Lysander Spooner (1808-1887) and Wendell Phillips (1811-1884)
Debate on the Constitutionality of Slavery

[Boston, 1845-47]

1. Spooner:
The Unconstitutionality of Slavery, Part I

[The U.S. Constitution (prior to the 13th amendment banning slavery) contains no explicit mention of slavery – a reflection of the general discomfort and embarrassment with regard to slavery, even among slaveowners, in the immediate post-Revolution period (a discomfort and embarrassment that was increasingly replaced in subsequent decades by a confrontation between proslavery militancy and antislavery militancy). But there are a number of indirect references to slavery in the Cosntitution, including Congress's right to regulate the "importation of such persons as any of the states now existing shall think proper to admit" (i.e., the slave trade); the assurance that the federal government would "suppress insurrections" and protect the states "against domestic violence" (*i.e.*, slave uprisings); the contrast, for purposes of representation, between "free persons" and "three fifths of all other persons"; and, most notoriously, the provision that "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 upon claim of the party to whom such service or labour may be due" (the Fugitive Slave Clause). On the grounds of its implicit protection for slavery, Garrison had publicly burned a copy of the Constitution, declaring it a covenant with death and agreement with hell.

As a fellow abolitionist, anarchist, and feminist, Spooner had much in common with Garrison; but he disagreed with Garrison over the Constitution, interpreting it as an antislavery document. While of course not denying that the aforementioned clauses were *intended* by the framers to protect slavery, Spooner held that the proper interpretation of the Constitution did not turn on the framers' intentions. (Frederick Douglass would cause some consternation among the Garrisonians by publicly switching from Garrison's to Spooner's reading of the Constitution.) Spooner's arguments raise issues not only in political and legal philosophy but in philosophy of language.]

1. What Is Law?

Before examining the language of the Constitution, in regard to Slavery, let us obtain a view of the principles, by virtue of which law arises out of those constitutions and compacts, by which people agree to establish government.

To do this it is necessary to define the term *law*. Popular opinions are very loose and indefinite, both as to the true definition of law, and also as to the principle, by virtue of which law results from the compacts or contracts of mankind with each other.

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

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

To determine whether this proposition be correct, we must look at the *general* signification of the term *law*.

The true and general meaning of it, 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, and to other things – and is consequently as unalterable at the nature of men. And it is solely because it is unalterable in its nature, and universal in its application, that it is

denominated law. If it were changeable, partial or arbitrary, it would be no law. Thus we speak of physical laws; of the laws, for instance, that govern the solar system; of the laws of motion, the laws of gravitation, the laws of light, etc., etc. – Also the laws that govern the vegetable and animal kingdoms, in all their various departments: among which laws may be named, for example, the one that like produces like. Unless the operation of this principle were uniform, universal and necessary, it would be no law.

Law, then, applied to any object or thing whatever, signifies a *natural*, unalterable, universal principle, governing such object or thing. Any rule, not existing in the nature of things, or that is not permanent, universal and inflexible in its application, is no law, according to any correct definition of the term law.

What, then, is that *natural*, universal, impartial and inflexible principle, which, under all circumstances, *necessarily* fixes, determines, defines and governs the civil rights of men? Those rights of person, property, etc., which one human being has, as against other human beings?

I shall define it to be simply *the rule, principle, obligation or requirement of natural justice.*

This rule, principle, obligation or requirement of natural justice, has its origin in the natural rights of individuals, results necessarily from them, keeps them ever in view as its end and purpose, secures their enjoyment, and forbids their violation. It also secures all those acquisitions of property, privilege and claim, which men have a *natural* right to make by labor and contract.

Such is the true meaning of the term law, as applied to the civil rights of men. And I doubt if any other definition of law can be given, that will prove correct in every, or necessarily in any possible case. The very idea of law originates in men's natural rights. There is no other standard, than natural rights, by which civil law can be measured. Law has always been the name of that rule or principle of justice, which protects those rights. Thus we speak of *natural law*. Natural law, in fact, constitutes the great body of the law that is *professedly* administered by judicial tribunals: and it always necessarily must be – for it is impossible to anticipate a thousandth part of the cases that arise, so as to enact a special law for them. Wherever the cases have not been thus anticipated, the natural law prevails. We thus politically and judicially *recognize* the principle of law as originating in the nature and rights of men. By recognizing it as originating in the nature of men, we recognize it as a principle, that is necessarily as immutable, and as indestructible as the nature of man. We also, in the same way, recognize the impartiality and universality of its application.

If, then, law be a natural principle – one necessarily resulting from the very nature of man, and capable of being destroyed or changed only by destroying or changing the nature of man – it necessarily follows that it must be of higher and more inflexible obligation than any other rule of conduct, which the arbitrary will of any man, or combination of men, may attempt to establish. Certainly no rule can be of such high, universal and inflexible obligation, as that, which, if observed, secures the rights, the safety and liberty of all.

Natural law, then, is the paramount law. And, being the paramount law, it is necessarily the only law: for, being applicable to every possible case that can arise touching the rights of men, any other principle or rule, that should arbitrarily be applied to those rights, would necessarily conflict with it. And, as a merely arbitrary, partial and temporary rule must, of necessity, be of less obligation than a natural, permanent, equal and universal one, the arbitrary one becomes, in reality, of no obligation at all, when the two come in collision. Consequently there is, and can be, correctly speaking, *no law but natural law*. There is no other principle or rule, applicable to the rights of men, that is obligatory in comparison with this, in any case whatever. And this natural law is no other than that rule of natural justice, which results either directly from men's natural rights, or from such acquisitions as they have a *natural* right to make, or from such contracts as they have a *natural* right to enter into.

Natural law recognizes the validity of all contracts which men have a *natural* right to make, and which justice requires to be fulfilled: such, for example, as contracts that render equivalent for equivalent, and are at the same time consistent with morality, the natural rights of men, and those rights of property, privilege, etc., which men have a natural right to acquire by labor and contract.

Natural law, therefore, inasmuch as it recognizes the natural right of men to enter into obligatory contracts, permits the formation of government, founded on contract, as all our governments profess to be. But in order that the contract of government may be valid and lawful, it must purport to authorize nothing inconsistent with natural justice, and men's natural rights. It cannot lawfully authorize government to destroy or take from men their natural rights: for natural rights are inalienable, and can no more be surrendered to government – which is but an association of individuals – than to a single individual. They are a necessary

attribute of man's nature; and he can no more part with them – to government or anybody else – than with his nature itself. But the contract of government may lawfully authorize the adoption of means – not inconsistent with natural justice – for the better protection of men's natural rights. And this is the legitimate and true object of government. And rules and statutes, not inconsistent with natural justice and men's natural rights, if enacted by such government, are binding, on the ground of contract, upon those who are parties to the contract, which creates the government, and authorizes it to pass rules and statutes to carry out its objects. ...

It is obvious that legislation can have, in this country, no higher or other authority, than that which results from natural law, and the obligation of contracts; for our constitutions are but contracts, and the legislation they authorize can of course have no other or higher authority than the constitutions themselves. The stream cannot rise higher than the fountain. The idea, therefore, of any *inherent* authority or sovereignty in our governments, *as governments*, or of any inherent right in the majority to restrain individuals, by arbitrary enactments, from the exercise of any of their natural rights, is as sheer an imposture as the idea of the divine right of kings to reign, or any other of the doctrines on which arbitrary governments have been founded. And the idea of any necessary or inherent authority in legislation, *as such*, is, of course, equally an imposture. If legislation be consistent with natural justice, and the natural or intrinsic obligation of the contract of government it is obligatory: if not, not. ...

But natural law tries the contract of government, and declares it lawful or unlawful, obligatory or invalid, by the same rules by which it tries all other contracts between man and man. A contract for the establishment of government, being nothing but a voluntary contract between individuals for their mutual benefit, differs in nothing that is essential to its validity from any other contract between man and man, or between nation and nation. If two individuals enter into a contract to commit trespass, theft, robbery or murder upon a third, the contract is unlawful and void, simply because it is a contract to violate natural justice, or men's natural rights. If two nations enter into a treaty, that they will unite in plundering, enslaving or destroying a third, the treaty is unlawful, void and of no obligation, simply because it is contrary to justice and men's natural rights. On the same principle, if the majority, however large, of the people of a country enter into a contract of government, called a constitution, by which they agree to aid, abet or accomplish any kind of injustice, or to destroy or invade the natural rights of any person or persons whatsoever, whether such persons be parties to the compact or not, this contract of government is unlawful and void – and for the same reason that a treaty between two nations for a similar purpose, or a contract of the same nature between two individuals, is unlawful and void. Such a contract of government has no moral sanction. It confers no rightful authority upon those appointed to administer it. It confers no legal or moral rights, and imposes no legal or moral obligation upon the people who are parties to it. The only duties, which any one can owe to it, or to the government established under color of its authority, are disobedience, resistance, destruction.

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

No oaths, which judicial or other officers may take, to carry out and support an unlawful contract or constitution of government, are of any moral obligation. It is immoral to take such oaths, and it is criminal to fulfil them. They are, both in morals and law, like the oaths which individual pirates, thieves and bandits give to their confederates, as an assurance of their fidelity to the purposes for which they are associated. No man has any moral right to assume such oaths; they impose no obligation upon those who do assume them; they afford no moral justification for official acts, in themselves unjust, done in pursuance of them.

If these doctrines are correct, then those contracts of government, state and national, which we call constitutions, are void, and unlawful, so far as they purport to authorize, (if any of them do authorize,) anything in violation of natural justice, or the natural rights of any man or class of men whatsoever. And all judicial tribunals are bound, by the highest obligations that can rest upon them, to declare that these contracts, in all such particulars, (if any such there be,) are void, and not law. And all agents, legislative,

executive, judicial and popular, who voluntarily lend their aid to the execution of any of the unlawful purposes of the government, are as much personally guilty, according to all the moral and legal principles, by which crime, in its essential character, is measured, as though they performed the same acts independently, and of their own volition.

Such is the true character and definition of law. Yet, instead of being allowed to signify, as it in reality does, that natural, universal and inflexible principle, which has its origin in the nature of man, keeps pace everywhere with the rights of man, as their shield and protector, binds alike governments and men, weighs by the same standard the acts of communities and individuals, and is paramount in its obligation to any other requirement which can be imposed upon men – instead, I say, of the term *law* being allowed to signify, as it really does, this immutable and overruling principle of natural justice, it has come to be applied to mere arbitrary rules of conduct, prescribed by individuals, or combinations of individuals, self-styled governments, who have no other title to the prerogative of establishing such rules, than is given them by the possession or command of sufficient physical power to coerce submission to them. ...

But I am aware that other definitions of law, widely different from that I have given, have been attempted – definitions too, which practically obtain, to a great extent, in our judicial tribunals, and in all the departments of government. But these other definitions are nevertheless, all, in themselves, uncertain, indefinite, mutable; and therefore incapable of being standards, by a reference to which the question of law, or no law, can be determined. Law, as defined by them, is capricious, arbitrary, unstable; is based upon no fixed principle; results from no established fact; is susceptible of only a limited, partial and arbitrary application; possesses no intrinsic authority; does not, in itself, recognize any moral principle; does not necessarily confer upon, or even acknowledge in individuals, any moral or civil rights; or impose upon them any moral obligation.

For example. One of these definitions – one that probably embraces the essence of all the rest -- is this:

> That "law is a rule of civil conduct, prescribed by the supreme power of a state, commanding what its subjects are to do, and prohibiting what they are to forbear." – *Noah Webster*.

In this definition, hardly anything, that is essential to the idea of law, is made certain. ... What is the "supreme power," that is here spoken of, as the fountain of law? Is it the supreme physical power? Or the largest concentration of physical power, whether it exist in one man or in a combination of men? Such is undoubtedly its meaning. And if such be its meaning, then the law is uncertain; for it is oftentimes uncertain where, or in what man, or body of men, in a state, the greatest amount of physical power is concentrated. Whenever a state should be divided into factions, no one having the supremacy of all the rest, law would not merely be inefficient, but the very principle of law itself would be actually extinguished. And men would have no "rule of civil conduct." This result alone is sufficient to condemn this definition. ...

