution.[90]

In the "Introduction" to the *Pro-Slavery Compact*, Phillips laid out five clauses "to which we refer as of a pro-slavery character."[91] These were the three clauses identified above as "level one"[92]—namely, the three-fifths clause, the slave trade clause, and the fugitive slave clause. To these, Phillips added the "suppress insurrections"[93] language of Article I, Section 8, and Article IV, Section 4's "Republican Form of Government" language. Significantly, recall that it is these last two clauses that Douglass combined when in his "Farewell Speech to the British People" he condemned the Constitution's "require[ment]" that the President, "at all times and under any circumstances . . . call out the army and navy to suppress 'domestic insurrection.'"[94] There is little doubt that the *Pro-Slavery Compact* influenced that speech.

In order to understand Phillips's interpretation of the relationship between slavery and the Constitution, it is first necessary to outline his definition of "law." Central to Phillips's understanding of the meaning of "law" was the opinion which, as Harold Hyman and William Wiecek have written, "molded American constitutional development for ninety years."[95] That is the opinion by Lord Mansfield in *Somerset v. Steuart*,[96] concluding that slavery violated natural law, and therefore could only be supported with the force of positive law. Phillips embraced this reasoning by pointing, enthusiastically, to what Chief Justice Lemuel Shaw said about *Somerset's Case* in *Commonwealth* [of Massachusetts] *v. Aves*.[97] "By *positive law*," wrote Shaw, "may be as well understood *customary law* as the enactment of a statute, [and] the word is used to designate *rules established by tacit acquiescence*, or by the legislative act of any State, and which derive their force [and authority] from such acquiescence or enactment, and not because they are the dictates of natural justice, and as such of universal obligation."[98] Not content with relying on Shaw's words alone, Phillips went further as he crafted his—and therefore, by extension, the default Garrisonian—definition of law:

> *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

90. MYERS, *supra* note 53, at 86.
91. PHILLIPS, *supra* note 87, at vi.
92. Knowles, *supra* note 79, at 311.
93. U.S. Const., art. I, § 8, cl. 15
94. Douglass, *supra* note 36, at 208.
95. HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875 88 (1982).
96. Lofft 1, 98 Eng. Rep. 499 (K.B. 1772).
97. 35 Mass. 193 (1836).
98. 35 Mass. at 212, quoted in PHILLIPS, *supra* note 28, at 85 (quoting *Aves* at 212—the italics were added by Phillips, and the words in parentheses represent those that he failed to include in the quotes).

> 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*.[99]

From this emerges an understanding of the law as consisting of (a) fidelity to custom/tradition and/or text; (b) an emphasis on rules; and, very significantly, (c) a *legal* irrelevancy of moral obligations.

Consider point (a)—fidelity to custom/tradition *and*/*or* text. On its own, the *text* of the Constitution could not support Phillips's "covenant with death" conclusions. When reviewing the first part of Spooner's treatise, Phillips conceded that Spooner was right that the Framers had been "employed merely to draft the Constitution," and that "[t]heir office was that of clerks."[100] However, in his opinion this concession did not detract from his 1844 conclusion that Madison's *Notes* clearly demonstrated the Framers' evil, pro-slavery intentions. Ultimately, he was of the opinion that this historical evidence played an essential role in helping us to understand the meaning of the Constitution.

In 1847, Phillips published his *Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery*, which had first appeared in the *National Anti-Slavery Standard*.[101] Phillips observed that his preferred "contemporaneous exposition" approach had been embraced by none other than Chief Justice John Marshall in *Cohens v. Virginia*,[102] who wrote that:

> Great weight has always been attached, and very rightly attached, to contemporaneous exposition. . . . The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed.[103]

Phillips believed that he had found further support for his conclusion that "words, when doubtful and ambiguous, are to be interpreted by the context, by the object sought, and by contemporaneous usage,"[104] from another Marshall opinion, the Chief Justice's opinion for the Court in *McCulloch v. Maryland*, where he uses "subject," "context," and "intent" to determine the meaning of "necessary."[105] However, Phillips wrongly relied on that opinion. For, as Christopher Wolfe convincingly demonstrates, *McCulloch* represents Marshall's fidelity to an interpretive philosophy constructed upon "*intrinsic*" rather than

---

99. PHILLIPS, *supra* note 28; *id*. at 85.
100. *Id*. at 32.
101. *Id*.; PHILLIPS, *supra* note 28.
102. 19 U.S. (6 Wheat.) 264 (1821).
103. *Id*. at 418, quoted in PHILLIPS, *supra* note 28, at 29.
104. PHILLIPS, *supra* note 28, at 29.
105. 17 U.S. (4 Wheat.) 316, 414–15 (1819).

"extrinsic" intent.[106] Marshall's use of "*intrinsic*" intent could also, and even more clearly, be seen in the opinion in *Ogden v. Saunders*,[107] the following extract from which can be considered a "typical general statement"[108] of Marshall's rules of interpretation:

> To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers; is to repeat what has been already said more at large, and is all that can be necessary.[109]

For the Chief Justice, "interpretation is not a 'mechanical' process in which a set number of technical rules is applied seriatim. It is rather the prudential application of complex and overlapping rules to a given set of facts."[110] Marshall interpreted the ambiguous words and phrases of the Constitution by looking at the "cumulative interaction" of, amongst other things, the subject, context, and intent that were by no means independent factors.[111]

From whence did Wendell Phillips's views on life and the law, and slavery and the United States Constitution, come? As the next section explains, those views were shaped by events he encountered, and the values inculcated upon him by his parents. They were not, for the most part, shaped by the legal education he received. When we get to Part IV, it will become clear that this is an important way in which Phillips and Lysander Spooner differed.

D. Wendell Phillips's Legal Education

As law schools began to be established in Massachusetts, young men from elite backgrounds were increasingly encouraged to seek the advantages that these programs of training offered. It was believed that such educational establishments would cultivate professional attitudes towards not only the law, but also the spheres of employment into which those with legal training would be expected to enter. For example, in the 1830s, receipt of an LL.B. often provided "a first step into the political arena";[112] and this meant far more than using one's law degree to run for elected office.

---

106. Christopher Wolfe, *John Marshall & Constitutional Law*, 15 POLITY 105 (1982).

107. 25 U.S. (12 Wheat.) 213 (1827).

108. Wolfe, *supra* note 106, at 7; *cf.* John Choon Yoo, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L. J. 1607, 1619 (1992) (describing *Ogden* as a "general statement" of Marshall's interpretive methodology").

109. 25 U.S. at 332.

110. Wolfe, *supra* note 106, at 11.

111. *Id.*

112. GAWALT, *supra* note 12, at 5.

The "political arena" also included the reform activities and speaking opportunities for which individuals, like Phillips, would become famous, the type of reform activities inextricably intertwined with the abolitionist crusade against slavery.[113] A law degree brought with it, as the title of Gerard W. Gawalt's book suggests, "*The Promise of Power*."[114] It comes as little surprise, therefore, that Phillips's pursuit of power was, in part, *supposed* to be realized by attending the nascent Harvard Law School. As we will see, however, "supposed" is italicized for good reason.

The son of members of Boston's aristocracy, from an early age Wendell Phillips was taught to respect and abide by the principle of controlling and channeling one's emotions, which was not unusual for boys of his generation and social upbringing.[115] Success in life came to those who exhibited "personal restraint."[116] This, it was believed, "could become a powerful agent for good, promoting progress and permitting individuals to realize their God-given talents."[117] In large part because of his mother's desire to keep him close to home and keep a watchful eye over the maturation of this self-restraint, Phillips attended the Boston Latin School instead of one of the Phillips family's academies in Andover and Exeter.[118] This in no way stifled his academic career, because by 1821, when he enrolled at Boston Latin, the school was widely perceived as the place for "boys who wished to become 'somebody.'"[119] Although his socially elite background made it a natural progression for Phillips to continue his education by attending Harvard College (in 1827) and then Harvard Law School (in 1831), the latter was not a satisfying choice for Wendell. As an undergraduate in Cambridge, he thrived on the study of history—an interest developed at a very young age. The drama which he saw in historical events continued to shape his awareness of, and interest in, the possibilities of political oratory. Additionally, the personal philosophy of self-restraint that his parents fostered evolved into a complementary, even if at this stage still rudimentary, "republican ideology distrustful of unchecked power, privilege hierarchy, social disorder, and popular licentiousness."[120]

Obtaining a legal education was, however, a very different experience. Although he did graduate with an LL.B. in August 1834, Phillips was not passionate about the subject matter. Like Charles Sumner, the future United States Senator and one of seven men with whom Phillips received his degree, Phillips

---

113. The best overview discussion of this remains JAMES BREWER STEWART, HOLY WARRIORS: THE ABOLITIONISTS AND AMERICAN SLAVERY (1976).

114. GAWALT, *supra* note 12.

115. Phillips was just one of many New England abolitionists whose families, upbringing, and religion fostered their desire to engage in social reform. STEWART, *supra* note 113, at 40.

116. JAMES BREWER STEWART, WENDELL PHILLIPS: LIBERTY'S HERO 25 (1986).

117. *Id.*

118. *Id.* at 9–10.

119. *Id.* at 10.

120. *Id.* at 25, 34.

"had no particular fondness for the law, except as a science, and . . . he did not much care whether or not he ever entered upon its practice."[121]

When Phillips enrolled at Harvard Law School in 1831, the institution was still in its infancy. Although founded in 1815, with full-time lectures beginning two years later, enrollment through the late 1820s was generally very low.[122] It was difficult to attract students to the school, and the education that the graduates received was not very highly regarded. To be sure, the college-educated who sought a legal education in Massachusetts were still most likely to have been graduated from Harvard College. A Harvard *legal* education, however, was much less attractive. Only when the institution experienced its rebirth in 1829, under the guidance of Nathan Dane, Joseph Story, and Josiah Quincy, would a legal degree from Harvard begin to acquire prestige.[123]

By 1831, Joseph Story had been Dane Professor of Law at Harvard (and head of the law school) for two years. Story, who already had an illustrious career first as a politician and then as a Supreme Court Justice (appointed by James Madison in 1811), brought immeasurable improvements and considerable prestige to the school.[124] His "vision to see and skill to bring to pass the possibilities of university study of law in America"[125] resulted in a doubling of enrollment beginning in 1829 through until the end of his tenure upon his death in 1845.[126] Story had little time for men who learned the law as apprentices. Like many others of his generation, he viewed the law as a science. His belief in a mechanistic approach to legal interpretation and reasoning led him to conclude that the technical skills needed for this work could only be learned by students who undertook a uniform program of study.[127]

Like the other students who passed through Harvard Law School between 1829 and 1845, Wendell Phillips probably benefited from the teachings of Story. However, when it came to constitutional interpretation the two disagreed on many aspects. We see in Phillips's approach an understanding of the law and the role of the courts which surely did not evolve from the teachings of his famous professor.[128] Under Story's leadership, Harvard Law School engaged in the teaching of "national" law, but this legal education was actually "pertinaciously sectional

---

121. GEORGE LOWELL AUSTIN, THE LIFE AND TIMES OF WENDELL PHILLIPS 42–43 (1893).

122. Moline, *supra* note 13, at 798.

123. Records of the Overseers of Harvard University, Volume VIII. From January, 1830 to the end of 1847, 18 years, 200. Harvard University Archives, UA II 5.5.2, Cambridge, Massachusetts (hereafter "HUA") (on file with author); THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917 815-816 (1918); R. Kent Newmyer, *Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence*, 74 J. AM. HIST. 814 (1987); JOEL PARKER, THE LAW SCHOOL OF HARVARD COLLEGE (1871).

124. CENTENNIAL HISTORY, *supra* note 123, at 1–11.

125. *Id.* at 7.

126. *Id.* at 10–11.

127. H. Jefferson Powell, *Book Review: Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L. J. 1285 (1985). *See also, generally*, GAWALT, *supra* note 12, at 130.

128. OSCAR SHERWIN, PROPHET OF LIBERTY: THE LIFE AND TIMES OF WENDELL PHILLIPS 33–35, 749 (1958).

in origin and character."[129] It reflected the republican and conservative ideals of Massachusetts; it was American law with a distinctly New England accent.[130] On the Supreme Court, *Justice* Story was no less the New England nationalist, and his understanding of "federal power meant federal support for a proslavery Constitution implemented by a proslavery national regime."[131] While Phillips and Story were both "republicans," and therefore committed to an ideology whereby "statesmanship was by definition national, not sectional and not self-interested,"[132] the two could not agree about what to do about the relationship between slavery and the Constitution. On this point the decision in *Prigg v. Pennsylvania* (1842)[133] was instructive.

Speaking through an opinion authored by Justice Story, in *Prigg* the Supreme Court upheld the 1793 Fugitive Slave Law and struck down states' personal liberty laws. Although the supporting historical evidence he presented was at best dubious, and at worst wrong, Story arrived at the conclusion that the Constitution was pro-slavery.[134] On this point Story and Phillips could agree. However, Phillips felt compelled to sharply criticize his former professor's writing. He described the opinion as one that "'sullied at last the lustre of a long life,'"[135] an opinion defined by "'infamy of which even his large services cannot hide.'"[136] Commentary that appeared in the *Boston Daily Advertiser*—and was reprinted in Garrison's *The Liberator* newspaper—remarked that this "charge of 'infamy' against a judicial opinion" could only be substantiated if the opinion was "not only wrong, contrary to law and justice, but also given from corrupt and wicked motives."[137] Regardless of whether Phillips was correct in his indictment of Story's opinion in *Prigg*, the fact remains that he saw such motives in the decision. For he was of the view that the Supreme Court's decisions were continuing evidence that judicial interpretations of the Constitution were inevitably pro-slavery because the document was, itself, so clearly no friend of the enslaved.

Ultimately, we know very little about Phillips's three years at Harvard beyond generalizations about the education that young men could have expected to gain at the Law School in the 1830s. We do know that, upon graduating from Harvard Law School, Phillips initially moved to Lowell, a prominent Massachusetts textile mill town, in order to learn "some of the technicalities of legal practice."[138]

---

129. Newmyer, *supra* note 123, at 817.

130. *Id*. at 817-19.

131. Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 250 (1994).

132. Newmyer, *supra* note 123, at 828.

133. 16 Pet. (41 U.S.) 539 (1842).

134. Finkelman, *supra* note 131.

135. Quoted in ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 242 (1975).

136. *Id*.

137. Mr. Wendell Phillips and the Late Judge Story, THE LIBERATOR, Sept., 11. 1846, at 46.

138. STEWART, *supra* note 116, at 40.

Phillips subsequently (from early 1835)[139] maintained a rather unsuccessful legal practice on Court Street in Boston until the end of 1837.[140] His interest in *practicing* law was, however, very limited.[141] In his biography of Phillips, James Brewer Stewart devotes only two pages to this period of his subject's life, and appropriately places it in a chapter in which he writes of Wendell's "career despair."[142] This paucity of discussion of the Harvard Law School years is fitting, because it indicates a larger observation that we can make: Wendell Phillips's views on life and the law, and slavery and the United States Constitution, were shaped by events (afforded extensive treatment in the historical literature), and the values inculcated upon him by his parents.

Undoubtedly, one of the most significant events to shape Phillips's views on life and the law was the destruction of the presses owned by Elijah P. Lovejoy, who edited and printed the *Alton Observer* newspaper in Alton, Illinois. Ending with the murder of Lovejoy, who was shot while trying to prevent an anti-abolitionist arsonist from destroying his property, these events unfolded in November 1837, just prior to Phillips's decision to terminate his law practice. Phillips responded to the Lovejoy incident by making a career-defining speech at Faneuil Hall in Boston. Although there are conflicting accounts of the speech, it is known that Phillips critically responded to remarks made by John T. Austin, the Massachusetts Attorney General, who spoke in praise of the mob that attacked Lovejoy. This was one of the earliest anti-slavery speeches that Phillips made, and it incorporated his abhorrence at the death of Lovejoy and his personal emotional response to other examples of anti-abolition sentiment that he witnessed in Boston.[143]

Phillips's agreement with the Garrisonian condemnation of the Constitution—that which Douglass publicly embraced for a decade—was shaped by events such as these. It was not the result of learning the law at Harvard.

II. "CHANGE OF OPINION ANNOUNCED"

By 1851, it was finally time for the AA-SS to find a new location for their annual meeting.[144] In large part because of the anti-abolitionist activities of the influential Tammany Hall ward boss Isaiah Rynders and the journalism of the *New York Herald*, New York City was no longer a hospitable home for the flagship

139. IRVING H. BARTLETT, WENDELL AND ANN PHILLIPS: THE COMMUNITY OF REFORM, 1840–1880 16 (1979).

140. Phillips apparently maintained his Court Street office until 1851, but did not practice law out of it after 1837. *Id.* at 20, n.38.

141. *Id.* at 20.

142. STEWART, *supra* note 116, at 37–39.

143. Louis Ruchames, *Wendell Phillips' Lovejoy Address*, 47 NEW ENG. Q. 108 (1974).

144. Twentieth Annual Report, presented to the Massachusetts Anti-Slavery Society, by its Board of Managers, January 28, 1852 (Boston, 1852).

organization of Garrison's followers.[145] Although there was "regret" at being "exile[d] from the Commercial Metropolis,"[146] many concluded that they "could not have fallen upon a more profitable field" in relocating upstate to Syracuse.[147] For the Garrisonians at the gathering, however, any enthusiasm at meeting in the Salt City that second week in May disappeared, almost immediately, when Douglass stepped up and started speaking.

Although Douglass's normal "assured manner" was "strangely absent,"[148] his conviction was strong. For reasons outlined below, Douglass explained that he no longer considered the Constitution to be pro-slavery. As the Garrisonian abolitionist and Syracuse-based pastor Samuel J. May observed in *The Liberator*, this "'announcement was a painful feature of the meeting,'"[149] especially for the presiding Garrison. Garrison responded to Douglass's change of opinion by exclaiming that "'[t]here is roguery, somewhere.'"[150] It was an "accusation" that "Douglass never forgot."[151]

Before proceeding to analyze and unpack Douglass's "change of opinion,"[152] it is important to understand that it did not just suddenly spring forth Athena-like. Yes, it was the first public announcement of Douglass's break with the Garrisonians. But the signs that this change was coming had been visible for almost two years.

A. "The Constitution and Slavery" (January–March 1849)

As Finkelman observes, Douglass's "constitutional theory grew out of the life he lived, and thus, his understanding of the Constitution evolved as his horizons expanded and his legal status change[d]."[153] That the "expansion" of Douglass's "horizons" extended to rethinking the relationship between slavery and the Constitution was something that began to show itself in his public discourse over three crucial months at the beginning of 1849.

1. Correspondence with C. H. Chase

First came two pieces of correspondence between Douglass and the Cleveland abolitionist, C. H. Chase, in January and February 1849. These were not private letters. Rather, Douglass published them, for all the world—including the

145. FRANK MOSS, THE AMERICAN METROPOLIS FROM KNICKERBOCKER DAYS TO THE PRESENT TIME: NEW YORK CITY LIFE IN ALL ITS VARIOUS PHASES 312–13 (1897); JOHN JAY CHAPMAN, WILLIAM LLOYD GARRISON 203–18 (1913).

146. *Meeting of the American Anti-Slavery Society*, *supra* note 144, at 51.

147. *Id*.

148. Quarles, *supra* note 2, at 150.

149. Quoted in *id*. at 150, n.29.

150. Quoted in *id*. at 150, n.31.

151. *Id*. at 150.

152. Douglass, *supra* note 7.

153. Finkelman, *supra* note 9, at 6.

Garrisonians—to see, in *The North Star*.[154] The first letter was penned by Chase after he was unable to meet with Douglass in person in Rochester. In his January 23 letter, Chase asked Douglass about the resolution he had introduced at a recent anti-slavery meeting in the city, a resolution which Douglass had "challenged" him "to debate."[155] That resolution read as follows:

> "Resolved, That the Constitution of the United States, if strictly construed according to its reading, is anti-slavery in all of its provisions."[156]

A little over two weeks later, on February 9, Douglass published Chase's letter and his reply.[157] In the second paragraph of that reply, Douglass reiterated his Garrisonian-Phillips *Pro-Slavery Compact* fidelity to an "original intent and meaning" reading of the Constitution.[158] As he noted, the "original intent and meaning" was "the one given to it by the men who framed it, those who adopted it, and the one given to it by the Supreme Court of the United States." And it was unambiguously "pro-slavery."[159]

Phillips, and the other Garrisonians, must have sighed an immense collective sigh of relief upon reading this, because part of the first paragraph would have given them considerable cause for concern. "On a close examination of the Constitution," wrote Douglass, "I am satisfied that if strictly 'construed according to its reading,' it is not a pro-slavery instrument."[160] Admittedly, this sentence was followed with the caveat that Douglass "disagree[d] with" Chase "as to the inference to be drawn from this admission."[161] In other words, Douglass could not subscribe to Chase's conclusion that the authoritative method of constitutional interpretation was strict construction of the document's language, a method which revealed a document devoid of the words "slave" and/or "slavery," thus leading to the conclusion that the Constitution was *not* pro-slavery. Nevertheless, publicly many Garrisonians must have feared the die had been cast.

Indeed, the *potential* of the first paragraph of Douglass's letter was certainly not lost on other abolitionists who stood in opposition to the Garrisonian indictment of the Constitution, especially Gerrit Smith (discussed below). Upon reading the February 9 letter, Smith immediately wrote to Douglass, wishing to convey the fact that he was now "cheer[ed] . . . with the hope that you are on the

154. C. H. Chase, Letter to Frederick Douglass (Jan. 23, 1849), *reprinted in* FONER, *supra* note 36, at 352; Frederick Douglass, Letter to C. H. Chase (Feb. 9, 1849), *reprinted in* FONER, *supra* note 36, at 352–53.

155. Chase, *supra* note 154, at 352.

156. *Id*.

157. *Id*.; Douglass, *supra* note 154, at 352–53.

158. *Id*. at 353.

159. *Id*.

160. *Id*. at 352.