If physical power be the fountain of law, then law and force are synonymous terms. ... Are we prepared to admit the principle, that there is no real distinction between law and force? ... According to this definition, too, a command to do injustice, is as much law, as a command to do justice. ... If mere will and power are sufficient, of themselves, to establish law – legitimate law – such law as judicial tribunals are morally bound, or even have a moral right to enforce – then it follows that wherever will and power are united, and continue united until they are successful in the accomplishment of any particular object, to which they are directed, they constitute the only legitimate law of that case, and judicial tribunals can take cognizance of no other. ...

On this principle, then – that mere will and power are competent to establish the law that is to govern an act, without reference to the justice or injustice of the act itself, the will and power of any single individual to commit theft, would be sufficient to make theft lawful, as lawful as is any other act of injustice, which the will and power of communities, or large bodies of men, may be united to accomplish. ...

But, perhaps it will be said that the soundness of this definition depends upon the use of the word "state" – and that it therefore make a distinction between "the supreme power of *a state*," over a particular act, and the power of an individual over the same act.

But .... what is "a state?" It is just what, and only what, the will and power of individuals may arbitrarily establish. ... It is simply the boundaries, within which any single combination or concentration of will and power axe efficient, or irresistible, *for the time being*. ...

Under this definition, law offers no permanent guaranty for the safety, liberty, rights or happiness of any one. It licenses all possible crime, violence and wrong, both by governments and individuals. The definition was obviously invented by, and is suited merely to gloss over the purposes of, arbitrary power. We are therefore compelled to reject it .... And if we seek another, where shall we find it, unless we adopt the one first given, viz., *that law is the rule, principle, obligation or requirement of natural justice*? ...

If, then, law really be nothing other than the rule, principle obligation or requirement of natural justice, it follows that government can have no powers except such as individuals may *rightly* delegate to it: that no law, inconsistent with men's natural rights, can arise out of any contract or compact of government: *that constitutional law, under any form of government, consists only of those principles of the written constitution, that are consistent with natural law, and man's natural rights*; and that any other principles, that may be expressed by the letter of any constitution, are void and not law, and all judicial tribunals are bound to declare them so. Though this doctrine may make sad havoc with constitutions and statute books, it is nevertheless law. It fixes and determines the real rights of all men; and its demands are as imperious as any that can exist under the name of law.

It is possible, perhaps, that this doctrine would spare enough of our existing constitutions, to save our governments from the necessity of a new organization. But whatever else it might spare, one thing it would not spare. It would spare no vestige of that system of human slavery, which now claims to exist by authority of law. ...

8. The Constitution of the United States

We will now ... attempt to show, specifically from its provisions, that the constitution of the United States not only does not recognize or sanction slavery, as a legal institution, but that, on the contrary, it presumes all men to be free; that it positively denies the right of property in man; and that it, of *itself*, makes it impossible for slavery to have a legal existence in any of the United States. ...

In the first place – although the assertion is constantly made, and rarely denied, yet it is palpably a mere begging of the whole question in favor of slavery, to say that the constitution intended to sanction it .... The error and fraud of this whole procedure [is] that it artfully substitutes the supposed intentions of those who drafted the constitution, for the intentions of the constitution itself ....

The falsehood of all these imaginings is apparent, the moment it is considered that the constitution is not a *person*, of whom an "intention," not legally expressed, can be asserted; that ... it is merely a written legal instrument; that, as such, it must have a fixed, and not a double meaning; that it is made up entirely of intelligible words; and that it has, and *can* have, no soul, no "*intentions*," no motives, no being, no personality, except what those words alone express or imply. Its "intentions" are nothing more nor less than the legal meaning of its words. Its intentions are no guide to its legal meaning – as the advocates of slavery all assume; but its legal meaning is the sole guide to its intentions. ...

In ascertaining the legal meaning of the words of the constitution, these rules of law ... are vital to be borne constantly in mind, viz.: 1st, that no intention, in violation of natural justice and natural right, (like that to sanction slavery,) can be ascribed to the constitution, unless that intention be expressed in terms that are *legally* competent to express such an intention; and, 2d, that 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. ...

To assert, therefore, that the constitution *intended* to sanction slavery, is, in reality, equivalent to asserting that the *necessary* meaning, the *unavoidable* import of the words alone of the constitution, come fully up to the point of a clear, definite, distinct, express, explicit, unequivocal, necessary and peremptory sanction of the specific thing, *human slavery, property in man*. If the necessary import of its words alone do but fall an iota short of this point, the instrument gives, and, legally speaking, intended to give, no legal sanction to slavery. Now, who can, in good faith, say that *the words alone* of the constitution come up to this point? No one, who knows anything of law, and the meaning of words. Not even the name of the thing, alleged to be sanctioned, is given. The constitution itself contains no designation, description, or necessary admission of the existence of such a thing as slavery, servitude, or the right of property in man. We are obliged to go out of the instrument, and grope among the records of oppression, lawlessness and crime – records unmentioned, and of course unsanctioned by the constitution – to *find* the thing, to which it is said that the words of the constitution

apply. And when we have found this thing, which the constitution dare not name, we find that the constitution has sanctioned it (if at all) only by enigmatical words, by unnecessary implication and inference, by innuendo and double entendre, and under a name that entirely fails of describing the thing. Everybody must admit that the constitution itself contains no language, from which alone any court, that were either strangers to the prior existence of slavery, or that did not assume its prior existence to be legal, could legally decide that the constitution sanctioned it. And this is the true test for determining whether the constitution does, or does not, sanction slavery, viz. whether a court of law, strangers to the prior existence of slavery or not assuming its prior existence to be legal – looking only at the naked language of the instrument – could, consistently with legal rules, judicially determine that it sanctioned slavery. Every lawyer, who at all deserves that name, knows that the claim for slavery could stand no such test. The fact is palpable, that the constitution contains no such legal sanction; that it is only by unnecessary implication and inference, by innuendo and double-entendre, by the aid of exterior evidence, the assumption of the prior legality of slavery, and the gratuitous imputation of criminal intentions that are not avowed in legal terms, that any sanction of slavery, (as a legal institution,) can be extorted from it.

But legal rules of interpretation entirely forbid and disallow all such implications, inferences, innuendos and double-entendre, all aid of exterior evidence, all assumptions of the prior legality of slavery, and all gratuitous imputations of criminal unexpressed intentions; and consequently compel us to come back to the *letter* of the instrument, and find there a distinct, clear, necessary, peremptory sanction for slavery, or to surrender the point.

To the unprofessional reader these rules of interpretation will appear stringent, and perhaps unreasonable and unsound. For his benefit, therefore, the reasons on which they are founded, will be given. ... The rules are absolutely indispensable to the administration of the justice arising out of any class of legal instruments whatever – whether the instruments be simple contracts between man and man, or statutes enacted by legislatures, or fundamental compacts or constitutions of government agreed upon by the people at large. In regard to all these instruments, the *law* fixes, and necessarily must fix their meaning; and for the obvious reason, that otherwise their meaning could not be fixed at all. The parties to the simplest contract may disagree, or pretend to disagree as to its meaning, and of course as to their respective rights under it. The different members of a legislative body, who vote for a particular statute, may have different intentions in voting for it, and may therefore differ, or pretend to differ, as to its meaning. The people of a nation may establish a compact of government. The motives of one portion may be to establish liberty, equality and justice; and they may think, or pretend to think, that the words used in the instrument convey that idea. The motives of another portion may be to establish the slavery or subordination of one part of the people, and the superiority or arbitrary power of the other part; and they may think, or pretend to think, that the language agreed upon by the whole authorizes such a government. In all these cases, unless there were some rules of law, applicable alike to all instruments, and competent to settle their meaning, their meaning could not be settled; and individuals would of necessity lose their rights under them. *The law, therefore, fixes their meaning*; and the rules by which it does so, are founded in the same justice, reason, necessity and truth, as are other legal principles, and are for that reason as inflexible as any other legal principles whatever. They are also simple, intelligible, natural, obvious. ... No one is allowed to plead ignorance of them, any more than of any other principle of law. All persons and people are presumed to have framed their contracts, statutes and constitutions with reference to them. And if they have not done so – if they have said black when they meant white, and one thing when they meant another, they must abide the consequences. The law will presume that they meant what they said. No one, in a court of justice, can claim any rights founded on a construction different from that which these rules would give to the contract, statute, or constitution, under which he claims. The judiciary cannot depart from these rules, for two reasons. First, because the rules embody in themselves principles of justice, reason and truth; and are therefore as necessarily law as any other principles of justice, reason and truth; and, secondly, because if they could lawfully depart from them in one case, they might in another, at their own caprice. Courts could thus at pleasure become despotic; all certainty as to the legal meaning of instruments would be destroyed; and the administration of justice, according to the true meaning of contracts, statutes and constitutions, would be rendered impossible. ...

What, then, are some of these rules of interpretation?

One of them, (as has been before stated,) is, that where words are susceptible of two meanings, one consistent, and the other inconsistent, with justice and natural right, that meaning, and *only that* meaning, which is consistent with right, shall be attributed to them – unless other parts of the instrument overrule that interpretation.

Another rule, (if indeed it be not the same,) is, that no language except that which is peremptory, and no implication, except one that is inevitable, shall be held to authorize or sanction anything contrary to natural right.

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

One of the reasons of these stringent and inflexible rules, doubtless is, that judges have always known, that, in point of fact, natural justice was itself law, and that nothing inconsistent with it could be made law, even by the most explicit and peremptory language that legislatures could employ. But judges have always, in this country and in England, been dependent upon the executive and the legislature for their appointments and salaries, and been amenable to the legislature by impeachment. And as the executive and legislature have always enacted more or less statutes, and had more or less purposes to accomplish, that were inconsistent with natural right, judges have seen that it would be impossible for them to retain their offices, and at the same time maintain the integrity of the law against the will of those in whose power they were. It is natural also that the executive should appoint, and that the legislature should approve the appointment of no one for the office of judge, whose integrity they should suppose would stand in the way of their purposes. The consequence has been that all judges, (probably without exception,) though they have not dared deny, have yet in practice yielded the vital principle of law; and have succumbed to the arbitrary mandates of the other departments of the government, so far as to carry out their enactments, though inconsistent with natural right. But, as if sensible of the degradation and criminality of so doing, they have made a stand at the first point at which they could make it, without bringing themselves in direct collision with those on whom they were dependent. And that point is, that they will administer, as law, no statute, that is contrary to natural right, unless its language be so explicit and peremptory, that there is no way of erasing its authority, but by flatly denying the authority of those who enacted it. They (the court) will themselves add nothing to the language of the statute, to help out its supposed meaning. They will imply nothing, infer nothing, and assume nothing, except what is inevitable; they will not go out of the letter of the statute in search of any *historical evidence* as to the meaning of the legislature, to enable them to effectuate any unjust intentions not fully expressed by the statute itself. Wherever a statute is supposed to have in view the accomplishment of any unjust end, they will apply the most stringent principles of construction to prevent that object being effected. They will not go a hair's breadth beyond the literal or inevitable import of the words of the statute, even though they should be conscious, all the while, that the real intentions of the makers of it would be entirely defeated by their refusal. The rule (as has been already stated) is laid down by the Supreme Court of the United States in these words:

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

Another reason for the rules before given, against all constructions, implications, inferences – except inevitable ones – in favor of injustice, is, that but for them we should have no guarantees that our honest contracts, or honest laws would be honestly administered by the judiciary. It would be nearly or quite impossible for men, in framing their contracts or laws, to use language so as to exclude every possible implication in favor of wrong, if courts were allowed to resort to such implications. *The law therefore excludes them*; that is, the ends of justice – the security of men's rights under their honest contracts, and under honest legislative enactments – make it imperative upon courts of justice to ascribe an innocent and honest meaning to all language that will possibly bear an innocent and honest meaning. ...