161. *Id*.

very edge of wielding the Federal Constitution for the abolition of American Slavery."[162]

2. March, 1849

It was entirely predictable that Douglass's letter to Chase would throw the idiomatic cat among the chickens. As Douglass understatedly wrote in the March 16, 1849 issue of *The North Star*, it "excited some interest among our Anti-Slavery brethren. Letters have reached us from different quarters on the subject. Some of these express agreement and pleasure with our views, and others, surprise and dissatisfaction."[163] Two of those letters, which he reprinted in the March 16 issue of the newspaper—the one from Smith[164] and from Robert B. Forten[165]—provided deeply divergent reactions. While Smith was "cheer[ed],"[166] Forten, an African American abolitionist, exhibited "not a little surprise" at what he interpreted to be a constitutional volte-face on the part of Douglass.[167] Forten read the letter to Chase as meaning that Douglass had "discovered" that the Constitution was "not to be a pro-slavery instrument" and that Douglass now "found *nothing* in the Constitution pro-slavery."[168] Look at the *plain language* of the document, he demanded. "[T]he *written* Constitution, according to its reading, is pro-slavery."[169] One need look no further than the fugitive slave clause for evidence of this.[170] Forten concluded his letter with a plea to Douglass to explain "what new light has broke in upon your mind, disclosing the fact that the Constitution, 'if strictly construed according to its reading,' is not pro-slavery."[171]

Douglass's lengthy clarification of his beliefs—as of March 16, 1849—stretched across four columns of page two of the March 16 issue. He sought to "vindicate the correctness of" his "former assertion," well aware that what he said might well not satisfy everyone.[172] He clarified the meaning of his words of February 9 in the following way:

> What we meant then, and what we would be understood to mean now, is simply this—that the Constitution of the United States, standing alone, and construed *only* in the light of its letter, without reference to the opinions of the men who framed and adopted it, or to the uniform, universal and undeviating

---

162. Gerrit Smith, Letter from Gerrit Smith to Frederick Douglass (Feb. 9, 1849), *in* THE FREDERICK DOUGLASS PAPERS: SERIES 3: CORRESPONDENCE, VOLUME 1: 1842–1852 356 (John R. McKivigan ed., 2009).

163. Douglass, *The Constitution and Slavery*, Mar. 16, 1849, *reprinted in* FONER, *supra* note 36, at 361.

164. Smith, *supra* note 162.

165. Letter from R.B. Forten to Frederick Douglass, Feb. 17, 1849, THE N. STAR, Mar. 16, 1849.

166. Smith, *supra* note 162.

167. Letter from R. B. Forten, *supra* note 165.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. Douglass, *supra* note 163, at 361.

> practice of the nation under it, from the time of its adoption until now, is not a pro-slavery instrument.[173]

Douglass immediately followed this with a crucial disclaimer. He wished no one to be under the opinion that he thought this was the "proper" "construction" to be given to the Constitution's language.[174] Whatever the plain meaning of its *text*, the document remained—as the Garrisonians emphasized—inextricably intertwined with the "cunningly-devised and wicked" *intent* of its framers. It was a pro-slavery "compact, demanding the most constant and earnest efforts of the friends of righteous freedom for its complete overthrow."[175] Garrison and Phillips must have read this and smiled.

Four paragraphs later, Garrison and Phillips's interpretive triumph was seemingly complete as Douglass now took on the opposing position, finally mentioning Lysander Spooner by name.[176] Douglass declined to "talk 'lawyer like' about law,"[177] especially when the subject at hand was the "ugly matter-of-fact looking thing" that was the Constitution.[178] He could not "bring" himself "to split hairs about the alleged legal rule of interpretation" upon which, he noted, "Lysander Spooner and others" rested their interpretive case.[179] Working through numerous clauses of the Constitution, Douglass rebutted Spooner's textualist arguments in favor of the original sinful intent of the Framers.[180]

This cannot have entirely settled the minds of the Garrisonians, though, because all of this was prefaced and followed with two important caveats. First, the prefatory statement: "True stability," Douglass wrote, "*consists not in being of the same opinion now as formerly*, but in a fixed principle of honesty, *even urging us to the adoption or rejection of that which may seem to us true or false at the ever-present now*."[181] Might this mean Douglass was still open to change? The statement that followed his intent-based condemnation of the Constitution suggested yes: "We are prepared to hear all sides," wrote Douglass, "and to give the arguments of our opponents a candid consideration. Where an honest expression of views is allowed, Truth has nothing to fear."[182] Change would not come immediately, though. For, two weeks later, again in the pages of *The North Star*, Douglass once again expressed his support for the Garrisonian position when he

173. *Id.* at 361–62.
174. *Id.* at 362.
175. *Id.*
176. *Id.* at 363.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 365–66.
181. *Id.* at 361 (emphasis added).
182. *Id.* at 366.

offered up his "Comments on Gerrit Smith's Address."[183] This was a response to Smith's interpretation of the Constitution.

Smith brought "inspiring leadership and persistent dependability"[184] to a faction of the abolitionist movement (principally situated in upstate New York) which subscribed to "the notion that all people should be given unfettered freedom to act on God's commands but should be strongly pressured by the community of Christian fellows, by social institutions and, more generally, by the culture about them, to use their freedom 'voluntarily,' morally, and in a cooperative spirit."[185] These individuals were deeply opposed to social class distinctions,[186] and were, in principle, wedded to the belief that their goals could best be achieved in small local communities. However, they came to realize the need for a less local, and more national approach if they were to succeed in abolishing slavery.

This pragmatic approach was, in part, a result of their anti-slavery constitutionalism. They realized that the federal government, empowered by a supreme law which did *not* sanction slavery, could help rather than hinder their cause.[187] As John Stauffer observes, they were abolitionists who "advocated a 'radical change' in government by tracing the evil of slavery to its constitutional origin, rooting it out, and restoring to America the 'original ideas of Civil Government and Civil Law.'"[188] With regard to constitutionalism, "[b]y seeking an immediate end to slavery and interpreting the Constitution as an antislavery document, Radical Abolitionists believed that they were affirming both the 'righteous language' of the Constitution and the historical objectives of the nation's Founders."[189]

Crucially, for Smith, this led to "argu[ing] that the constitutionality of slavery was not 'a historical question—but a legal question.'"[190] Smith's principal treatment of this subject appeared in 1844,[191] the same year that Phillips published his *Pro-Slavery Compact*. He laid out many of the book's arguments in his voluminous correspondence. Typical of such letters was the one he wrote to the New England abolitionist and poet John Greenleaf Whittier, on July 18, 1844.[192] Describing the Constitution "as a noble and beautiful Temple of Liberty" whose amendments embody "the deep solicitude of our fathers for the utmost security of

183. Frederick Douglass, *Comments on Gerrit Smith's Address (1849)*, *reprinted in* THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: VOLUME 2 – PRE-CIVIL WAR DECADE 374–379 (Philip S. Foner ed., 1950).

184. FRIEDMAN, *supra* note 85, at 101.

185. *Id*. at 102.

186. *Id*. at 104–05.

187. *Id*. at 113.

188. JOHN STAUFFER, THE BLACK HEARTS OF MEN: RADICAL ABOLITIONISTS AND THE TRANSFORMATION OF RACE 22 (2001).

189. *Id*. at 23.

190. *Id*. at 300, n. 80. Stauffer is quoting from GERRIT SMITH, SUBSTANCE OF THE SPEECH MADE BY GERRIT SMITH, IN THE CAPITOL OF THE STATE OF NEW YORK, MARCH 11TH AND 12TH, 1850 4 (1850).

191. Gerrit Smith, *Constitutional Argument* (Jackson & Chaplin), July 15, 1844.

192. Gerrit Smith, Letter to John G. Whittier (July 18, 1844), *in* Syracuse University Library Gerrit Smith Pamphlets and Broadsides Collection (1844), available at https://digitalcollections.syr.edu/Documents/Detail/gerrit-smiths-constitutional-argument./1062 [https://perma.cc/M67Y-59XR].

human rights,"[193] Smith emphasized that simply because "the nation, in its national capacity, favors and upholds slavery, proves nothing against the Constitution."[194]

Smith devoted considerable space—in both his correspondence and in his 1844 book—to explaining why each of the supposed pro-slavery clauses did not in fact amount to a "covenant with death."[195] Although he made some valid points, generally his interpretations of those clauses were unconvincing. For example, his explanation as to why the fugitive slave clause was not pro-slavery included the observation that it could not be pro-slavery because that would stand it in tension with "the definitions of the Southern slave codes . . . [wherein] the slave is a chattel; and hence to predicate indebtedness of a slave is, in the light of those definitions, as absurd, as to predicate it of a horse, or a stone."[196] There are numerous problems with this interpretation, not the least of which is its underlying assumption that the southern slave codes could take legal preeminence over the federal Constitution.

As Blight observes, "[i]f William Lloyd Garrison was a fatherly figure in Douglass's life, then Gerrit Smith was his mentor."[197] Smith's role as a *life* mentor to Douglass certainly helps to explain the latter's "change of opinion" about the relationship between slavery and the Constitution.[198] However, James A. Colaiaco is right to describe Spooner, rather than Smith, as Douglass's "*legal* mentor."[199] The quality of Smith's constitutional interpretation pales in comparison to Spooner's; and Smith was willing to concede that the Constitution might contain some pro-slavery provisions, even if those were "exceptions" that were not "entitled to give character to the instrument. The current of a stream is not determined by its eddies; nor a principle overthrown by the exceptions to it. *The general principles, scope, and tendency of the Federal Constitution decide whether it is, or is not, pro-slavery*."[200]

Additionally, in Douglass's March 30, 1849 "Comments," when he addressed Smith's fidelity to the "letter alone" of the Constitution,[201] Douglass said he would be willing to give "consideration" to Smith's point of view "when he [Smith] gives us some fixed and settled legal rules sustaining his views[.] Such rules may exist, but we have not yet seen them."[202] Importantly, Douglass conceded that he had "not read law very extensively," but from what he had read, he had found "rules of interpretation favoring" a focus on the intent of the framers

193. *Id*. at 4.
194. *Id*.
195. *See*, *e.g*., *id*. at 8–14.
196. *Id*. at 13.
197. DAVID W. BLIGHT, FREDERICK DOUGLASS' CIVIL WAR: KEEPING FAITH IN JUBILEE 30 (1991).
198. On this point, James A. Colaiaco's work is instructive. See, for example, JAMES A. COLAIACO, FREDERICK DOUGLASS AND THE FOURTH OF JULY (2006) (especially chapter four).
199. *Id*. at 166 (emphasis added).
200. Smith, *supra* note 191, at 6.
201. Douglass, *supra* note 183, at 377.
202. *Id*.

but "none against it," and therefore none favoring a plain meaning of the language approach.[203] In light of the fact that Douglass mentioned Spooner's work in *The North Star* article published two weeks earlier, we can assume that his knowledge of, and time spent studying the two parts of *The Unconstitutionality of Slavery* was limited. That would change. For as we will see in Part III-A below, in that work Spooner centered his theory of interpretation around precisely the kind of rule that Douglass mentioned on March 30, thus cementing the conclusion that it was Spooner who served as Douglass's "*legal* mentor"[204] when it came to "the QUESTION OF QUESTIONS so far as the Anti-Slavery cause was concerned."[205]

B. "My Dear Friend": Douglass to Smith (January 1851)

In the late 1840s and early 1850s, Smith "frequently conversed with Douglass and, over time, made Douglass increasingly receptive to the basic voluntarist doctrines of his old intimacy circle"[206] and to his conclusions about the relationship between slavery and the Constitution. Four months before Douglass publicly announced his "change of opinion,"[207] he privately corresponded with Smith on the subject. He was still "not yet" ready to interpret the Constitution "in the same light" as Smith.[208] However, as Smith read on, he must have realized that the time of conversion was not far away. "I am sick and tired," wrote Douglass, "of arguing on the slaveholders' side of this question, although they are doubtless right so far as the intentions of the framers of the Constitution are concerned."[209] This did not represent a departure from Douglass's previous Garrisonian, original intent-focused condemnations of the Constitution. What he wrote next, however, did signal that a change of opinion was imminent: "these intentions you fling to the wind. Your legal rules of interpretation override all speculations as to the opinions of the Constitution makers and these *rules* may be sound and I confess I know not how to meet or refute them on *legal* grounds."[210] Continuing, Douglass asked:

> You will now say I have conceded all that you require, and it may be so. But there is a consideration which is of much importance between us. It is this: may we avail ourselves of legal rules which enable us to defeat even the wicked intentions of our Constitution makers? It is this question which puzzles me more than all others involved in the subject. Is it good morality to take advantage of a legal flaw and put a meaning upon a legal instrument the very

203. *Id*.
204. Colaiaco, *supra* note 198, at 166 (emphasis added).
205. Douglass, *Is the Constitution Pro-Slavery?*, *supra* note 3, at 221.
206. FRIEDMAN, *supra* note 85, at 192.
207. Douglass, *supra* note 7, at 174.
208. Frederick Douglass, Letter from Frederick Douglass to Gerrit Smith (Jan. 21, 1851), *reprinted in* FONER, *supra* note 183, at 149.
209. *Id*.
210. *Id*. at 150.

> opposite of what we have a good reason to believe was the intention of the men who framed it?[211]

This was, he explained, "the question of difficulty with me."[212] As Smith knew, and as he was reminded in the letter, Douglass had "already ceased to affirm the proslavery character of the Constitution"[213] at the recent annual meeting of the Western New York Anti-Slavery Society. What Douglass was not quite ready yet to do was to complete the move. He was willing to say the Constitution was not pro-slavery; but in order to say that slavery was unconstitutional he needed to find himself on far more solid legal ground.

C. Syracuse 1851

Gerrit Smith and Frederick Douglass "frequently conversed";[214] by contrast, the surviving collections[215] of Spooner's letters do not suggest that he and Douglass ever engaged in correspondence. I do not believe, however, that this means that ultimately Smith's impact on Douglass's intellectual constitutional conversion was greater than Spooner's. Indeed, there is every reason to believe that during 1851 in particular Douglass spent more time working through Spooner's treatises[216] than ever before, reading and undertaking research that led up to the dramatic moment, one May day in Syracuse, when, in response, Garrison cried out that "'There is roguery somewhere!'"[217]

Douglass, once and for all, publicly stated that he:

> had arrived at the firm conviction that the Constitution, construed in the light of well established rules of legal interpretation, might be made consistent in its details with the noble purposes avowed in its preamble; and that hereafter we should insist upon the application of such rules to that instrument, and demand

---

211. *Id.*
212. *Id.*
213. *Id.*
214. FRIEDMAN, *supra* note 85, at 192.
215. On April 12, 1908, the *New York Herald* reported that Benjamin R. Tucker's Unique Bookstore (which stocked libertarian and anarchist volumes), in New York City, was lost to fire. Among the destroyed materials were manuscripts entrusted to Tucker by Spooner, one of his mentors. Irving Levitas, The Unterrified Jeffersonian: Benjamin R. Tucker (1974) (unpublished manuscript); JAMES J. MARTIN, MEN AGAINST THE STATE: THE EXPOSITORS OF INDIVIDUALIST ANARCHISM IN AMERICA, 1827–1908 273 (1953); WENDY MCELROY, THE DEBATES OF LIBERTY: AN OVERVIEW OF INDIVIDUALIST ANARCHISM, 1881–1908 20 (2003). Although Spooner's "papers" did not survive, approximately four-hundred letters did—although where they were actually stored is not clear. The originals are held at the New-York Historical Society, New York City, New York, and at the Boston Public Library, Boston, Massachusetts (Rare Books Department). In this article these are referred to as N-YHS and BPL, respectively. Although Spooner's letters are available online (http://www.lysanderspooner.org/lettershttp://www.lysanderspooner.org/letters) [https://perma.cc/7W9M-N6LZ], the reader should be aware that many of the links are broken and/or incorrect, and many of the transcriptions contain important errors.
216. Spooner, *supra* note 11; Spooner, *Part Second*, *supra* note 11.
217. Douglass, *supra* note 7, at 156.

> that it be wielded in behalf of emancipation. The change in our opinion on this subject has not been hastily arrived at. A careful study of the writings of Lysander Spooner, of Gerrit Smith, and of William Goodell, has brought us to our present conclusion. We found, in our former position, that, when debating the question, we were compelled to go behind the letter of the Constitution, and to seek its meaning in the history and practice of the nation under it—a process always attended with disadvantages; and certainly we feel little inclination to shoulder disadvantages of any kind, in order to give slavery the slightest protection.[218]

Douglass did not go into any more detail about his newfound interpretation of the Constitution. That would come later.

Douglass restated, reaffirmed, and elaborated upon his new opinion on numerous occasions.[219] However, as we will see in Part III-B below, it is the speech that Douglass gave in Glasgow, Scotland, in 1860,[220] that left the listener in little doubt about (a) why, specifically, Douglass had come to the conclusion that slavery was unconstitutional, and (b) the extent to which he had been influenced by the work of Lysander Spooner.

But just who was this person, Lysander Spooner? It is to that question that this article now turns.

III. THE CONSTITUTION ACCORDING TO LYSANDER SPOONER

Born in January 1808, Lysander Spooner was raised in Athol, in western Massachusetts. By the end of the nineteenth century, Spooner was not the only Athol native to have attained a position of fame or distinction. The town could also claim as its own George Henry Hoyt (1837-1877), who was one of John Brown's attorneys in *Virginia v. John Brown* (1859),[221] as well as Ginery Twichell (1811-1883), a railroad president and three-term member of Congress.[222] In the opinion of an historian of Athol, however, Spooner could accurately be described as "undoubtedly the most unique and remarkable character Athol ever produced."[223] Spooner could not claim prestigious family lineage, but he was able to trace his ancestry directly back to English settlers who arrived

---

218. *Id.* at 155–56.

219. Including, for example, in his famous 1852 speech "The Meaning of July Fourth for the Negro," Frederick Douglass, *The Meaning of July Fourth for the Negro, July 5, 1852*, *reprinted in* FONER, *supra* note 183, at 201; and "The Republican Party – Our Position," which appeared in the December 7, 1855 issue of *Frederick Douglass' Paper*. Douglass, *The Republican Party - Our Position, December 7, 1855*, *reprinted in* FONER, *supra* note 183, at 379.

220. Douglass, *The Constitution of the United States: Is It Pro-slavery or Anti-slavery?*, *reprinted in* FONER, supra note 183, at 467.

221. BILL HOYT, GOOD HATER: GEORGE HENRY HOYT'S WAR ON SLAVERY (2012).

222. *Death of Hon. Ginery Twichell*, BOSTON GLOBE, July 24. 1883; *Twichell, Ginery, 1811-1883*, *available at* https://bioguide.congress.gov/search/bio/T000443 [https://perma.cc/GM6G-HDHV].

223. LILLEY B. CASWELL, ATHOL MASSACHUSETTS, PAST AND PRESENT 362 (1899).

at New Plymouth, Massachusetts in 1637.[224] He was also unable to point to the advantages of a formal education, but by remaining at home to work on the family farm until his mid-twenties Spooner benefited from rich life experiences, and home-schooling that ultimately brought opportunities to teach at the local school and tutor a local farmer's children.[225]

Spooner is, to use M. Leon Perkal's term, one of the "middle rank" abolitionists who have attracted far less scholarly interest than someone like Phillips.[226] Few works offer sympathetic treatments of Spooner. In place of serious scholarly praise for his contribution to legal theory, one usually finds a variation on the observation that he was "always a pamphleteer/advocate before he [was] a philosopher."[227] This radical and rather eccentric Massachusetts native's writings, so the argument goes, are methodologically weak and/or flawed because he was a consummate opportunist:

> The *application* of his thought was dictated by the historical events that affected him and American society—religion, slavery, economic malaise, and expanding government intervention. Coupled with his continual struggle to finance his writings, these historical particulars produce a largely piecework system of thought.[228]

Some argue that this produced "the most highly developed and workable system of *individualist anarchism* that emerges in nineteenth century America," but not the construction of a consistent and highly developed *political (or legal) philosophy*.[229]

Many scholars also emphasize Spooner's anarchist and libertarian tendencies.[230] It is true that late in life Spooner was heavily involved in America's anarchist community and that he played the role of mentor to prominent anarchist Benjamin R. Tucker.[231] However, these scholarly emphases are predicated upon

---

224. THOMAS SPOONER, RECORDS OF WILLIAM SPOONER OF PLYMOUTH, MASS., AND HIS DESCENDANTS 16 § 1 (1883).

225. CHARLES SHIVELY, *Biography and Introduction*, *in* THE COLLECTED WORKS OF LYSANDER SPOONER: VOLUME ONE, DEIST, POSTAL, AND ANARCHIST WRITINGS 15, 16 (Charles Shively ed., 1971).

226. Perkal uses the term to describe William Goodell, but it is an equally appropriate description of Spooner. M. Leon Perkal, William Goodell: A Life of Reform 1 (May 10, 1972) (Ph.D. dissertation, the City University of New York) (ProQuest), https://www.proquest.com/docview/288059950?pq-origsite=gscholar&fromopenview=true [https://perma.cc/WLJ3-XV4Y].

227. Larry M. Hall, The Political Thought of Lysander Spooner 2 (March 1986) (M.A. thesis, the University of Tennessee, Knoxville unpublished manuscript) (on file with the University of Tennessee, Knoxville).

228. *Id*. at 56 (emphasis in original).

229. *Id*. at 56.

230. See, for example, STEVE J. SHONE, LYSANDER SPOONER: AMERICAN ANARCHIST (2010). For my critical analytical review of Shone's book, see Helen J. Knowles, *Review of Steve J. Shone, Lysander Spooner: American Anarchist*, 16 INDEP. REV. 302 (2011). On Spooner's anarchism, also see DAVID BOAZ, THE LIBERTARIAN READER: CLASSIC & CONTEMPORARY WRITINGS FROM LAO-TZU TO MILTON FRIEDMAN 154–60 (1997); MARTIN, *supra* note 215; MCELROY, *supra* note 215, at 20.

231. MCELROY, *supra* note 215, at 20.

the assumption that Spooner should be best remembered for *No Treason, No. VI: The Constitution of no Authority* (1870)[232] rather than for *The Unconstitutionality of Slavery* (1845, 1847).[233]

Over forty years ago, C. William Hill, Jr. wrote that "[f]ew except close friends and sponsors seem to have taken the time to realize that Spooner's view of the Constitution required nothing less than a complete reinterpretation of how the Constitution had been formulated and what it authorized. His view was the truly radical one, but it offered an emotionally less satisfying alternative."[234] To a large extent, attitudes in the intervening decades have not changed. Most scholars still take this less than sympathetic view of the theory laid out in the two volumes of *The Unconstitutionality of Slavery*. The conclusions that Spooner was a "constitutional utopian" whose constitutional arguments were "more polemical than serious";[235] and that his "position" was "destroyed"[236] by Wendell Phillips still dominate discussions of abolitionist constitutionalism.

In this section, it will become clear that the theories are "emotionally satisfying" and that a reevaluation of them helps us to understand why they were so attractive to Douglass when he underwent his change of opinion about the answer to the "the question of questions."

A. The Unconstitutionality of Slavery

In 1855, ten years after the publication of the first volume of *The Unconstitutionality of Slavery*, the New York abolitionist Lewis Tappan wrote to Louis Alexis Chamerovzow, the Secretary to the British and Foreign Anti-Slavery Society. He contended that "[i]n the progress of its history, *not a few* began to believe that ... slaveholding was not only sinful but illegal and unconstitutional."[237] He might also have added that "less than a few" had begun to express this belief in extensive written, scholarly form. Indeed, there is a good reason why, in support of his statement, Tappan only cited the work of Spooner. As I have detailed elsewhere, in the 1830s some abolitionists did refuse to toe the Garrisonian "covenant with death" line. Yet, when they did so they generally set forth alternative arguments and theories that modestly and cautiously contended

---

232. Lysander Spooner, *No Treason., No. VI., The Constitution of No Authority (1870)*, in SHIVELY, *supra* note 225.

233. Spooner, *supra* note 11; Spooner, *Part Second*, *supra* note 11.

234. C. William Hill, Jr., The Place of Lysander Spooner in the American Higher Law Tradition 9 (1980) (unpublished manuscript) (on file with author).