In the light of these principles, then, let us examine those clauses of the constitution, that are relied on as recognizing and sanctioning slavery. They are but three in number.

The one most frequently quoted is the third clause of Art. 4, Sec. 2, in these words:

> "No person, held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due."

There are several reasons why this clause renders no sanction to slavery. ... It must be construed, if possible, as sanctioning nothing contrary to natural right.

If there be any "service or labor" whatever, to which any "persons" whatever may be "held," *consistently with natural right*, and which any person may, consistently with natural right, "*claim*" as his "*due*" of another, such "service or labor," and *only* such, is recognized and sanctioned by this provision.

It needs no argument to determine whether the "service or labor," that is exacted of a slave, is such as can be "*claimed*," *consistently with natural right*, as being "*due*" from him to his master. And if it cannot be, some other "service or labor" must, if possible, be found for this clause to apply to.

The proper definition of the word "service," in this case, obviously is, the labor of a *servant*. ... There is, therefore, not the slightest apology for pretending that there was not a sufficient class for the words "service or labor" to refer to, without supposing the existence of slaves. ...

"*Held to service or labor*," is no legal description of slavery. Slavery is property in man. It is not necessarily attended with either "service or labor." A very considerable portion of the slaves are either too young, too old, too sick, or too refractory to render "service or labor." As a matter of fact, slaves, who are able to labor, may, in general, be compelled by their masters to do so. Yet labor is not an essential or necessary condition of slavery. The essence of slavery consists in a person's being owned as property ... If "service or labor" were either a test, or a necessary attendant of slavery, that test would of itself abolish slavery; because all slaves, before they can render "service or labor," must have passed through the period of infancy, when they could render neither service nor labor, and when, therefore, according to this test, they were free. And if they were free in infancy, they could not be subsequently enslaved. ...

Another clause relied on as a recognition of the constitutionality of slavery, is the following, (Art. 1, Sec. 2:)

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

The slave argument *assumes*, *gratuitously*, that the word "free" is used as the correlative of slavery, and thence it infers that the words "all other persons," mean slaves. ... The English law had for centuries used the word "free" as describing persons possessing citizenship, or some other franchise or peculiar privilege – as distinguished from aliens, and persons not possessed of such franchise or privilege. ... The sense is an appropriate one in itself; the most appropriate to, and consistent with, the whole character of the constitution, of any of which the word is susceptible. In fact, it is the only one that is either appropriate to, or consistent with, the other parts of the instrument. ...

The other clause relied on as a recognition and sanction, both of slavery and the slave trade, is the following:

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

The slave argument, drawn from this clause, is, that the word "importation" applies only to property, and that it therefore implies, in this clause, that the persons to be imported are necessarily to be imported as property – that is, as slaves.

But the idea that the word "importation" applies only to property, is erroneous. It applies correctly both to persons and things. The definition of the verb "import" is simply "to bring from a foreign country, or jurisdiction, or from another State, into one's own country, jurisdiction or State." When we speak of "importing" things, it is true that we mentally associate with them the idea of property. But that is simply because *things* are property, and not because the word "import" has any control, in that particular, over the character of the things imported. ... [T]he word "import," when applied to "persons," does not convey the

idea of property. It is only when it is applied distinctly to "slaves," that any such idea is conveyed; and then it is the word "slaves," and not the word "import," that suggests the idea of property. ...

One other provision of the constitution, viz., the one that, "the United States shall protect each of the States against domestic violence" – has sometimes been claimed as a special pledge of impunity and succor to that kind of "violence," which consists in one portion of the people's standing constantly upon the neck of another portion, and robbing them of all civil privileges, and trampling upon all their personal rights. The argument seems to take it for granted, that the only proper way of protecting a "*republican*" State (for the States are all to be "republican") against "domestic violence," is to plant men firmly upon one another's necks ... arm the two with whip and spur, and then keep an armed force standing by to cut down those that are ridden, if they dare attempt to throw the riders. When the ridden portion shall, by this process, have been so far subdued as to bear the burdens, lashings and spurrings of the other portion without resistance, then the state will have been secured against "domestic violence," and the "republican form of government" will be completely successful. ...

If it have been shown that none of the other clauses of the constitution refer to slavery, this one, of course, cannot be said to refer to slave insurrections; because if the constitution presumes everybody to be free, it of course does not suppose that there can be such a thing as an insurrection of slaves. ...

The *legal* meaning, and the only legal meaning of the word "violence," in this clause, is *unlawful force*. The guaranty, therefore, is one of protection only against *unlawful* force. Let us apply this doctrine to the case of the slaves and their masters, and see which party is entitled to be protected against the other. Slaveholding is not an act of law; it is an act of pure "violence," or unlawful force. It is a mere trespass, or assault, committed by one person upon another. For example – one person beats another, until the latter will obey him, work for him without wages, or, in case of a woman, submit to be violated. ... Resistance to such slaveholding is not "violence," nor resistance to law; it is nothing more nor less than self-defence against a trespass. It is a perfectly lawful resistance to an assault and battery. It can no more be called "violence," (unlawful force,) than resistance to a burglar, an assassin, a highwayman, or a ravisher, can be called "violence." All the "violence" (unlawful force) there is in the case, consists in the aggression, not, in the resistance. This clause, then, so far as it relates to slavery, is a guaranty against the "violence" of slaveholding, not against any necessary act of self-defence on the part of the slave. ...

The clauses mentioned, taken either separately or collectively, neither assert, imply, sanction, recognize nor acknowledge any such thing as slavery. They do not even speak of it. They make no allusion to it whatever. They do not suggest, and, of themselves, never would have suggested the idea of slavery. There is, in the whole instrument, no such word as slave or slavery; nor any language that can legally be made to assert or imply the existence of slavery. ... The clauses, that have been claimed for slavery, are all, in themselves, honest in their language, honest in their legal meaning; and they can be made otherwise only by such gratuitous assumptions against natural right ....

Let us now look at the positive provisions of the constitution, *in favor of liberty*, and see whether they are not only inconsistent with any legal sanction of slavery, but also whether they must not, of themselves, have necessarily extinguished slavery, if it had had any constitutional existence to be extinguished.

And, first, the constitution made all "the people of the United States" *citizens* under the government to be established by it; for all of those, by whose authority the constitution declares itself to be established, must of course be presumed to have been made citizens under it. And whether they were entitled or not to the right of suffrage, they were at least entitled to all the personal liberty and protection, which the constitution professes to secure to "the people" generally.

Who, then, established the constitution?

The preamble to the constitution has told us in the plainest possible terms, to wit, that "We, *the people* of the United States," "do ordain and establish this constitution," etc.

By "the people of the United States," here mentioned, the constitution intends *all* "the people" then permanently inhabiting the United States. If it does not intend all, who were intended by "the people of the United States?" – The constitution itself gives no answer to such a question. – It does not declare that "we, the *white* people," or "we, the *free* people," or "we, a *part* of the people" – but that "we, *the* people" – that is, we the *whole* people – of the United States, "do ordain and establish this constitution." ...

We cannot go out of the constitution for evidence to prove who were to be citizens under it. We cannot go out of a written instrument for evidence to prove the parties to it, nor to explain its meaning, except the language of the instrument on that point be ambiguous. In this case there is no ambiguity. The language of the instrument is perfectly explicit and intelligible. ... If the constitution had intended that any portion of "the people of the United States" should be excepted from its benefits, disfranchised, outlawed, enslaved; it would of course have designated these exceptions with such particularity as to make it sure that none but the true persons intended would be liable to be subjected to such wrongs. Yet, instead of such particular designation of the exceptions, we find no designation whatever of the kind. But on the contrary, we do find, in the preamble itself, a sweeping declaration to the effect that there are no such exceptions; that the whole people of the United States are citizens, and entitled to liberty, protection, and the dispensation of justice under the constitution. ...

If the constitution was established by authority of all "the people of the United States," they were all legally parties to it, and citizens under it. And if they were parties to it, and citizens under it, it follows that neither they, *nor their posterity*, nor any nor either of them, can ever be legally enslaved within the territory of the United States; for the constitution declares its object to be, among other things, "to secure the blessings of liberty to *ourselves, and our posterity*." This purpose of the national constitution is a law paramount to all State constitutions; for it is declared that "this constitution ... shall be the supreme law of the land; and the judges *in every* State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." ...

Besides the provisions already mentioned, there are numerous others, in the constitution of the United States, that are entirely and irreconcilably inconsistent with the idea that there either was, or could be, any constitutional slavery in this country. ...

"The Congress shall have power to provide for the organizing, *arming* and disciplining the *militia* ...." Have not Congress, under these powers ... undoubted authority to enroll in the militia, and "*arm*" those whom the States call slaves, and authorize them always to keep their arms by them, even when not on duty ...? Can the State governments determine who may, and who may not, compose the militia of the "United States"?

Look, too, at this power, in connection with the second amendment to the constitution; which is in these words:

> "A well regulated militia being necessary to the security of free State, the right of the people to keep and bear arms shall not be, infringed."

These provisions obviously recognize the natural right of all men "to keep and bear arms" for their personal defence; and prohibit both Congress and the State governments from infringing the right of "the people" – that is, of *any* of the people – to do so; and more especially of any whom Congress have power to include in their militia. This right of a man "to keep and bear arms," is a right palpably inconsistent with the idea of his being a slave. Yet the right is secured as effectually to those whom the States presume to call slaves, as to any whom the States condescend to acknowledge free. ...

Under this provision any man has a right either to give or sell arms to those persons whom the States call slaves; and there is no *constitutional* power, in either the national or State governments, that can punish him for so doing; or that can take those arms from the slaves; or that can make it criminal for the slaves to use them, if, from the inefficiency of the laws, it should become necessary for them to do so, in defence of their own lives or liberties; for this constitutional right to keep arms implies the constitutional right to use them, if need be, for the defence of one's liberty or life. ...

The constitution of the United States declares that "no State shall pass *any* law impairing the obligation of contracts."

"The obligation of contracts," here spoken of, is, of necessity, the *natural obligation*; for that is the only real or true obligation that any contracts can have. ... Yet, if slave laws were constitutional, they would effectually impair the obligation of all contracts entered into by those who are made slaves; for the slave laws must necessarily hold that all a slave's contracts are void.

This prohibition upon the States to pass *any* law impairing the natural obligation of men's contracts, implies that all men have a constitutional right to enter into all contracts that have a natural obligation. It therefore *secures* the constitutional right of all men to enter into such contracts, and to have them respected by the State governments. Yet this constitutional right of all men to enter into all contracts that have a natural

obligation, and to have those contracts recognized by law as valid, is a right plainly inconsistent with the idea that men can constitutionally be made slaves. This provision, therefore, absolutely prohibits the passage of slave laws ....

The constitution declares that "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

The privilege of this writ, wherever it is allowed, is of itself sufficient to make slavery impossible and illegal. The object and prerogative of this writ are to secure to all persons their natural right to personal liberty, against all restraint except from the government; and even against restraints by the government itself, unless they are imposed in conformity with established general laws, and upon the charge of some legal offence or liability. It accordingly liberates all who are held in custody against their will, (whether by individuals or the government,) unless they are held on *some formal writ or process, authorized by law, issued by the government, according to established principles, and charging the person held by it with some legal offence or liability.* ...

Now the master does not hold his slave in custody by virtue of any formal or legal writ or process, either authorized by law, or issued by the government, or that charges the slave with any legal offence or liability. ... The slave is held simply as property, by individual force, without legal process. But the writ of *habeas corpus* acknowledges no such principle as the right of property in man. ... The writ of *habeas corpus*, then, *necessarily* denies the right of property in man. ...