235. COVER, *supra* note 135, at 154–58 (1975); Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV., 423, n.59 (1999); PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 201 n.33 (2001).

236. COVER, *supra* note 135, at 151; A. John Alexander, *The Ideas of Lysander Spooner*, 23 NEW ENG. Q. 200, 206 (1950) (in the *Review* "Phillips demolished the Spooner argument in short order").

237. Quoted in ANNIE HELOISE ABEL & FRANK J. KLINGBERG, A SIDE-LIGHT ON ANGLO-AMERICAN RELATIONS, 1839–1858: FURNISHED BY THE CORRESPONDENCE OF LEWIS TAPPAN AND OTHERS WITH THE BRITISH AND FOREIGN ANTI-SLAVERY SOCIETY 357, 359 (1927) (emphasis added).

that the Constitution *permitted* but did not actually *sanction* slavery.[238] Although the next decade witnessed the slow adoption of more radical arguments, only Spooner went as far as to contend that slavery was unconstitutional.

Recall, from above, that Wendell Phillips's Garrisonian condemnation of the Constitution was constructed upon a belief that law consisted of fidelity to custom/tradition and/or text; a strong emphasis on rules; and a belief that moral obligations are legally irrelevant. Spooner's definition of the law could not have been more different. He was very critical of "popular opinion" that embraced a "very loose and indefinite,"[239] positivistic understanding of law as nothing more than "an arbitrary rule, that can be established by mere will, numbers or power."[240] The morality of law was an absolutely essential part of the equation because a "law" was only a "law" if it was consistent with natural justice, at the heart of which lay the "moral obligations" of individuals. The "true and general meaning" of law, he wrote, is:

> . . . that *natural*, permanent, unalterable principle, which governs any particular thing or class of things. The principle is strictly a *natural* one; and the term applies to every *natural* principle, whether mental, moral, or physical. Thus we speak of the laws of mind; meaning thereby those *natural*, universal and necessary principles, according to which mind acts, or by which it is governed. We speak too of the moral law; which is merely an universal principle of moral obligation, that arises out of the nature of men, and their relations to each other. . . ."[241]

He wrote that the "principle, by virtue of which law results from" is "'*the rule, principle, obligation or requirement of natural justice*,' whose true origins lie in individuals' natural rights." This led him to the conclusion that "[t]he very idea of law originates in men's natural rights."[242]

The Unconstitutionality of Slavery, in which Spooner applied these conclusions about the nature of law to constitutional interpretation, appeared in two parts in 1845[243] and 1847.[244] Spooner made no mention of Phillips's *Pro-Slavery Compact* in the first volume. Yes, his arguments were a clear response to those of Phillips, but they were not a *direct* response to what the Bostonian had written. That would not come until the publication of *Part Second* in 1847, when Spooner did mention his intellectual adversary by name. [245] It should come as no surprise that it was in the second volume that Spooner responded to the methodological challenges that Phillips's writings posed. This is because *Part Second* appeared a

238. Knowles, *supra* note 79.
239. Spooner, *supra* note 11, at 5.
240. *Id.*
241. *Id.* at 5–6.
242. *Id.* at 6.
243. *Id.*
244. Spooner, *Part Second, supra* note 11.
245. *Id.* at 155–56, 191, 243.

few months after the publication of Phillips's aptly titled *Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery*.[246] What *Part Second* was not, however, was a detailed discussion of—in Spooner's opinion—the shortcomings of Phillips's writings. Why? The answer is simple. Spooner did not believe it was necessary to dignify them with a detailed analysis of their content. Rather, as Spooner explained in a letter to his best friend George Bradburn, he wrote *Part Second* because there were "other matters which I wish to put into a sequel."[247]

1. The *Fisher* Rule

To what extent, then, did the intertwined nature of law and morality influence Spooner's interpretive philosophy? As discussed above, Phillips believed (erroneously) that the reasoning in several of John Marshall's opinions supported his own conclusions about the relationship between slavery and the Constitution. Spooner also looked to the Chief Justice's writings, but not because he wanted to vindicate the use of external evidence for understanding the nation's supreme law. Rather, he looked to one particular opinion as a perfect exposition of the rule of constitutional interpretation consistent with the dictates of natural justice. Spooner's use of that opinion bears extensive discussion not only because of its centrality to his interpretive philosophy, but also because, as discussed below in Part III-B5, it is an aspect of his philosophy that helped to convert Douglass from a Garrisonian into a Spoonerian.

Described by one scholar as "the Marshall Court's most extensive discourse on interpretive methodology,"[248] *United States v. Fisher* (1805)[249]—like the far more famous *McCulloch v. Maryland* (1819)[250]—involved an interpretation of the Necessary and Proper Clause (Article I, Clause 18, of the Constitution), which gives Congress power "[t]o make all Laws which shall be *necessary and proper* for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[251] The passage from the *Fisher* opinion upon which Spooner focused his attention, reads as follows:

---

246. PHILLIPS, *supra* note 28.

247. Letter from Lysander Spooner to George Bradburn (June 1, 1847) (on file with N-YHS).

248. Yoo, *supra* note 108, at 1619.

249. 6 U.S. at 358, 360, 379 (1805). Although *Fisher* dealt with statutory rather than constitutional construction and interpretation, Spooner would argue that there was no legal difference between the two: "A constitution is nothing but a contract, entered into by the mass of the people, instead of a few individuals. This contract of the people at large becomes a law unto the judiciary that administer it, just as private contracts, (so far as they are consistent with natural right,) are laws unto the tribunals that adjudicate upon them. All the essential principles that enter into the question of obligation, in the case of a private contract, or a legislative enactment, enter equally into the question of the obligation of a contract agreed to by the whole mass of the people. This is too self-evident to need illustration." Spooner, *supra* note 11, at 65.

250. 17 U.S. at 316.

251. U.S. Const., art. I, § 18 (emphasis added).

> 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.[252]

This, hereinafter, will be referred to as the *Fisher* Rule (or FR).

To Spooner, the FR possessed "reasonableness, propriety, and therefore truth," all of which were made obvious by consulting the fundamental principles of natural justice.[253] And it gave him the operational presumption that he used to determine the original meaning of the Constitution. This meaning was what the reasonable person would have understood it to be (in a *hypothetical* consent form), and it was preposterous to believe that such an individual would have consented to the violation of his or her natural rights. Therefore, any such violations must be "expressed with irresistible clearness."[254] In short, in Spooner's view, the FR provided a tool to determine the consistency or inconsistency of positive law with natural justice.[255]

The FR validated Spooner's method of constitutional interpretation, which resisted the use of extraneous evidence to understand *legal* rules. "The pith" of the FR, he wrote, "is that any *unjust* intention must be '*expressed with irresistible clearness*,'" in the text of the law itself, in order "to induce a court to give a law an unjust meaning."[256] Continuing, he explained that "[a]s a written legal instrument," the Constitution "must have a fixed, and not a double meaning." One cannot attribute to its text a "soul," "motive," or "personality" with the exception of "what those words alone express or imply."[257] If one wants to understand and interpret the *text* of the Constitution, it is pointless to use Madison's *Notes* or Jonathan Elliott's compilation of the states' constitutional ratification debates,[258] or any other such evidence. What those documents contain is "at best a matter of conjecture and history, not of law, nor of any evidence cognizable by any judicial tribunal."[259] For, as Spooner also observed, "[t]he intentions of the framers of the constitution (if we could have, as we cannot, any *legal* knowledge of them, except from the words of the constitution,) have nothing to do with fixing the legal meaning of the constitution."[260] When the text of the Constitution is vague,

---

252. 6 U.S. at 390, quoted in Spooner, *supra* note 11, at 18–19.

253. Spooner, *supra* note 11, at 155.

254. *Id*. at 153–54, 182–83, 190.

255. *Id*.

256. Spooner, *Part Second*, *supra* note 11, at 190.

257. Spooner, *supra* note 11, at 58.

258. *Id*. at 116–18 (explaining how sources like Madison's *Notes* or Jonathan Elliott's compilation of the states' constitutional ratification debates are not useful for understanding the Constitution) (citing JONATHAN ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION: AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787. TOGETHER WITH THE JOURNAL OF THE FEDERAL CONVENTION, LUTHER MARTIN'S LETTER, YATES'S MINUTES, CONGRESSIONAL OPINIONS, VIRGINIA AND KENTUCKY RESOLUTIONS OF '98-'99, AND OTHER ILLUSTRATIONS OF THE CONSTITUTION (1836–1845).

259. Spooner, *supra* note 11, at 114, 121.

260. *Id*.

ambiguous, and/or susceptible to multiple meanings, the only legitimate interpretive tools are the FR and these two related rules (as crafted by Spooner):

> 1. No intention, in violation of natural justice and natural right . . . can be ascribed to the constitution, unless that intention be expressed in terms that are *legally competent* to express such an intention;
> 2. No terms, except those that are plenary, express, explicit, distinct, unequivocal, *and to which no other meaning can be given, are legally competent* to authorize or sanction anything contrary to natural right.[261]

The 1860 speech that Douglass gave in Glasgow, Scotland left the listener with little doubt as to (a) why he had come to the conclusion that slavery was unconstitutional, and (b) the extent to which he had been influenced by Spooner's work. It is to the specifics of that influence that we now turn.

B. The Unconstitutionality of Slavery and Frederick Douglass

Adopting a strict focus on original meaning, as opposed to original intent, Douglass emphasized in his Glasgow speech that the Constitution was nothing more nor, anything less than its "text . . . *only* the text, and not any commentaries or creeds written by those who wished to give the text a meaning apart from its plain reading."[262] For the purposes of interpreting the Constitution, the original intentions of the Framers only held relevance if "those intentions" were "plainly stated in the Constitution."[263] The only way to interpret and decipher the meaning of the document's clauses—and thus the only way to debate those who condemned certain of those clauses as pro-slavery—was to take the clauses "word for word just as they stand."[264]

Douglass then proceeded to examine the four clauses "which the most extravagant defenders of slavery can claim to guarantee a right of property in man."[265] When one compares what Douglass said about these clauses with what Spooner wrote in his treatise, the similarities are easily identifiable.

1. The Three-Fifths Clause (Article I, §2, cl. 3)

> 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.[266]

---

261. *Id*. at 58–59.
262. Douglass, *supra* note 220, at 469.
263. *Id*.
264. *Id*. at 471.
265. *Id*. at 472.
266. U.S. Const., art. I, §2, cl. 3.

"We are not compelled," [267] wrote Douglass, to admit that the Three-Fifths Clause is—to employ the phrase I have used elsewhere—a "level one"[268] pro-slavery clause. Why? There are other groups in society, Douglass continued, to whom this clause might refer. For example, "it might fairly apply to aliens—persons living in the country, but not naturalized."[269]

This draws directly from one of Spooner's main interpretations of the clause. In *The Unconstitutionality of Slavery*, Spooner rejects the argument that "all other persons" is a synonym for slavery because slavery cannot be the correlative of the word "free" in this clause.[270] Why? Simply, under the definition of law that Spooner employs, slavery does not—and, crucially, did not at the time of the Constitution's framing—have any "*legal* existence."[271] This is because something cannot be a legal correlative of something else if that something else has no "*legal* existence."[272] What, then, does "other persons" mean? As Spooner explains, at the same time that the Constitution fails to denote "slavery" as a legal correlative of "free," it does denote (or "suggest[s]") a correlative—namely, "aliens"—through the granting of the naturalization power to the federal government.[273] Ignoring this language, which *is* in the Constitution, and instead saying that "all other persons" actually means "slavery," involves, ironically, "go[ing] out of the constitution" to find a meaning for something that is in the Constitution.[274]

2. The Slave Trade Clause (Article I, §9, cl. 1)

> 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.[275]

Douglass offered a relatively weak interpretation of this clause. Putting aside the obvious point that, as of January 1, 1801, per this clause, the international slave trade was no more, [276] he identified what he considered to be an important additional reason why this was not a pro-slavery clause. In Douglass's view, this clause actually contributes to the abolition and not the perpetuation of slavery, because "it says to the slave States, the price you will have to pay for coming into the American Union is, that the slave trade, which you would carry on indefinitely out of the Union, shall be put an end to in twenty years if you come into the

267. Douglass, *supra* note 220, at 472.
268. Knowles, *supra* note 79, at 311.
269. Douglass, *supra* note 220, at 472.
270. Spooner, *supra* note 11, at 74–75.
271. *Id.* at 74.
272. *Id.*
273. *Id.* at 75.
274. *Id.*
275. U.S. Const., art. I, §9, cl. 1.
276. Douglass, *supra* note 220, at 472–73.

Union."[277] This analysis is underpinned by a presupposition that is either missing from or far less evident in Douglass's analysis of the other clauses he discussed in his Glasgow speech. Namely, that the Framers' original intentions are relevant—that they "were good, not bad,"[278] because the language of the clause tells us that they specifically stated a date upon which an aspect of slavery would come to an end.

It is very difficult to identify specific similarities between the analyses of this clause offered by Douglass and Spooner. However, one thing that their analyses do have in common is weak constitutional interpretation. Spooner's reading of the clause was no stronger than Douglass's. The "only *legal* object, of the clause,"[279] he wrote, was for it to serve as a restraint on another related Congressional power—namely, the Article I, Section 8, clause 3 power of the Congress "to regulate commerce with foreign nations."[280] The restraint was "to obstruct the introduction of new population into such of the States as were desirous of increasing their population in that manner."[281] This, of course, is related to the plenary federal naturalization power that Spooner incorporated into his analysis of the three-fifths clause[282] (a point he reemphasized in this analysis of the slave trade clause).[283] "The clause," continued Spooner, "does not imply at all, that the population, which the States were thus to 'admit,' was to be a slave population."[284]

3. The Suppression of Insurrections Clause (Article I, §8, cl. 15)

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions[285]

Douglass begins his analysis of this clause by observing that it is often referred to using the entirely misleading label "'slave insurrection' clause."[286] This clause, Douglass emphasizes, "has nothing *whatever* to do with slaves."[287] Looking strictly at the text of the clause, one sees that it "is only a law for suppression of riots or insurrections."[288] Perhaps, one might concede "generous[ly]"[289] that it relates to slave insurrections. However, as Douglass explains, this does not make the clause pro-slavery, because "[t]he right to put down an insurrection carries

277. *Id*. at 473.
278. Id.
279. Spooner, *supra* note 11, at 82.
280. U.S. Const., art. I, §8, cl. 3.
281. Spooner, *supra* note 11, at 83.
282. *Id*. at 75.
283. *Id*. at 86–87.
284. *Id*. at 83.
285. U.S. Const., art. I, §8, cl. 15.
286. Douglass, *supra* note 220, at 473.
287. *Id*.
288. *Id*.
289. *Id*.

with it the right to determine the means by which it shall be put down."[290] Consequently, Douglass suggested, one could imagine an antislavery President resolving a slave insurrection by abolishing slavery.[291]

Nowhere in *The Unconstitutionality of Slavery* does Spooner offer up an interpretation of this clause that speaks to whether the "suppress Insurrections and repel Invasions"[292] language relates to slave insurrections. However, he concluded implicitly that this could not possibly relate to slave insurrections. This conclusion may be reached because Spooner writes about the language of the "Militia" part of the clause and who may be part of that militia. "Have not Congress, under these powers, as undoubted authority to enroll in the militia, and 'arm' those whom the States call slaves . . . as they have thus to enroll and arm those whom the States call free?"[293] he asks rhetorically.

4. The Fugitive Slave Clause (Article IV, §2, cl. 3)

> No Person held to Service or Labour 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 Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[294]

The fugitive slave clause is the fourth and final supposedly pro-slavery clause of the Constitution to which Douglass turns his analytical attention in his Glasgow speech. Here, the futility of utilizing historical evidence of the Framers' intentions becomes evident. This is because, as Douglass explains,[295] Madison and others "can be cited on both sides."[296] By contrast, when one looks to the "plain reading"[297] of the clause, one finds that:

> it applies to a very large class of persons—namely, redemptioners—persons who had come to America from Holland, from Ireland, and other quarters of the globe—like the Coolies to the West Indies—and had, for a consideration duly paid, become bound to 'serve and labour' for the parties to whom their service and labour was due. It applies to indentured apprentices and others who had become bound for a consideration, under contract duly made, to serve and labour.[298]

Spooner engages in an extensive analytical discussion of this clause.[299] However, we need look no further than the first point he makes to see the

290. *Id.*
291. *Id.*
292. U.S. Const., art. I, §8, cl. 15.
293. Spooner, *supra* note 11, at 97.
294. U.S. Const., art. IV, §2, cl. 3.
295. Douglass, *supra* note 220, at 474–75.
296. *Id.* at 475.
297. *Id.*
298. *Id.*
299. Spooner, *supra* note 11, at 67–73.

similarities between his interpretation and Douglass's. Again, drawing on the principal assumptions that could be made about the Constitution from his definition of law, Spooner emphasized that the clause "must be construed, if possible, as sanctioning nothing contrary to natural right."[300] "[T]he 'service or labor,' that is exacted of a slave" cannot possibly be "'*claimed. . .*' *consistently with natural right*, as being '*due*' from him to his master."[301] The clause, therefore—consistent with Douglass's reading—refers to a different "class of persons."[302] Specifically,

> The proper definition of the word "service," in this case, obviously is, the labor of a *servant*. And we find, that at and before the adoption of the constitution, the persons recognized by the state laws as "servants," constituted a numerous class. The statute books of the states abounded with statutes in regard to "servants." Many seem to have been indented as servants by the public authorities, on account of their being supposed incompetent, by reason of youth and poverty, to provide for themselves. Many were doubtless indented as apprentices by their parents and guardians, as now. The English laws recognized a class of servants—and many persons were brought here from England, in that character, and retained that character afterward. . . . In these various ways, the class of persons, recognized by the statute books of the states as "servants," was very numerous; and formed a prominent subject of legislation.[303]

Here, as with the above analysis of the other three clauses discussed by Douglass in his Glasgow speech, there is clearly not perfect symmetry between Spooner and Douglass. That is reassuring because, as Colaiaco reminds us, while "Douglass's interpretation of the Constitution was not original . . . his rhetorical brilliance did more to publicize an abolitionist reading of the nation's charter than did the tortuous reasoning of his legal mentors,"[304] including, most notably, Lysander Spooner.

5. Douglass and the *Fisher* Rule

The absence of perfect symmetry should not detract from the fact that the main points underpinning Spooner's interpretation of the Constitution are also clearly present in Douglass's post-May 1851 interpretation. Most notably, we see this in Douglass's Glasgow speech after he laid out his aforementioned analysis of four clauses of the Constitution. "[W]here human liberty and justice are at stake," observed Douglass, we must use "something more than history—something more than tradition" to interpret the law.[305] Thankfully, that "something more" exists in the form of a rule laid down by the Supreme Court. He then proceeds to quote

---

300. *Id*. at 68.
301. *Id*.
302. Douglass, *supra* note 220, at 475.
303. Spooner, *supra* note 11, at 68.
304. Colaiaco, *supa* note 198, at 166.
305. Douglass, *supra* note 220, at 476.

the entirety of the *Fisher* Rule and the accompanying rules of interpretation that Spooner crafted in his treatise.[306] There is no doubt that Spooner was the principal legal influence on Douglass's "change of opinion."

As we saw in Part I-D, Wendell Phillips's views on life and the law, and slavery and the United States Constitution, were not primarily shaped by his legal education. Instead, Phillips's Garrisonian views were melded by events he witnessed and experienced. Standing in distinct contrast are the origins of Spooner's legal interpretive philosophy. As we will see in Part IV, Spooner's philosophy owes much to the way in which he learned the law.

IV. LEARNING THE LAW

Christopher Calton astutely observes that the *Unconstitutionality of Slavery* "held as much personal significance for Spooner as it did political significance for abolitionists who agreed that the Constitution prohibited slavery."[307] In support of this statement, Calton points[308] to an October 27, 1845, letter that Spooner wrote to George Bradburn, his closest friend. Lamenting the recent death of his mother Dolly, Spooner took solace in the fact that she lived to see the publication of the first part of his treatise.[309]

He wrote:

> She died on the 20th two days after I got here. During those two days she was too sick to talk much, but she expressed great pleasure that my book was out and that it was thought likely to do so much good . . . Almost all our family have been ardent abolitionists for years—And you will readily imagine that it was no slight consolation to me to have contributed in such a manner to the happiness of my family, and above all to the happiness of the last days of such a mother.[310]

Although this certainly supports Calton's conclusion, it only represents one data point, a problem that is compounded by the fact that we know precious little about Spooner's parents. We know, from the October 1845 letter, that Dolly Spooner was a source of encouragement and support for her son's abolitionist activities, but that is the extent of Spooner's discussion of his mother.

In the large number of letters that have survived, Spooner never mentions his father, who lived for another six years. However, in a genealogical description of Asa Spooner we see several distinctive character traits that also defined the life of his second son. For example, Asa "was a man of great independence and

306. *Id.*

307. Christopher Calton, *From Abolitionist to Anarchist: Lysander Spooner's Radical Transition through the Civil War*, 9 LIBERTARIAN PAPERS 38, 42–43 (2017).

308. *Id.* at 43 n.13.

309. Letter from Lysander Spooner to George Bradburn (Oct. 27, 1845) (on file with N-YHS).

310. *Id.*

individuality of character."[311] Additionally, as the following passage indicates, Lysander also inherited from his father a commitment to, and passion for social causes regardless of the popularity they enjoyed:

> He [Asa Spooner] is noted chiefly for the advanced ground which he took on the subject of total abstinence from the use of intoxicating liquors at a time when temperance societies had not yet begun to be formed, and when little was thought and still less said in support of temperance principles. As early as 1811 he became a promoter, both by precept and example, of the cause which he had so much at heart; but he was far ahead of his time, 'Temperance fanatics' were not wanted, and it is worthy of remark that in the town in which he lived he found but one supporter of his doctrines.[312]

One need only substitute "the unconstitutionality of slavery" (or one of the many other 'radical' topics upon which Lysander wrote) for "temperance" in order to see that the apple did not fall far from the family tree. So, while it is clear that Spooner's work was indeed of "much personal significance for"[313] him, it is equally evident that familial influences alone cannot explain why he was driven to write his two-part treatise on slavery's unconstitutionality.[314] As such, in order to develop an understanding of Spooner's motivation, we need to look elsewhere. In this Part, I contend that Spooner's legal education explains his keen and detailed analysis of the relationship between slavery and the Constitution.