"The United States *shall guaranty* to every State in this Union a republican form of government." ... And what is "a republican form of government?" It is where the government is a commonwealth – the property of the public, of the mass of the people, or of the entire people. It is where the government is made up of, and controlled by the combined will and power of the public, or mass of the people – and where, of natural consequence, it will have, for its object, the protection of the rights of all. It is indispensable to a republican form of government, that the public, the mass of the people, if not the entire people, participate in the grant of powers to the government, and in the protection afforded by the government. It is impossible, therefore, that a government, under which any considerable number of the people (if indeed any number of the people, are disfranchised and enslaved, can be a republic. A slave government is an oligarchy; and one too of the most arbitrary and criminal character. ...

9. The Intentions of the Convention

The 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. That convention were not delegated to adopt or establish a constitution; but only to consult, devise and recommend. The instrument, when it came from their hands, was a mere proposal, having no legal force or authority. It finally derived all its validity and obligation, as a frame of government, from its adoption by the people at large.

Of course the intentions of the people at large are the only ones, that are of any importance to be regarded in determining the legal meaning of the instrument. And their intentions are to be gathered entirely from the words, which they adopted to express them. And their intentions must be presumed to be just what, and only what the words of the instrument *legally* express. In adopting the constitution, the people acted as legislators, in the highest sense in which that word can be applied to human lawgivers. They were establishing a law that was to govern both themselves and their government. And their intentions, like those of other legislators, are to be gathered from the words of their enactments. ...

But why do the partisans of slavery resort to the debates of the convention for evidence that the constitution sanctions slavery? Plainly for no other reason than because the words of the instrument do not sanction it. But can the intentions of that convention, attested only by a mere skeleton of its debates, and not by any impress upon the instrument itself, add anything to the words, or to the legal meaning of the words of the constitution? Plainly not. Their intentions are of no more consequence, in a legal point of view; than the intentions of any other equal number of the then voters of the country. Besides, as members of the convention, they were not even parties to the instrument; and no evidence of their intentions, at *that* time, is applicable to the case. They became parties to it only by joining with the rest of the people in its subsequent adoption; and they themselves, equally with the rest of the people, must then be presumed to have adopted its legal meaning, and that alone – notwithstanding anything they may have previously said. ...

But notwithstanding the opinions expressed, in the convention by some of the members, we are bound, as a matter of law, to presume that the convention itself, in the aggregate, had no intention of sanctioning slavery – and why? Because, after all their debates, they agreed upon an instrument that did not sanction it. ... This instrument is also the only authentic evidence of their intentions. It is subsequent in its date to all the other evidence. It comes to us, also, as none of the other evidence does, signed *with their own hands.* ... And is this to be set aside, and the constitution itself to be impeached and destroyed, and free government overturned, on the authority of a few meagre snatches of argument, intent or opinion, uttered by a few only of the members; jotted down by one of them, (Mr. Madison,) merely for his own convenience, or from the suggestions of his own mind; and only reported to us fifty years afterwards by a posthumous publication of his papers? ... Did Mr. Madison, when he took his oath of office, as President of the United States, swear to support these scraps of debate, which he had filed away among his private papers? – Or did he swear to support that written instrument, which the people of the country had agreed to, and which was known to them, and to all the world, as the constitution of the United States? ...

Many selfish, ambitious and criminal purposes, not expressed in the constitution, were undoubtedly intended to be accomplished by one and another of the thousands of unprincipled politicians, that would naturally swarm around the birth-place and assist at the nativity of a new and splendid government. But the people are not therefore responsible for those purposes; nor are those purposes, therefore, a part of the constitution; nor is its language to be construed with any view to aid their accomplishment.

But even if the people intended to sanction slavery by adopting the intentions of the convention, it is obvious that they, like the convention, intended to use no language that should legally convey that meaning, or that should necessarily convict them of that intention in the eyes of the world. ...

Why should we search at all for the intentions, either of the, convention, or of the people, beyond the words which both the convention and the people have agreed upon to express them? What is the object of written constitutions, and written statutes, and written contracts? Is it not that the meaning of those who make them may be known with the most absolute precision of which language is capable? ... Where would be our constitution, if, instead of its being a written instrument, it had been merely agreed upon orally by the members of the convention? And by them only orally reported to the people? ...

If the principle be admitted, that the meaning of the constitution can be changed on proof being made that the scriveners or framers of it had secret and knavish intentions, which do not appear on the face of the instrument, then perfect license is given to the scriveners of constitutions to contrive any secret scheme of villainy they may please, and impose it upon the people as a system of government, under cover of a written instrument that is so plainly honest and just in its terms, that the people readily agree to it. Is such a principle to be admitted in a country where the people claim the prerogative of establishing their own government, and deny the right of anybody to impose a government upon them, either by force, or fraud, or against their will? ...

The constitution is a contract; a written contract, consisting of a certain number of precise words, to which, and to which only, all the parties to it have, in theory, agreed. Manifestly neither this contract, nor the meaning of its words, can be changed, without the consent of all the parties to it. ... If there were a single honest man in the nation, who assented, in good faith, to the honest and legal meaning of the constitution, it would be unjust and unlawful towards him to change the meaning of the instrument so as to sanction slavery, even though every other man in the nation should testify that, in agreeing to the constitution, he intended that slavery should be sanctioned. ...

13. The Children of Slaves Are Born Free

The idea that the children of slaves are necessarily born slaves, or that they necessarily follow that *natural law* of property, which gives the natural increase of property to the owner of the original stock, is an erroneous one.

It is a principle of natural law in regard to property, that a calf belongs to the owner of the cow that bore it; fruit to the owner of the tree or vine on which it grew; and so on. But the principle of natural law, which makes a calf belong to the owner of the cow, does not make the child of a slave belong to the owner of the slave – and why? Simply because both cow and calf are *naturally* subjects of property; while neither men nor children are *naturally* subjects of property. The law of nature gives no aid to anything inconsistent with itself.

It therefore gives no aid to the transmission of property in man .... Slavery is a wrong to each individual enslaved; and not merely to the first of a series. ...

This law of nature, that all men are born free, was recognized by this country in the Declaration of Independence. ... The Constitution of the United States recognizes the principle that all men are born free; for it recognizes the principle that natural birth in the country gives citizenship – which of course implies freedom. And no exception is made to the rule. Of course all born in the country since the adoption of the constitution of the United States, have been born free, whether there were, or were not any legal slaves in the country before that time. ...

2. Phillips:
Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery

[Garrison and Spooner each attracted followers less anarchistic than themselves; Frederick Douglass, for example, started out as a Garrisonian and then became a Spoonerite. Here Wendell Phillips – a leading abolitionist (and, after the Civil War, a leading defender of the rights of Native Americans) – defends a less anarchistic version of Garrisonianism and criticises the Spoonerite approach.

The Garrisonian approach of repudiating the Constitution as a "covenant with death and agreement with hell" on the grounds of its proslavery clauses seems *prima facie* more anarchistic than the Spoonerite strategy of reinterpreting the Constitution as an antislavery document and so vindicating it. Interestingly, however, Phillips here argues, as a criticism of Spooner, that his approach is actually more anarchistic in its implications than is Garrison's.]

Two years ago, Lysander Spooner, Esq. published an essay on the *Unconstitutionality of Slavery*. We shall but fulfill an old promise in reviewing the argument it contains. Events beyond our control have delayed us till now, which we regret only as it seems to have led some of Mr. Spooner's admirers to imagine that the delay proceeded from an unwillingness, on our part, to measure lances with so skillful an adversary. We exhort them, on the contrary, to believe that we have no innate antipathy to the idea of an anti-slavery Constitution; – that so far from being obstinately wedded to our own opinion, Mr. Spooner, or any one else, shall find in us a most ready, willing, and easy convert to a doctrine, which will restore to us the power of voting, – a right we much covet, – and a direct share in the Government of the country, a privilege we appreciate as highly as any one can. Only *convince* us fairly and we will outdo Alvan Stewart himself in glowing eulogy of this newfound virtue of the American Constitution.

Indeed, if merely *believing* the Constitution to be anti-slavery would really make it so, we would be the last to stir the question. If the beautiful theories of some of our friends could oust from its place the ugly reality of a pro-slavery administration, we would sit quiet, and let Spooner and Goodell convert the nation at their leisure. But alas, the ostrich does not get rid of her enemy by hiding her head in the sand. Slavery is not abolished, although we have persuaded ourselves that it has no right to exist. The pro-slavery clauses of the national compact still stand there in full operation, notwithstanding our logic. The Constitution will never be amended by persuading men that it does not need amendment. National evils are only cured by holding men's eyes open, and forcing them to gaze on the hideous reality. To be able to meet a crisis men must understand and appreciate it.

All that we have to do, as *abolitionists*, with Mr. Spooner's argument is to consider its influence on the anti-slavery cause. He maintains that *the judges of the United States courts have the right to declare slavery illegal*, and he proposes that they should be made to do so. We believe that, in part, he mistakes fancy for argument; in part, he bases his conclusions on a forced interpretation of legal maxims, and that the rest of his reasoning, where not logically absurd and self-contradictory, is subversive of all sound principles of government and of public faith. Any movement or party, therefore, founded on his plan, would, so soon as it grew considerable enough to attract public attention, be met by the contempt and disapprobation of every enlightened and honest man. To trust our cause with such a leader is to insure its shipwreck. ...

Mr. Spooner's first chapter is employed in answering the question, "What is law?" ... His conclusion is, "that law is simply the rule, principle, obligation, or requirement of natural justice." ... We might pass this chapter by without notice, as not concerning our inquiry, since Mr. Spooner not only conducts his argument

afterward without reference to it, but distinctly allows that a definition exactly the opposite of his is the one usually adopted by the people, by courts of justice, and by governments. So that, "The very name of law has come to signify little more than an arbitrary command of power, without reference to its justice or its injustice; its innocence or its criminality." ...

Surely, mankind cannot be presumed to have so universally mistaken what they were about, as to have *uniformly* set up Governments, that were not *legal* in their own sense of the term! And as surely words must be interpreted according to the sense mankind choose to put upon them, and not according to the caprice of an individual. Mr. Spooner is at liberty to say, that much of what the world *calls* law is not obligatory, because it is not just in the eye of God; and there all good men will agree with him. But to assert that because a thing is not right it is not *law*, as that term is commonly and rightfully used, is entering into the question of what constitutes the basis of government among men; and according to a man's theory of government, will be his denial or assent to the proposition.

Does Mr. Spooner mean to say merely, that a nation in making its laws has no right, in the eye of God, to perpetrate injustice? We agree with him. It is a doctrine certainly as old as Cicero, and may be traced through Grotius and Locke, and all writers on the subject, down to Jefferson and Channing. Nations are bound by the same rule of right and wrong, as individuals: agreed.

Or does he mean to say that in settling what shall be *the rule* of civil conduct, the voice of the majority is not final and conclusive, on its own officers, in *all the departments of government*? Then we differ from him entirely, and assert, that, on his plan, government is impossible. An individual may, and ought to resign his office, rather than assist in a law he deems unjust. But while he retains, under the majority, one of *their* offices, he retains it on *their conditions*, which are, to obey and enforce *their* decrees. There can be no more self-evident proposition, than that, in every government, the majority must rule, and their will be *uniformly* obeyed. Now, if the majority enact a wicked law, and the Judge refuses to enforce it, which is to yield, the judge, or the majority? Of course, the first. On any other supposition, government is impossible.

Indeed, Mr. Spooner's idea is practical no-governmentism. It leaves every one to do "what is right in his own eyes." After all, Messrs. Goodell and Spooner, with the few who borrow this idea of them, are the real no-government men; and it is singular, how much more consistent and sound are the notions of Non-resistants on this point, – the men who are generally considered, though erroneously, to be no-government men. ... [Phillips is referring to the Garrisonians – although many of them, including Ezra Heywood, Charles Lane, and Garrison himself *were* in fact anarchists, a fact Phillips is soft-pedaling here.]