In his doctoral dissertation, in which he analyzed the differing interpretations of the Constitution by abolitionists (including Spooner and Phillips), Stanley Bernstein made generally disparaging remarks about *The Unconstitutionality of Slavery*.[315] Like most scholars writing before him, and since, Bernstein argued that in both substance and style Spooner's legal theory paled in comparison to that of Phillips. Unlike other historians, however, Bernstein also noted the different legal educations that the two abolitionists received. He only made one observation about this, but it is nevertheless very significant. While Phillips *studied* at Harvard Law School, Spooner, wrote Bernstein, "instead 'read' law in the offices of two Worcester attorneys."[316] The reading of law is a term of art, and it is indeed true, with regard to definitions of that term of art, that Spooner *read* law. However, placing the word "read" in quotation marks is misleading to the lay reader, for it suggests that there was something fundamentally inferior about the knowledge of law that an apprentice "reading" law would receive. Spooner could not lay claim to a résumé that included either a college education or law school training. Yet, the absence of such references was, if not completely, then

311. Spooner, *supra* note 224, at 345.
312. *Id.*
313. Calton, *supra* note 307, at 42–43.
314. Spooner, *supra* note 11; Spooner, *Part Second*, *supra* note 11.
315. Bernstein, *supra* note 89, at 148–82.
316. *Id.* at 153.

significantly, compensated for by the fact that he received his legal apprenticeship under the tutelage of three Ivy League graduates who were prominent figures in the Massachusetts legal community—John Davis, Charles Allen, and Emory Washburn.

A. The Legal Education of Lysander Spooner

After graduating from Yale, John Davis served his legal apprenticeship with Francis Blake, at the time one of the leading lawyers in Worcester.[317] Charles Allen, a Harvard graduate who briefly attended Yale, studied law with Samuel M. Burnside, another Worcester-based lawyer.[318] Emory Washburn, who received degrees from Dartmouth College and Williams College before working as an apprentice for several lawyers, completed his legal training at Harvard under Professor Asahel Stearns, previously a prominent member of the Suffolk County bar.[319] All three men held elected offices. By 1833, when Spooner began his apprenticeship, Allen and Davis were both heavily engaged in state and national politics. Davis had served for nearly a decade in Congress, and the following year he served as Governor of Massachusetts.[320] Allen was a state senator during much of Spooner's apprenticeship and served in Congress and in the state judiciary later in his life.[321] Similarly, Washburn's political career came after Spooner's apprenticeship ended; and compared to Davis and Allen, he had only brief political engagements, which can be described as mere "interruptions."[322]

1. Davis and Allen

There are conflicting accounts regarding the dates of the duration of the Davis-Allen partnership. In her biographical treatment of Davis, Rita Marie Kelly says that Allen left the partnership in 1831.[323] Other sources suggest, however, that

317. Rita Marie Kelly, John Davis: Lawyer and Politician, 1787–1854 (1945) (unpublished manuscript).

318. George F. Hoar, *Charles Allen of Worcester*, XIV PROC. AM. ANTIQUARIAN SOC'Y 327, 329 (1901).

319. Before attending Harvard, Washburn studied under Nathaniel P. Denny and Bradford Sumner (two Leicester, Massachusetts lawyers), and Charles Dewey of Williamstown, who later served as an Associate Justice of the Supreme Judicial Court of Massachusetts (1837-1866). A. P. PEABODY, MEMOIR OF THE HON. EMORY WASHBURN. REPRINTED FROM THE PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY, 1879 5 (1879); WILLIAM LINCOLN, HISTORY OF WORCESTER, MASSACHUSETTS: FROM ITS EARLIEST SETTLEMENT TO SEPTEMBER, 1836; WITH VARIOUS NOTICES RELATING TO THE HISTORY OF WORCESTER COUNTY 250 (1837); CONRAD RENO, MEMOIRS OF THE JUDICIARY AND THE BAR OF NEW ENGLAND FOR THE NINETEENTH CENTURY WITH A HISTORY OF THE JUDICIAL SYSTEM OF NEW ENGLAND 700 (1901).

320. *Davis, John*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/D000117 (last visited Feb. 4, 2024) [https://perma.cc/2TKJ-D6NB]; Kelly, *supra* note 317, at 14–15.

321. *Allen, Charles*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/A000115 (last visited Feb. 4, 2024) [https://perma.cc/2MAG-64PS]; RENO, *supra* note 319, at 317.

322. RENO, *supra* note 319, at 700.

323. Kelly, *supra* note 317, at 14.

Allen and Davis worked together between 1833 and 1835 in order to, among other things, tutor Spooner.[324] What is clear, however, is that the political activities of these three men, particularly those of Davis and Allen, affected the time that they spent with Spooner. They all influenced their law student, and in Spooner's constitutional theorizing we see elements that were either nurtured by, or that emerged as a reaction to, the education he received from Davis, Allen, and Washburn.

Kelly has explained that while there was a lack of scholarly flair in Davis's legal briefs, a great use of logic, in both Davis's briefs and oral arguments, made up for this shortcoming.[325] Indeed, Davis was famous for the effectiveness of the logical arguments in his briefs.[326] Although it is reasonable to assume that Spooner was naturally inclined to approach the study of the law from a rigorously logical perspective, it is clear that this trait was fostered by Davis, for whom legal logic formed a central part of his work and, most likely, his tutelage. We can rightly say about Davis what Robert Anton Wilson has said about Spooner: that he "was a lawyer . . . [whose] arguments are put forth with the battering ram effect of a good lawyer's brief."[327]

It is also reasonable to conclude that Spooner's commitment to the original meaning of the Constitution[328] was strongly encouraged by Davis, himself an advocate of a strict construction of the text. As Davis remarked in an 1833 letter to another famous Worcester lawyer, Levi Lincoln, he undertook his interpretation of the Constitution with "reference to the meaning of its language."[329] Most famously, we see a similarly text-centered approach in Davis's argument before the United States Supreme Court in *Charles River Bridge v. Warren Bridge*.[330] Davis, and his co-counsel Simon Greenleaf, successfully argued for a strict reading of the charter granted to the Charles River Bridge Company, a reading that found no language expressly providing the plaintiffs with a monopoly on bridges over the river.[331]

Correspondence between Spooner and Bradburn suggests that both Davis and Allen were receptive to the arguments that their former pupil was espousing on the constitutional status of slavery.[332] However, Spooner's conclusion that his

---

324. See, for example, Benjamin R. Tucker, *Our Nestor Taken From Us*, LIBERTY, May 28, 1887, 632–33.

325. Kelly, *supra* note 317, at 16–17.

326. *Id*.

327. ROBERT ANTON WILSON, LYSANDER SPOONER, 1808–1888 1 (1970).

328. Helen J. Knowles, *Securing the 'Blessings of Liberty' For All: Lysander Spooner's Originalism*, 5 N.Y.U. J. L. & LIBERTY 34 (2010).

329. Kelly, *supra* note 317, at 42.

330. 36 U.S. (11 Pet.) 420 (1837).

331. STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE ch. 6 (1971). It should be noted that Davis prevailed in this case, a decision from which Justice Story dissented.

332. Letters from George Bradburn to Lysander Spooner (Oct. 17, 1845, and July 3, 1853) (on file at N-YHS).

mentors agreed with his position may have been the result of some wishful thinking. Despite his rejection of Garrisonian disunionism, Allen advocated political action to correct what he saw as the proslavery ills of the Constitution.[333] Likewise, the radicalism of Spooner's theory was inconsistent with Davis's generally conservative political views, and with his tendency in political debate to prefer the application of "great principles" to "real life, and to the condition and wants of the people"[334] rather than principles as theory alone.[335] However, Allen probably admired Spooner's stubbornness, strong convictions, passionate prose, and unwillingness to sacrifice his personal "inclinations" or "conscience": all hallmarks of Allen's own work (political and legal).[336] And, Davis's politics notwithstanding, the legalistic approach taken by his pupil undoubtedly made the teacher proud. For, it evinced the importance of the Constitution as a document for protecting personal liberty and, as has been described of Davis's work, a "comprehensive scope of mind . . . steady and unerring judgment . . . inflexible integrity, and unswerving decision of character."[337]

It is likely that Davis and Allen knew the kind of legal mind they helped to develop, and it is difficult to agree with Charles Sprading's assessment that they did not know "what a giant intellect was developing under their eyes."[338] The influence of Davis and Allen manifested in Spooner's repeated argument that the shortcomings in Phillips's theories were in large part the result of the abolitionist's failure to adopt a legalistic approach (as understood by Lysander Spooner).

2. Washburn

In 1831, Davis began a law partnership with Emory Washburn, who would become a prominent member of the legal community in Worcester and a renowned professor at Harvard Law School (1856-1876).[339] At Harvard, his popularity with the students easily matched that of any of his esteemed colleagues.[340] While Washburn probably transmitted his strong work ethic to the young Spooner, the

---

333. HOAR, *supra* note 318, at 348–49.

334. Charles Hudson, Political Biographies 1864-1880: Character of the Late Hon. John Davis of Worcester, 12 (1864) (unpublished manuscript) (on file with American Antiquarian Society).

335. *Id.*

336. Alonzo Hill, *A Memorial Sermon preached before the Second Congregational Society in Worcester, on the life and character of Hon. Charles Allen* (Sept. 12, 1869), in A MEMORIAL OF THE HON. CHARLES ALLEN FROM HIS CHILDREN 24, 31 (1870); HOAR, *supra* note 318, at 329–30.

337. ALONZO HILL, THE PERFECT MAN: A SERMON ON THE DEATH OF HON. JOHN DAVIS, PREACHED AT WORCESTER, MASS., APRIL 23, 1854 23–24 (1854). *See also* Thomas Kinnicutt, *Memoir of Hon. John Davis, LL.D.*, III Transactions and Collections of the American Antiquarian Society, 348 (1857); Kelly, *supra* note 317, at 42.

338. CHARLES T. SPRADING, LIBERTY AND THE GREAT LIBERTARIANS: AN ANTHOLOGY ON LIBERTY A HANDBOOK OF Freedom 258 (1913).

339. CENTENNIAL HISTORY, *supra* note 123.

340. *See, generally*, Charles Hudson, Political Biographies 1864–1880: The Character of Governor Emory Washburn, 12-14 (1878) (unpublished manuscript) (on file with American Antiquarian Society); *Obituary: Emory Washburn, LL.D.*, 15 ALB. L.J. 238 (1877).

Charles Hudson, Political Biographies 1864–1880: Character of the Late Hon. John Davis of Worcester, 12 (1864) (unpublished manuscript) (on file with American Antiquarian Society).

two men worked from very different definitions of the law, and very different perceptions of the nature of the judiciary.

In an 1846 letter to Bradburn, Spooner described Phillips as "lack[ing] one indispensable requisite of a lawyer—to wit, a knowledge of the *purpose* of law."[341] A "pettifogger"—or a mere "case lawyer"—Phillips "remember[ed] how particular questions were decided in such and such instances," but "that is about all." He "cannot tell you whether the decisions were right or wrong" because he "take[s] it for granted that decisions are correct."[342] Spooner most likely held Washburn in similarly low regard. For unlike Spooner, who outlined a constitutional theory that envisioned an active judiciary, Washburn had a restrained view of the power of judges. In his *Lectures on the Study and Practice of the Law* (published in 1871 but consistent with views he expressed throughout his life), Washburn argued that philosophy and theory had only a small influence on the study of law.[343] Ultimately, what separated Spooner from Washburn, and what probably accounts for the absence of references to the tutor in the student's correspondence, likewise divided Spooner and Phillips.