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

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

And here begins the real and only important dispute between us. ... His position now is: That laws and constitutions which violate justice, are void. They are as little binding in the eye of the law, as in the eye of God. They are *legally* as well as morally void.

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

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

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

Our government is founded on contract. ... Under our Constitution, then, the people and the office-holder make a contract together. They grant him certain specified powers, and demand of him certain

specified duties. He deliberately looks over the catalogue (that is, the Constitution,) – assents to it, – swears that he agrees to it, and will perform his part, – and so takes office and acquires power. *That power*, Mr. Spooner thinks, he may retain while he refuses to perform the conditions on which he received it; and *that power*, granted him expressly, and only for the support of the Constitution, he is *bound* to use for the destruction of that instrument! Mr. Spooner's ground is that, "immoral contracts are void." Granted; but if they are absolute nullities, then the governments supposed to spring from them, do not exist, since they have nothing to spring from. Accordingly, the supposed judge is no judge, and has no authority to *declare or decide anything*. ...

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

"Only what is just and right is law." Granted, but who is to decide what is just and right? We say that *for the purpose of the civil government of any nation*, the majority of that nation is to decide, and their decision is final, and constitutes, for that nation, LAW. Mr. Spooner thinks not; he thinks that each judge is to decide for himself and act accordingly. A uniform government is impossible on this plan. ... Law would be one thing in Maine and another thing in Maryland – one thing today, another thing tomorrow. And each day and each court would think itself infallibly right. ... In these United States some think that neither men nor nations have the right to make war – to take life by the gallows – to authorize the holding of the soil as individual property – to debar women from the right of voting. One not inconsiderable sect holds that the magistrate should enforce theological orthodoxy. Will Mr. Spooner inform us on his principle what is *law* on each of these points; and also what a judge in such case is to pronounce? ...

We say to him, quit the bench rather than violate your conscience. Mr. Spooner instructs him that all laws inconsistent with natural justice are void, and that he is bound to stay there and declare them so. Accordingly as every man's own conscience is, for the time being, his highest and holiest guide, he must set up his own idea of right ....

Leaving the question whether Law, properly speaking, *can* establish Slavery, Mr. Spooner next attempts to show that it has never *actually* been established by law in this country. ... We submit, of course, to the rule which Marshall lays down, and which Mr. Spooner makes the corner-stone of his book, that of two meanings, one honest and the other wicked, the court will, if possible, adopt the former. But the point to which we draw attention is, that if the other parts of the law, its object, and its contemporaneous construction afford irresistible evidence that the legislature intended to make a wicked law, the courts acknowledge it to be their duty to yield. ... it is evident that the understanding of the nation at the time, uniform practice since, and uninterrupted acquiescence by all parties, form one of the most obvious methods of determining with irresistible clearness the meaning of the Constitution, and one which all courts admit and respect. ... Archbishop Whately once framed an argument, in jest, to prove that Napoleon never existed. The attempt of Mr. Spooner here seems a counterpart to that, but then he is in earnest. ...

What, then, are the legal rules by which the Constitution is to be interpreted? ... We will ... remind the reader of two other rules, which Mr. Spooner will not dispute, so universally recognized as not to need proof, but which will be found in the places named.

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

2d. Every word must be made to have some meaning. ...

In the light of these rules let us open the Constitution. ... Mr. Spooner nowhere denies that the "*plain, obvious and common*" use of the word "free" is to designate one not a slave: and he allows that if it be so interpreted here, the Constitution must be confessed to recognize slavery. But he informs us that the word has also a technical legal meaning, designating a person in any community, who is invested with peculiar privileges, etc., and so might describe a citizen as distinguished from an alien. This is true. He asks us to pass by the plain, obvious, and common meaning, and adopt this technical one, in accordance with his rule above quoted, that where words are capable of two meanings, the one consistent with justice, is to be preferred to that which is not so. Now, here the court is in a dilemma. ...

Mr. Spooner remarks that "importation" is sometimes used in reference to the voluntary arrival of foreigners, and has no necessary reference to slaves. Granted: still its *ordinary* and *common* use is to describe the bringing into a country, of articles of merchandize and for sale. ...

Mr. Spooner's second point is that:

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

Now, how was Slavery defined in 1788, and previous to, and about that period? We have seen how the nation itself described a slave in the Ordinance of 1787 .... "A PERSON FROM WHOM LABOR OR SERVICE IS LAWFULLY CLAIMED." ...

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

Bailey's Dictionary, the best of his day, edition of 1782: "Slave, a perpetual *servant*; a person in the absolute power of a master." ...

The above quotations show that, in 1788, "service and labor" were thought to make a part of slavery, and that slaves were *usually*, if not *always*, described as *persons held, bound, and sold to service or labor*. ... This is our answer to Mr. Spooner on this point. ...

Mr. Spooner says the government of the states must be *republican*, and no republic can hold slaves; hence the above clauses cannot apply to slaves. ... If this be his opinion, then we can only say, that Mr. Spooner's idea of a republic does not agree with that described in the *Constitution itself!* ... Mr. Spooner decides that no state can be a republic unless "the mass of the people, if not the *entire* people, participate in the grant of powers to the government." Now it happens that the Constitution itself directs, that "the electors of Congress, in each state, shall have the qualifications requisite for electors of the most numerous branch of the state legislature," thereby *distinctly* and *expressly* recognizing the right of each state to determine *how many* of its citizens shall VOTE, that is, shall *participate in the grant of power to Government*. ... The reader will hence perceive that any definition of a republic, which is got up in order to make slavery inconsistent with it, will be found *equally inconsistent* with what the Constitution confessedly permits, namely, that the states should regulate for themselves who, and how many, shall be permitted to participate in the government. ...

3. Spooner:
The Unconstitutionality of Slavery, Part II

14. The Definition of Law

It has been alleged, by way of objection to the definition of law given in chapter first, that under it the law would be uncertain, and government impracticable. Directly the opposite of both these allegations is true. ...

Natural law, so far from being uncertain, when compared with statutory and constitutional law, is the only thing that gives any certainty at all to a very large portion of our statutory and constitutional law. The reason is this. The words, in which statutes and constitutions are written, are susceptible of so many different meanings, – meanings widely different from, often directly opposite to, each other, in their bearing upon men's rights, – that, unless there were some rule of interpretation for determining which of these various and opposite meanings are the true ones, there could be no certainty at all as to the meaning of the statutes and constitutions themselves. Judges could make almost anything they should please out of them. Hence the necessity of a rule of interpretation. *And this rule is, that the language of statutes and constitutions shall be construed, as nearly as possible, consistently with natural law.* ...

It is a principle perfectly familiar to lawyers, and one that must be perfectly obvious to every other man that will reflect a moment, that, as a general rule, *no one can know what the written law is, until he knows what it ought to be*; that men are liable to be constantly misled by the various and conflicting senses of the same words, unless they perceive the true legal sense in which the words *ought to be taken*. And this true legal sense is the sense that is most nearly consistent with natural law of any that the words can be made to bear, consistently with the laws of language, and appropriately to the subjects to which they are applied.

Though the words *contain* the law, the *words* themselves are not the law. Were the words themselves the law, each single written law would be liable to embrace many different laws, to wit, as many different laws as

there were different senses, and different combinations of senses, in which each and all the words were capable of being taken.

Take, for example, the Constitution of the United States. By adopting one or another sense of the single word "*free*," the whole instrument is changed. Yet, the word *free* is capable of some ten or twenty different senses. So that, by changing the sense of that single word, some ten or twenty different constitutions could be made out of the same written instrument. ... But each written law, in order to be a law, must be taken only m some one definite and distinct sense; and that definite and distinct sense must be selected from the almost infinite variety of senses which its words are capable of. How is this selection to be made? It can be only by the aid of that perception of natural law, or natural justice, which men naturally possess.

Such, then, is the comparative certainty of the natural and the written law. Nearly all the certainty there is in the latter, so far as it relates to principles, is based upon, and derived from, the still greater certainty of the former in fact, nearly all the uncertainty of the laws under which we live, – which are a mixture of natural and written laws, – arises from the difficulty of construing, or, rather, from the facility of misconstruing, the *written* law. While natural law has nearly or quite the same certainty as mathematics. ...

The objections made to natural law, on the ground of obscurity, are wholly unfounded. It is true, it must be learned, like any other science, but it is equally true, that it is very easily learned. Although as illimitable in its applications as the infinite relations of men to each other, it is, nevertheless, made up of simple elementary principles, of the truth and justice of which every ordinary mind has an almost intuitive perception. *It is the science of justice* .... Men living in contact with each other, and having intercourse together, cannot avoid learning natural law, to a very great extent, even if they would. ...

Children learn many principles of natural law at a very early age. For example: they learn that when one child has picked up an apple or a flower, it is his, and that his associates must not take it from him against his will. They also learn that if he voluntarily exchange his apple or flower with a playmate, for some other article of desire, he has thereby surrendered his right to it, and must not reclaim it. These are fundamental principles of natural law, which govern most of the greatest interests of individuals and society; yet, children learn them earlier than they learn that three and three are six, or five and five, ten. Talk of enacting natural law by statute, that it may be known! It would hardly be extravagant to say, that, in nine cases in ten, men learn it before they have learned the language by which we describe it. ... And a man has the same excuse for being ignorant of arithmetic, or any other science, that he has for being ignorant of natural law. He can learn it as well, if he will, without its being enacted, as he could if it were.

If our governments would but themselves adhere to natural law, there would be little occasion to complain of the ignorance of the people in regard to it. The popular ignorance of law is attributable mainly to the innovations that have been made upon natural law by legislation; whereby our system has become an incongruous mixture of natural and statute law, with no uniform principle pervading it. To learn such a system, – if system it can be called, and if learned it can be, – is a matter of very similar difficulty to what it would be to learn a system of mathematics, which should consist of the mathematics of nature, interspersed with such other mathematics as might be created by legislation, in violation of all the natural principles of numbers and quantities. ...

The whole object of legislation, excepting that legislation which merely makes regulations, and provides instrumentalities for carrying other laws into effect, is to overturn natural law, and substitute for it the arbitrary will of power. In other words, the whole object of it is to destroy men's rights. At least, such is its only effect; and its design must be inferred from its effect. Taking all the statutes in the country, there probably is not one in a hundred, – except the auxiliary ones just mentioned, – that dues not violate natural law; that does not invade some right or other. ...

But it is said further, that government is not *practicable* under this theory of natural law. If by this is meant only that government cannot have the same arbitrary and undisputed supremacy over men's rights, as under other systems – the same absolute authority to do injustice, or to maintain justice, at its pleasure – the allegation is of course true; and it is precisely that, that constitutes the merits of the system. But if anything more than that is meant, it is untrue. The theory presents no obstacle to the use of all *just* means for the maintenance of justice; and this is all the power that government ought ever to have. It is all the power that it can have, consistently with the rights of those on whom it is to operate. ...

If we say it is impracticable to limit the constitutional power of government to the maintenance of natural law, we must, to be consistent, have done with all attempts to limit government at all by written constitutions; for it is obviously as easy, by written constitutions, to limit the powers of government to the maintenance of natural law, as to give them any other limit whatever. ...

On what ground it can seriously be said that such a government is impracticable, it is difficult to conceive. Protecting the rights of all, it would naturally secure the cordial support of all, instead of a part only. The *expense* of maintaining it would be far less than that of maintaining a different one. And it would certainly be much more practicable to live under it, than under any other. Indeed, this is the *only* government which it is practicable to establish by the consent of all the governed; for an unjust government must have victims, and the victims cannot be supposed to give their consent. All governments, therefore, that profess to be founded on the consent of the governed, and yet have authority to violate natural laws, are necessarily frauds. ... Justice is evidently the only principle that *everybody* can be presumed to agree to, in the formation of government.

It is true that those appointed to administer a government founded on natural law, might, through ignorance or corruption, depart from the true theory of the government in particular cases, as they do under any other system; and these departures from the system would be departures from justice. But departures from justice would occur only through the errors of the men; such errors as systems cannot wholly prevent; they would never, as under other systems, be authorized by the constitution. And even errors arising from ignorance and corruption would be much less frequent than under other systems, because the powers of government would be much more definite and intelligible; they could not, as under other systems, be stretched and strained by construction, so as to afford a pretext for anything and everything that corruption might desire to accomplish.

It is probable that, on an average, three fourths, and not unlikely nine tenths, of all the law questions that are decided in the process of every trial in our courts, are decided on natural principles; such questions, for instance, as those of evidence, crime, the obligation of contracts, the burden of proof, the rights of property, etc., etc. If government be practicable, as we thus see it to be, where three fourths or nine tenths of the law administered is natural, it would be equally practicable where the whole was so.

So far from government being impracticable on principles of natural law, it is wholly impracticable to have a government of law, applicable to all cases, unless the great body of the law administered be natural; because it is impossible for legislation to anticipate but a small portion of the cases that must arise in regard to men's rights, so as to enact a law for them. In all the cases which the legislature cannot anticipate and provide for, natural law must prevail, or there can be no law for them, and, consequently, so far as those cases are concerned – no government. ...

Whether, therefore, we regard the certainty of the law, or the practicability of a government applicable to all cases, the preference is incomparably in favor of natural law.

But suppose it were not so. Suppose, for the sake of the argument, that the meaning of the arbitrary commands of power were, in the majority of cases, more easily ascertained than the principles of natural justice; is that any proof that the former are law, and the latter not? Does the comparative intelligibility of the two determine which is to be adopted as the true definition of law? It is very often easier to understand a lie than to ascertain a truth; but is that any proof that falsehood is synonymous with fact? ...

Or suppose, further, that government were *impracticable*, under such a definition of law as makes law synonymous with natural justice; would that be any argument against the definition? or only against government?

The objection to the practicability of government under such a definition of law, assumes, 1st, that government must be sustained, whether it administer justice or injustice; and, 2d, that its commands must be called law, whether they really are law or not. Whereas, if justice be not law, it may certainly be questioned whether government ought to be sustained. And to this question all reasonable men must answer, that we receive such an abundance of injustice from private persons, as to make it inexpedient to maintain a government for the sole purpose of increasing the supply. ...

In short, the definition of law involves a question of truth or falsehood. Natural justice either is law, or it is not. If it be law, it is always law, and nothing inconsistent with it can ever be made law. If it be not law, then we have no law except what is prescribed by the reigning power of the state; and all idea of justice being any part of our system of law, any further than it may be specially prescribed, ought to be abandoned; and

government ought to acknowledge that its authority rests solely on its power to compel submission, and that there is not necessarily any moral obligation of obedience to its mandates.

If natural justice be *not* law, then all the decisions that are made by our courts on natural principles, without being prescribed by statute or constitution, are unauthorized, and not law. And the decisions of this kind, as has already been supposed, comprise probably three fourths, or more likely nine tenths, of all the decisions given by our courts as law.

If natural justice *be* law, then all statutes and constitutions inconsistent with it are no law, and courts are bound to say so. ...

Cicero says, "There is a true law, a right reason, conformable to nature, universal, unchangeable, eternal. ... This law cannot be contradicted by any other law, and is not liable either to derogation or abrogation. Neither the senate nor the people can give us any dispensation for not obeying this universal law of justice. ... It is not one thing at Rome, and another at Athens; one thing today, and another tomorrow; but in all times and nations, this universal law must forever reign, eternal and imperishable. ... He who obeys it not, flies from himself and does violence to the very nature of man. ..." – *Cicero's Republic* ....

15. Ought Judges to Resign Their Seats?

It being admitted that a judge can rightfully administer injustice as law, in no case, and on no pretence whatever; that he has no right to assume an oath to do so; and that all oaths of that kind are morally void; the question arises, whether a judge, who has actually sworn to support an unjust constitution, be morally bound to resign his seat? or whether he may rightfully retain his office, administering justice, instead of injustice, regardless of his oath?

The prevalent idea is, that he ought to resign his seat; and high authorities may be cited for this opinion. Nevertheless, the opinion is probably erroneous; for it would seem that, however wrong it may be to take the oath, yet the oath, when taken, being morally void to all intents and purposes, can no more bind the taker to resign his office, than to fulfil the oath itself.

The case appears to be this: The office is simply *power*, put into a man's hands, on the condition, based upon his oath, that he will use that power to the destruction or injury of some person's rights. This condition, it is agreed, is void. He holds the power, then, by the same right that he would have done if it had been put into his hands *without the condition*. Now, seeing that he cannot fulfill, and is under no obligation to fulfill, this void condition, the question is, whether he is bound to resign the power, in order that it may be given to some one who will fulfill the condition? or whether he is bound to hold the power, not only for the purpose of using it himself in *defence* of justice, but also for the purpose of withholding it from the hands of those who, if he surrender it to them, will use it unjustly? Is it not clear that he is bound to retain it for both of these reasons?

Suppose A put a sword into the hands of B, on the condition of B's taking an oath that with it he will murder C. Now, however immoral the taking of this oath may be, yet, when taken, the oath and the condition are utterly void. They are incapable of raising the least moral obligation, of any kind whatever, on the part of B towards A. B then holds the sword on the same principle, and by the same right, that he would have done if it had been put into his hands without any oath or condition whatever. Now the question is, whether B, on refusing to fulfil the condition, is bound to retain the sword, and use it, if necessary, in *defence* of C? or whether he is bound to return it to A, in order that A may give it to some one who will use it for the murder of C? The case seems to be clear. If he. were to give up the sword, under these circumstances, knowing the use that was intended to be made of it, and it should then be used, by some other person, for the murder of C, he would be, on both moral and legal principles, as much accessory to the murder of C, as though he had furnished the sword for that specific purpose, under any other circumstances whatever. ...

Perhaps it will be said that a judge has no right to set up his own notions of the validity of a statute, or constitution, against the opinions of those who enact or establish it; that he is bound to suppose that they consider the statute or constitution entirely just, whatever may be his own opinion of it; and that he is therefore bound to yield his opinion to theirs, or to resign his seat. But this is only saying that, though appointed judge, he has no right to be judge. It is the prerogative of a judge to decide everything that is involved in the question of law, or no law. His own mind alone is the arbiter. To say that it is not, is to say

that he is not judge. He may err, like other men. Those who appoint him, take the risk of his errors. He is bound only by his own convictions. ...

17. Rules of Interpretation

First Rule:

The first rule, in the interpretation of the constitution, as of all other laws and contracts, is, "*that the intention of the instrument must prevail.*"

The reason of this rule is apparent; for unless the intention of the instrument prevail, wherefore was the instrument formed? or established as law? If any other intention is to prevail over the instrument, the instrument is not the law, but a mere nullity. ...

The intentions, which individuals, in discussions, conversations, and newspapers, may attribute to statutes and constitutions, are no part of the instruments themselves. And they are not of the slightest importance as evidence of their intentions, especially if they are in opposition, either to the declared, or the *presumed*, intentions of the instruments. If the intentions of statutes and constitutions were to be gathered from the talk of the street, there would be no use in writing them in terms. The talk of the street, and not the written instruments, would constitute the laws. And the same instrument would be as various and contradictory in its meanings, as the various conjectures, or assertions, that might be heard from the mouths of individuals; for one man's conjecture or assertion would be of as much legal value as another's; and effect would therefore have to be given to all, if to any.

Those who argue for slavery, hold that "the intentions of *the people*" must prevail, instead of "the intentions of *the instrument*"; thus falsely assuming that there is a legal distinction between the intentions of the instrument and the intentions of the people. Whereas the only object of the instrument is to express the intentions of the people. ... *The people established the constitution solely to give written and certain evidence of their intentions*. Having their written instrument, we have their own testimony, their own declaration of what their intentions are. The intentions of the instrument, then, and the intentions of the people, are identical. ...

But the same class of persons, who assume a distinction between the intentions of the instrument and the intentions of the people, labor to prove, *by evidence extraneous to the instrument*, that the intentions of the people were different from those the instrument expresses; and then they infer that the instrument must be warped and twisted, and made to correspond to these *unexpressed* intentions of the people.

The answer to all this chicanery is this. The people, assuming that they have the right to establish their will as law, have, in theory, agreed upon an instrument to express their will, or their intentions. They have thus said that the intentions expressed in that instrument are *their* intentions. Also that their intentions, *as expressed in the instrument*, shall be the supreme law of the land.

"The people," by thus agreeing that the intentions, *expressed by their joint instrument*, shall be the supreme law of the land, have virtually and legally contracted with each other, that, for the sake of having these, their *written* intentions, carried into effect, they will severally forego all other intentions, of every name and nature whatsoever, that *conflict* with the written ones, in which they are all agreed.

Now this written instrument, which is, in theory, the voluntary contract of each and every individual with each and every other, is *the highest legal evidence* of their intentions. It is the specific evidence that is required of all the parties to it. It is the *only* evidence that is required, or accepted, of any. It is equally valid and sufficient, in favor of all, and against all. ... The intentions it expresses must, therefore, stand as the intentions of all, and be carried into effect as law, in preference to any contrary intentions, that may have been separately, individually, and informally expressed by any one or all the parties on other occasions; else the contract is broken.

As long as the parties acknowledge the instrument as being their contract, they are each and all estopped by it from saying that they have any intentions adverse to it. *Its* intentions and their intentions are identical, else the parties individually contradict themselves. To acknowledge the contract, and yet disavow its intentions, is perfect self-contradiction.

If the parties wish to repudiate the intentions of the instrument, they must repudiate or abolish the instrument itself. If they wish to *change* the intentions of the instrument, in any one or more particulars, they

must change its language in those particulars, so as to make it express the intentions they desire. But no change can be wrought by exterior evidence; because the *written* instrument, to which, and to which only, all have, in theory, agreed, must always be the *highest evidence* that the courts can have of the intentions of the whole people.

If, therefore, the fact were *historically* well authenticated, *that every man in the nation* had publicly asserted, within one hour after the adoption of the constitution, (that is, within one hour after he had, in theory, agreed to it,) that he did not agree to it intending that any or all of the principles expressed by the instrument should be established as law, all those assertions would not be of the least legal consequence in the world; and for the very sufficient reason, that what they have said *in the instrument* is the law; and what they have said out of it is no part of it, and has no legal bearing upon it.

Such assertions, if admitted to be true, would only prove that the parties had lied when they agreed to the instrument; and if they lied then, they may be lying now. If we cannot believe their first and formal assertion of their intentions, we cannot believe their second and informal one.

The parties cannot claim that they did not *understand* the language of the instrument; for if they did not understand the language then, when they agreed to it, how can we know that they understand it now, when they dissent from it? Or how can we know that they so much as understand the very language they are now using in making their denial? or in expressing their contrary intentions?

They cannot claim that they did not understand *the rules, by which their language, used in the instrument, would be interpreted*, for if they did not understand them then, how can we know that they understand them now? Or how do we know that they understand the rules, by which their present declarations of their intentions will be interpreted?

The consequence is, that every man must be presumed to understand a contract to which he agrees, whether he actually does understand it or not. He must be presumed to understand the meaning of its words; the rules by which its words will be interpreted; and the intentions, which its words, thus interpreted, express. Otherwise men can never make contracts that will be binding upon them; for a man cannot bind himself by a contract which he is not presumed to understand; and it can seldom, or never, be proved whether a man actually does understand his contract, or not. If, therefore, at any time, through *ignorance*, carelessness, mental reservations, or fraudulent designs, men agree to instruments that express intentions different from their own, they must abide the consequences. The instrument must stand, as expressing their intentions, and their adverse intentions must fail of effect.