Writing in his unpublished biography of Washburn, Charles Hudson says that in 1878, "Washburn was not a man of stern logic, who arrived at his conclusions by a cold abstract process of the most acute reasoning, so much as from a general view of the subject, its apparent bearing upon other questions, and its practical effect upon the community."[344] By contrast, Spooner's works are dominated by "stern logic"; indeed, even his critics were compelled to admire this characteristic of his writing.[345] Where Washburn and Phillips found an understanding of law in its application to, and effects on real life (they asked and answered the question "what is the law?"),[346] Spooner was far more concerned with identifying the correct response to the normative inquiry "what should the law be?" As the catalogue of books that Washburn owned at the time suggests,[347] Spooner's apprenticeship took place in an office where he would have had at his disposal not just the works that he needed to complete his tasks, *but also those that he needed to undertake more extensive theorizing*. There is little indication, however, that Washburn shared his pupil's natural inclination to focus on normative inquiries.

While it is true that the *typical* legal apprentice could not afford to devote much time to "theorizing," Lysander Spooner was not the typical apprentice. His writings are imbued with a very strong legal *theory*. Consequently, we can

---

341. Letter from Lysander Spooner to George Bradburn (Mar. 5, 1846) (on file with N-YHS).

342. *Id.*

343. *See* Emory Washburn, *Lecture One*, *in* LECTURES ON THE STUDY AND PRACTICE OF THE LAW (1871).

344. HUDSON, *supra* note 340, at 49–50.

345. William Lloyd Garrison, *Slavery Unconstitutional*, THE LIBERATOR, Aug., 22, 1845 (responding to THE UNCONSTITUTIONALITY OF SLAVERY by Lysander Spooner).

346. "Endowment of Liberia College," Emory Washburn Papers, 1833-1865 (on file with American Antiquarian Society); Hudson, *supra* note 340, at 61; STEWART, *supra* note 113.

347. "Catalogue of Books belonging to the Library of Emory Washburn," Emory Washburn Papers, 1833-1865 (on file with American Antiquarian Society); see also GAWALT, *supra* note 12, at 132–34.

conclude that Davis and Allen not only had a profound influence on their student, but also that they, unlike Washburn, admired the legalistic nature, if not the precise content, of the writings they lived to see Spooner publish. In this respect, certain assessments of Spooner's training need to be revised. Benjamin Tucker, for instance, wrote of Davis and Allen:

> . . . it is more than likely that their hopes were slight regarding the future of a young man to whom already the details and formalities and absurdities and quackeries of statute law seemed but so much cobweb which he must brush away in order to obtain a closer view of those fundamental veracities and realities which he called the principles of natural justice, whose mind had begun to soar from the realms of pettifoggery into those of high philosophy. . .[348]

Although written to eulogize Spooner's commitment to natural justice in glowing terms, this is an inaccurate understanding of the relationships between Davis and Allen, and Spooner. For further confirmation of this conclusion, one need look no further than the actions that Spooner, himself, took upon completion of his legal apprenticeship in 1835.

B. Challenging the "Three-Five" Rule

In 1740, in Massachusetts, there was one lawyer for every ten thousand residents. In 1840, this ratio had fallen to one lawyer for approximately every one thousand residents of the Bay State.[349] At the beginning of the nineteenth century the number of lawyers increased far more rapidly than the State's population (there was a reduction between 1820 and 1830 because of the loss of nine counties to the new State of Maine).[350] During this time, as was common in most states, legal training underwent profound changes. Not until the last quarter of the nineteenth century did the number of new lawyers who received their training from a law school outnumber those who were educated as legal apprentices in a local lawyer's office. Among practicing lawyers, however, a noticeable social stigma had long since attached itself to the apprenticeship system, which was perceived as an obstacle to the development of a legal *profession*, as opposed to a legal *trade*.

As early as the 1750s and 1760s, at a time when all lawyers were trained as apprentices, in Massachusetts some of the county bar associations restricted legal apprenticeships to persons who had a college (or equivalent liberal) education.[351] In Worcester County (where Spooner studied), the lack of college graduates made this impractical, so an alternate rule was adopted.[352] As of 1784 the Worcester County Bar Association required any college-educated apprentice to study with a lawyer for three years. Without a college education one could train for a legal

348. Tucker, *supra* note 324, at 632–33.
349. GAWALT, *supra* note 12, at 14.
350. *Id.*
351. *Id.* at ch. one.
352. *Id.*

career, but knowledge of Greek and Latin was necessary, and the apprenticeship would last for *five* years.[353] In the years following the American Revolution these stricter educational requirements were instigated by a profession eager to mirror what it saw as the benefits of similar standards adopted by the medical profession and by the clergy.[354]

While these changes were perceived as raising the social status of lawyers, they established a significant obstacle for any person of limited financial means. By the 1830s, when Spooner completed his legal apprenticeship, the "three-five rule"—which now required non-college graduates to complete more years of legal training than those who held a college degree—had become the most obvious example of the social and professional discrimination that the existence of two contrasting methods of legal education created. To be sure, it was also evidence of the professionalization of law, because the number of law schools was still very small, and their graduates only accounted for a very small percentage of new lawyers. For the *profession*, however, it was a perfect way to restrict admission to persons with the most esteemed social pedigrees. The rule was a form of assurance that being a lawyer would remain a noble and prestigious calling.

Upon completion of his legal apprenticeship in 1835, Spooner immediately encountered this form of discrimination, which was well established in the Massachusetts legal community by the 1830s. The three-five rule undoubtedly dissuaded lesser men from pursuing a career practicing the law. Spooner's reaction to the discrimination is the earliest written evidence that he had a commitment to individual equality and liberty, regardless of the unpopularity of the positions that this generated. Establishing a pattern that pervaded every one of his subsequent writings, the newly trained lawyer did what he thought was entirely appropriate for someone who had learned that the justice of the law did not turn upon majoritarian sentiment. Refusing to accept the legality of the three-five rule and its inherent discrimination against the "well-educated poor," Spooner made a concerted effort to offer his legal services to the Worcester community even though the law prevented him from gaining admission to the bar.[355] Beginning in April, 1835, and continuing through April, 1836, he placed the following advertisement in all of the newspapers then in publication in Worcester: "LYSANDER SPOONER OFFERS to the public; his services in the profession of LAW. Office in the Central Exchange. Worcester."[356] Additionally, Spooner mounted a formal challenge to the rule when he submitted a petition "To the Members of the Legislature of Massachusetts" in August 1835, seeking repeal of the rule.[357]

---

353. *Id*.

354. *Id*.

355. Shively, *supra* note 225, at 17.

356. The advertisement appeared regularly in the *Massachusetts Spy* between April 8, 1835 and April 6, 1836; the *Worcester Palladium*, during the same time frame; and the *Worcester Republican*, between April 8, 1835, and March 30, 1836.

357. Lysander Spooner, *To the Members of the Legislature of Massachusetts (1835)*, *in* THE COLLECTED WORKS OF LYSANDER SPOONER: VOLUME TWO, LEGAL WRITINGS (I) (Charles Shively ed., 1971). He also

In his petition, Spooner explained that the rule did not account for whether those who met the time requirements had spent their years "in study, or in idleness."[358] He noted that "in fact, the *time and money*, expended in *nominally preparing* for the profession, and not the acquirements or capacity of the candidate, constitute the real criterion, by which [a person] is tried when he applies for admission."[359] In a manner that would come to define all of his works, Spooner asked for a radical reformulation of these criteria. He proposed that:

> . . . a law be passed that any person, above the age of twenty-one years, of decent and good moral character, on making application either to the Common Pleas or Supreme Court for admission as an Attorney, and paying to the Clerk his recording fees, be admitted, without further ceremony or expense, to practice in every Court, and before every magistrate in the State, and that he then have the same right, that an admitted Attorney now has, of appearing in actions without a power of Attorney.[360]

He argued that these requirements would bring to the profession lawyers from the "WELL-EDUCATED POOR" who, by virtue of their life experiences, would be better positioned to serve impoverished clients.[361]

During the Jacksonian era there was a widespread reduction in requirements for bar admission.[362] This was the case even in cities like Boston, where an aristocratic influence served to temper any democratizing effects on the judiciary and legal profession.[363] Spooner anticipated the criticism that the new rule he proposed would allow too many people to become lawyers—one of the noticeable results of Jacksonianism. Spooner made the incredibly astute observation that even if the ranks of the profession were to swell, the balance of supply and demand would not be upset because so many people—and he clearly meant those from the socially elite—were lawyers in name only, using (as did Phillips) their qualifications to gain entry primarily into political circles.[364]

Although Spooner's petition was probably only one of several contributing factors, it seems likely that its "principal plea" was very appealing to the Massachusetts Legislature (which included Representative Charles Allen).[365] The

---

asked for other changes. For example, he objected to the requirement that upon admission to the bar a new lawyer was required to pay $20 to the Massachusetts Supreme Court, and $30 to the Law Library Association. He would gladly pay to use the Law Library if the need arose, but he could not find sense in a rule that required a monetary contribution to an institution that he might never visit.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. ROBERT STEVENS, LAW SCHOOLS: LEGAL EDUCATION IN AMERICA FROM THE 1950S TO THE 1980S 9 (1983).

363. *Id.*

364. Spooner, *supra* note 357.

365. Shively, *supra* note 225, at 18.

State abolished the three-five rule the following year.[366]

CONCLUSION

Understandably, Frederick Douglass "never forgot"[367] his former mentor's accusation that "[t]here is roguery, somewhere."[368] It was not only a stinging criticism—from the great William Lloyd Garrison—of the former slave's "change of opinion"[369] about the relationship between human bondage and the United States Constitution; it also falsely implied that Douglass had suddenly been corrupted by disreputable forces. As this article has shown, nothing can be farther from the truth. First, although Douglass's conversion from a Garrisonian "covenant with death" disciple into a believer that the Constitution was anti-slavery did not become public until May 1851, the signs of a future conversion had long been there, including in the pages of abolitionist newspapers. Second, there is ample evidence that while the evolution of Douglass's constitutional thought was influenced by the works of numerous individuals, the meticulous and theory-laden writings of Lysander Spooner had the greatest impact on his conversion.

What this Article has also shown is that, in direct contrast to the Garrisonian Wendell Phillips, it was the process of learning the law that brought forth the influential *The Unconstitutionality of Slavery* treatise from Spooner's mind and pen. On March 5, 1846, the year after the publication of the first part of that treatise, Spooner sat down and wrote a letter to his friend George Bradburn. In that piece of correspondence, he made the following observation about Phillips: "I concur with you, in part, as to the cause of" his "attack on my book. But an additional reason for it was that he is no lawyer . . . He lacks one indispensable requisite of a lawyer—to wit, a knowledge of the purpose of law. It is an old saying that a man cannot know the law, until he knows the reason of the law."[370] Although it is likely that Spooner knew very little about the way in which Phillips's legal education did not influence the Garrisonian's views of the Constitution, this letter—for the reasons outlined above—is very incisive.

Ultimately, for Spooner, it was the learning of the law that proved decisive in formulating the views that he later laid down in *The Unconstitutionality of Slavery*. And these are the very same views that would, in the 1850s, lead the great Frederick Douglass to a negative answer to the question "Was the U.S. Constitution pro-slavery?"—the question which, as Douglass once stated, was "the QUESTION OF QUESTIONS so far as the Anti-Slavery cause was concerned."[371]

366. *Id*.
367. Quarles, *supra* note 2, at 150.
368. Quoted in *id*., at 150 n.31.
369. Douglass, *supra* note 7, at 174.
370. Spooner to Bradburn, *supra* note 341.
371. Douglass, *supra* note 220, at 221.