Every one, therefore, when he agrees to a contract, judges for himself, *and takes his own risk*, whether he understands the instrument to which he gives his assent. It is plainly impossible to have constitutions established by contract of the people with each other on any other principle than this; for, on any other principle, it could never be known what the people, as a whole, had agreed to. If every individual, after he had agreed to a constitution, could set up his own intentions, his own understandings of the instrument, or his own mental reservations, in opposition to the intentions expressed by the instrument itself, the constitution would be liable to have as many different meanings as there were different individuals who had agreed to it. And the consequence would be, that it would have no obligation at all, as a mutual and binding contract, for, very likely, no two of the whole would have understood the instrument alike in every particular, and therefore no two would have agreed to the same thing. ...

The constitution of the United States, therefore, until its language is altered, or the instrument itself abolished, by the people of the United States, must be taken to express the intentions of the whole people of the United States, whether it really do express their intentions or not. It is the highest evidence of their intentions. It is the only evidence which they have agreed to furnish of their intentions. All other adverse evidence is, therefore, legally worthless and inadmissible. The intentions of the instrument, then, must prevail, as being the intentions of the people, or the constitution itself is at an end. ...

Second Rule:

The second rule of interpretation is, that "the intention of the constitution must be collected from its words." This rule is, in reality, nearly synonymous with the preceding one; and its reason, like that of the other, is apparent; for why are words used in writing a law, unless it is to be taken for granted that when written they

contain the law? If more was meant, why was not more said? If less was meant, why was so much said? If the contrary was meant, why was this said, instead of the contrary?

To go *beyond* the words of a law, (including their necessary or reasonable implications,) *in any case*, is equivalent to saying that the *written* law is incomplete; that it, in reality, is not a law, but only a part of one; and that the remainder was left to be guessed at, or rather to be *made*, by the courts. ...

Rules of interpretation ... are as old as the use of words, in prescribing laws, and making contracts. They are as necessary for defining the words as the words are for describing the laws and contracts. The words would be unavailable for writing laws and contracts, without the aid of the rules for interpreting them. The rules, then, are as much a part of the *language* of laws and contracts as are the words themselves. Their application to the words of laws and contracts is as much presumed to be understood, by all the parties concerned, as is the meaning of the words themselves. And courts have no more right to depart from, or violate, these rules, than to depart from, or contradict, the words themselves. ...

Third Rule:

A third rule is, that we are always, if possible, to give a word some meaning appropriate to the subject matter of the instrument itself.

This rule is indispensable, to prevent an instrument from degenerating into absurdity and nonsense.

In conformity with this rule, words which purport to describe certain classes of persons existing under the constitution, must be taken in a sense that will aptly describe such persons as were actually to exist under it, and not in a sense that will only describe those who were to have no existence under it.

It would, for instance, be absurd for the constitution to provide that, in every ten years, there should be "added to the whole number of *free* persons three fifths of all *other* persons," if there were really to be no other persons than the free.

If, therefore, a sense correlative with slavery were given to the word *free*, it would make the word inappropriate to the subject matter of the constitution, *unless there were really to be slaves under the constitution.*

It is, therefore, inadmissible to say that the word *free* is used in the constitution as the correlative of slaves, *until it be first proved what there were to be slaves under the constitution.*

We must find out what classes of persons were to exist under the constitution, before we can know what classes of persons the terms used in the constitution apply to.

If the word *free* had but one meaning, we might infer, *from the word itself*, that such persons as that word would necessarily describe were to exist under the constitution. But since the word has various meanings, we can draw no certain inference *from it alone*, as to the class of persons to whom it is applied. We must, therefore, fix its meaning in the constitution, by ascertaining, from other parts of the instrument, what kind of "free persons," and also what kind of "other persons," were really to exist under the constitution. Until this is done, we cannot know the meaning of the word *free*, as it is used in the constitution. ...

Fourth Rule:

A fourth rule is, that where *technical* words are used, a technical meaning is to be attributed to them.

This rule is commonly laid down in the above general terms. It is, however, subject to these exceptions, viz., that where the technical sense would be inconsistent with, or less favorable to, justice, or not consonant to the context, or not appropriate to the nature of the subject, some other meaning may be adopted. Subject to these exceptions, the rule is of great authority, for reasons that will hereafter appear.

Thus, in commercial contracts, the terms and phrases used in them are to be taken in the technical or professional sense common among merchants, if that sense be consonant to the context, and appropriate to the nature of the contracts.

In political contracts, the terms and phrases used in them are to be taken in the political and technical sense common in such instruments, if that sense be consonant to the context, and appropriate to the subject matter of the contracts.

Terms common and proper to express political rights, relations, and duties, are of course to be taken in the technical sense natural and appropriate to those rights, relations, and duties.

Thus, in political papers, such terms as liberty, allegiance, representation, citizenship, citizens, denizens, freemen, free subjects, freeborn subjects, inhabitants, residents, people, aliens, allies, enemies, are all to be

understood in the technical sense appropriate to the subject matter of the instrument, unless there be something else, in *the instrument itself*, that shows that some other meaning is intended.

Terms which, by common usage, are properly descriptive of the parties to, or members of, the compact, as distinguished from others, are to be taken in the technical sense, which describes them, as distinguished from others, unless there be, in the instrument itself, some unequivocal evidence that they are to be taken in a different sense,

The authority of this rule is so well founded in nature, reason, and usage, that it is almost strange that it should be questioned. It is a rule which everybody, *by their common practice*, admit to be correct; for everybody more naturally understands a word in its technical sense than in any other, unless that sense be inconsistent with the context.

Nevertheless, an attempt has been made by some persons to deny the rule, and to lay down a contrary one, to wit, that where a word has what they *choose to call* a common or popular meaning, and also a technical one, the *former* is to be preferred, unless there be something, in other parts of the instrument, that indicates that the technical one should be adopted.

The argument for slavery virtually claims, not only that this so called common and popular meaning of a word, (and especially of the word "free,") is to be preferred to the technical one, but also that this simple preference is of sufficient consequence to outweigh all considerations of justice and injustice, and indeed all, or nearly all, the other considerations on which legal rules of interpretation are founded. ...

The falsehood of this pretended rule will be evident when it is considered that it assumes that the technical meaning of a word is not the common and popular one; *whereas it is the very commonness, approaching to uniformity, with which a word is used in a particular sense, in relation to particular things, that makes it technical.*

A technical word is a word, which in one profession, art, or trade, or in reference to particular subjects, is generally, or uniformly, used in a particular sense, and that sense a somewhat different one from those in which it is generally used out of that profession, art, or trade, or in reference to other subjects.

There probably is not a trade that has not its technical words. Even the cobbler has his. His ends are generally quite different things from the ends of other people. If we hear a cobbler speak of his ends, we naturally suppose he means the ends of his threads, because he has such frequent occasion to speak of and use them. If we hear other people speak of their ends, we naturally suppose that they mean the objects they have in view. With the cobbler, then, *ends* is a technical word, because he frequently or generally uses the word in a different sense from that in which it is used by other people. ...

So, if we were to hear a banker speak of "the days of grace having expired," we should naturally attach a very different meaning to the words from what we should if we were to hear them from the pulpit. We should suppose, of course, that he used them in the technical sense appropriate to his business, and that he had reference only to a promissory note that had not been paid when due. ...

These examples might be multiplied indefinitely. But it will be seen from those already given that, so far from the technical sense and the common sense of words being opposed to each other, *the technical sense is itself the common sense in which a word is used with reference to particular subjects. ...*

Almost every word of substantive importance, that is of frequent use in the law, is used in a technical sense – that is, in a sense having some special relation either to natural justice, or to men's rights or privileges under the laws.

The word *liberty*, for instance, has a technical meaning in the law. It means, not freedom from all restraint, or obligation; not a liberty to trespass with impunity upon other men's rights; but only that degree of liberty which, of natural right, belongs to a man; in other words, the greatest degree of liberty that he can exercise, without invading or immediately endangering the rights of others.

Unless nearly all words had a technical meaning in the law, it would be impossible to describe laws by words; because words have a great variety of meanings in common use; *whereas the law demands certainty and precision. ...*

Fifth Rule:

A fifth rule of interpretation is, that the sense of every word, that is ambiguous in itself, must, *if possible*, be determined by reference to the rest of the instrument.

The importance of this rule will be seen, when it is considered that the only alternatives to it are, that we must go out of the instrument, and resort to conjecture, for the meaning of ambiguous words.

The rule is an universal one among courts .... *Vattel* says, "If he who has expressed himself in an obscure or equivocal manner, has spoken elsewhere more clearly on the same subject, he is the best interpreter of himself. ..."

Sixth Rule:

A sixth rule of interpretation, and a very important, inflexible, and universal one, applicable to *contracts*, is, that a contract must never, if it be possible to avoid it, be so construed, as that any one of the parties to it, assuming him to understand his rights, and to be of competent mental capacity to make *obligatory* contracts, may not reasonably be presumed to have consented to it.

If, for instance, two men were to form a copartnership in business, their contract, if its language will admit of any other possible construction, must not be so construed as to make it an agreement that one of the partners shall be the slave of the other; because such a contract would be unnatural, unreasonable, and would imply that the party who agreed to be a slave was incompetent to make a reasonable, and therefore obligatory, contract.

This principle applies to the Constitution of the United States, and to all other constitutions that purport to be established by "the people"; for such constitutions are, in theory, but contracts of the people with each other, entered into by them severally for their individual security and benefit. ...

By the rule laid down, these statutes and constitutions, therefore, must not be construed, (unless such construction be unavoidable,) so as to authorize anything whatever *to which every single individual of* "*the people*" may not, as competent men, knowing their rights, reasonably be presumed to have freely and voluntarily assented.

Now the parties to the contract expressed in the Constitution of the United States, are "the people of the United States," that is, the whole people of the United States. The description given of the parties to the constitution, as much includes those "people of the United States" who were at the time treated as slaves, as those who were not. ... *We certainly cannot go out of the constitution to find the parties to it.* And the constitution affords no legal ground whatever for separating the then "people of the United States" into two classes, and saying that one class were parties to the constitutional contract, and that the other class were not. ...

It is a universal rule of courts, that where justice will be promoted by taking a word in the most comprehensive sense in which it can be taken consistently with the rest of the instrument, it must be taken in that sense, in order that as much justice as possible may be accomplished. ... In conformity with this rule, the words, "the people of the United States," would have to be taken in their most extensive sense ....

Assuming, then, that *all* "the people of the United States" are parties to the constitutional contract, it is manifest, that it cannot reasonably be presumed that any, even the smallest, portion of them, knowing their natural rights, and being competent to make a reasonable contract of government, would consent to a constitution that should either make them slaves, or assist in keeping them in slavery. Such a construction, therefore, must not be put upon the contract, if the language admits of any other. This rule alone, then, is sufficient to forbid a construction sanctioning slavery.

It may, perhaps, be argued that the slaves were not parties to the constitution, inasmuch as they never, *in fact*, consented to it. But this reasoning would disfranchise half the population; for there is not a single constitution in the country – state, or national – into which one half of the people who are, *in theory*, parties to it, ever, *in fact and in forms*, agreed. ...

Voting for and under a constitution, are almost the only acts that can, with any reason at all, be considered a *formal* assent to a constitution. Yet a bare majority the adult males, or about one tenth of the whole people, is the largest number of "the people" that has ever been considered necessary, in this country, to establish a constitution. And after it is established, only about one fifth of the people are allowed to vote under it, even where suffrage is most extended. So that no formal assent to a constitution is ever given by the people at large. Yet the constitutions themselves assume, and *virtually* assert, that *all* "the people" have agreed to them. They must, therefore, be construed on the theory that all have agreed to them, else the instruments themselves are at once denied, and, of course, invalidated altogether. No one, then, who upholds the validity of the constitution, can deny its own assertion, that all "the people" are parties to it. ...

But it may, perhaps, be said that it cannot reasonably be presumed that the *slaveholders* would agree to a constitution, which would destroy their right to their slave property.

One answer to this argument is .... that it is, *in law*, considered reasonable – as it is, in fact, one of the highest evidences of reason – for a man voluntarily to do justice, against his apparent pecuniary interests. Is a man considered *non compos mentis* for restoring stolen property to its rightful owner, when he might have retained it with impunity? Or are all the men, who have voluntarily emancipated their slaves, presumed to have been fools? incompetent to make reasonable contracts? ... There would be just as much reason in saying that it cannot be supposed that thieves, robbers, pirates, or criminals of any kind would consent to the establishment of governments that should have authority to suppress *their* business, as there is in saying that slaveholders cannot be supposed to consent to a government that should have power to suppress slaveholding. If this argument were good for anything, we should have to apply it to the state constitutions, and construe them, if possible, so as to sanction all kinds of crimes which men commit, on the ground that the criminals themselves could not be supposed to have consented to any government that did not sanction them. ... In short, it is obvious that government would not, and could not, be upheld for an instant, by any portion of society, honest or dishonest, if such a presumption were to be adopted by the courts as a general rule for construing either constitutions, laws, or private contracts. ...

Seventh Rule:

The seventh rule of interpretation is the one that has been repeatedly cited from the supreme court of the United States, to wit:

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

The word "*expressed*" is a very important one, in this rule. ... In law, a thing is said to be "expressed," only when it is *uttered, or written out, embodied in distinct words,* in contradistinction to its being inferred, *implied*, or gathered from evidence exterior to the words of the law. ...

The amount of the rule, then, is, that the court will never, *through inference, nor implication,* attribute an unjust intention to a law; *nor seek for such an intention in any evidence exterior to the words of the law.* They will attribute such an intention to the law, only when such intention is *written out in actual terms*; and in terms, too, of "irresistible clearness."

The rule, it will be observed, does not forbid a resort to inference, implication, or exterior evidence, to help out the supposed meaning of, or to solve any ambiguities in, *a law that is consistent with justice.* It only forbids a resort to such means to help out the supposed meaning of, or to solve any ambiguities in, *an unjust law.* It virtually says that if an ambiguous law can possibly be interpreted favorably to justice, it shall be thus interpreted. But if it cannot be thus interpreted, it shall be suffered to remain inoperative – void for its ambiguity – rather than the court will help out its supposed meaning by inference, implication, or exterior evidence. ...

Such is the variety of senses in which language is used by different persons, and such the want of skill in many of those who use it, that laws are very frequently left in some ambiguity. Men, nevertheless, act upon them, assuming to understand them. Their rights thus become involved in the efficacy of the law, and will be sacrificed unless the law be carried into effect. *To save these rights, and for no other purpose,* the courts will venture to seek the meaning of the law in exterior evidence, when the intent of the law is good, and the apparent ambiguity not great. *Strictly speaking, however, even this proceeding is illegal.* Nothing but the necessity of saving men's rights, affords any justification for it.

But where a law is ambiguous and unjust, there is no such necessity for going out of its words to settle its probable meaning, because men's rights will not be saved, but only sacrificed, by having its uncertainty settled, and the law executed. It is, therefore, *better* that the law should perish, be suffered to remain inoperative for its uncertainty, than that its uncertainty should be removed, (or, rather, attempted to be removed, for it cannot be removed absolutely, by exterior evidence,) and the law carried into effect for the destruction of men's rights. ...

There are only four or five single words and phrases in the constitution, that are claimed to be ambiguous in regard to slavery. All the other parts of the instrument, its preamble, its prevailing spirit and principles, its

subject matter, "the general system of the laws" authorized by it, all repel the idea of its sanctioning slavery. If, then, the ambiguous words and phrases be construed with reference to the rest of the instrument, there is no occasion to go out of the instrument to find their meaning.

But, in point of fact, the words of a law *never are ambiguous, legally speaking,* where the alternative is only between a meaning that is consistent, and one that is inconsistent, with natural right; for the rule that requires the right to be preferred to the wrong, is imperative and universal in all such cases; *thus making the legal meaning of the word precisely as certain, as though it could, in no case, have any other meaning. It thus prevents the ambiguity, which, but for the rule, might have existed.*

This rule, that a just, in preference to an unjust, meaning must be given to a word, wherever it is possible, consistently with the rest of the instrument, obviously *takes precedence* of the rule that permits a resort to exterior evidence .... Nothing would be *gained* by going out of a law to find evidence of the meaning of one of its words, when a *good* meaning could be found in the law itself. Nothing better than a *good* meaning could be expected to be found by going out of the law. As nothing could be *gained*, then, by going out of the law, the only object of going out of it would be to find an *unjust* meaning; but that, surely, is no sufficient reason for going out of it. ...

Apply, then, this rule of the court, in all its parts, to the word "free," and the matter will stand thus.

1. A sense correlative with aliens, makes the constitution consistent with natura1 right. A sense correlative with slaves, makes the constitution inconsistent with natural right. The choice must therefore be made of the former sense.

2. A sense correlative with aliens, is consistent with "the general system of the laws" established by the constitution. A sense correlative with slavery, is inconsistent with that system. The former sense then must be adopted.

3. If a sense correlative with aliens be adopted, the constitution itself designates the individuals to whom the word "free," and the words "all other persons" apply. If a sense correlative with slaves be adopted, the constitution itself has not designated the individuals to whom either of these descriptions apply, and we should have to go out of the constitution and laws of the United States to find them. This settles the choice in favor of the former sense. ...

Eighth Rule:

An eighth rule of interpretation is, that where the prevailing principles and provisions of a law are favorable to justice, and general in their nature and terms, no *unnecessary exception* to them, or to their operation, is to be allowed.

It is a dictate of law, as of common sense – or rather of law, because of common sense – that an exception to a rule cannot be established, unless it be stated with at least as much distinctness and certainty as the rule itself, to which it is an exception; because otherwise the authority of the rule will be more clear and certain, and consequently more imperative, than that of the exception, and will therefore outweigh and overbear it. This principle may justly be considered a strictly mathematical one. It is founded simply on the necessary preponderance of a greater quantity over a less. On this principle, an exception to a general *law* cannot be established, unless it be expressed with at least as much distinctness as the law itself. ...

Yet the argument for slavery, (I mean that founded on the representative clause,) makes *two* exceptions – not *one* merely, but *two* – and both of the most flagitious and odious character – without the Constitution's having used any words of proviso or exception ....

One of these exceptions is an exception of *principle*, substituting injustice and slavery, for "justice and liberty."

The other is an exception of *persons*; excepting a part of "the people of the United States" from the rights and benefits, which the instrument professes to secure to the whole; and exposing them to wrongs, from which the people generally are exempt. ...

Ninth Rule:

A ninth rule of interpretation is, to be guided, in doubtful cases, by the preamble. ...

In fact, the whole object of the preamble is to indicate the objects had in view in the enacting clauses; and of necessity those objects will indicate the construction to be given to the words used in those clauses. Any other supposition would either make the preamble worthless, or, worse than that, deceitful.

If we are guided by the preamble in fixing the meaning of those clauses that have been claimed for slavery, it is plain that no sanction or recognition of slavery will be found in them; for the preamble declares the objects of the constitution to be, among other things, "justice" and "liberty."

Tenth Rule:

A tenth rule of interpretation is, that one part of an instrument must not be allowed to contradict another, unless the language be so explicit as to make the contradiction inevitable.

Now the constitution would be full of contradictions, if it tolerated slavery, unless it be shown that the constitution itself has established an *exception* to all its general provisions, limiting their operation and benefits to persons not slaves. Such an exception or limitation would *not, legally speaking,* be a contradiction. But ... it has already been shown that no such exception can be made out from its words. ...

Eleventh Rule:

An eleventh rule is one laid down by the Supreme Court of the United States, as follows:

"An act of congress" (and the rule is equally applicable to the constitution) "ought never to be construed to violate the law of nations, if any other *possible* construction remains."

This rule is specially applicable to the clause relative to "the importation of persons." If that clause were construed to sanction the kidnapping of the people, of foreign nations, and their importation into this country as slaves, it would he a flagrant violation of that law.

Twelfth Rule:

A twelfth rule, universally applicable to questions both of *fact and law,* and sufficient, *of itself alone,* to decide, *against slavery*, every possible question that can be raised as to the meaning of the constitution, is this, "*that all reasonable doubts must be decided in favor of liberty.*" ...

Thirteenth Rule:

A thirteenth rule, and one of great importance, is, *that instruments must be so construed as to give no shelter or effect to fraud.*

This rule is especially applicable for deciding what meaning we are to give to the word *free* in the constitution; for if a sense correlative with slavery be given to that word, it will be clearly the result of fraud.

We have abundant evidence that this fraud was intended by some of the *framers* of the constitution. They knew that an instrument legalizing slavery could not gain the assent of the north. They therefore agreed upon an instrument honest in its terms, with the intent of misinterpreting it after it should be adopted.

The fraud of the framers, however, does not, of itself, implicate the people. But when any portion of the people adopt this fraud in practice, they become implicated in it, equally with its authors. And any one who claims that an ambiguous word shall bear a sense inappropriate to the subject matter of the instrument, contrary to the technical and common meaning of the word, inconsistent with any intentions that *all* the parties could reasonably be presumed to agree to, inconsistent with natural right, inconsistent with the preamble, and the declared purpose of the instrument, inconsistent with "the general system of the laws" established by the instrument; any one who claims such an interpretation, becomes a participator in the fraud. It is as much fraudulent, *in law*, for the people of the present day to claim such a construction of the word *free*, as it was for those who lived at the time the instrument was adopted. ...

Fourteenth Rule:

In addition to the foregoing particular rules of interpretation, this general and sweeping one may be given, to wit, *that we are never unnecessary to impute to an instrument any intention whatever which it would be unnatural for either reasonable or honest men to entertain.* Such intention can be admitted only when the language will admit of no other construction.

Law is "a rule of conduct." The very idea of law, therefore, necessarily implies the ideas of reason and right. Consequently, every instrument, and every man, or body of men, that profess to establish a law, impliedly assert that the law they would establish is reasonable and right. The law, therefore, must, if possible, be construed consistently with that implied assertion. ...

Rules Cited for Slavery:

The rules already given (unless perhaps the fourth) *take precedence* of all the rules that can be offered on the side of slavery; and, taking that precedence, they decide the question without reference to any others.

It may, however, be but justice to the advocates of slavery, to state the rules relied on by them. The most important are the following:

First Rule Cited for Slavery:

One rule is, that the most common and obvious sense of a word is to be preferred.

This rule, so far as it will apply to the word *free* in the constitution, is little or nothing more than a repetition of the rule before given, (under rule fourth,) in favor of the technical meaning of words. It avails nothing for slavery; and for the following reasons:

1. In determining, in a particular case, what *is* "the most common and obvious meaning" of a word, reference must be had not alone to the sense in which the word is most frequently used in the community, without regard to the context, or the subject to which it is applied; but only to its most common meaning, when used in a similar connection, for similar purposes, and with reference to the same or similar subjects. ... In a law relative to vessels navigating Massachusetts Bay, or Chesapeake Bay, we must not understand the word *bay* in the same sense as when we speak of a bay horse, a bay tree, or of a man standing at bay.

To ascertain, then, the most "common and obvious meaning" of the word "*free*," *in such a connection as that in which it stands in the Constitution*, we must *first* give it a meaning that appropriately describes a class, which the Constitution certainly presumes will exist under the constitution. *Secondly*, a meaning which the whole "people of the United States," (slaves and all,) who are parties to the constitution, may reasonably be presumed to have voluntarily agreed that it should have. *Thirdly*, we must give it a meaning that will make the clause in which it stands consistent with the intentions which "the people," in the preamble, declare they have in view in ordaining the constitution, viz., "to establish justice," and "secure the blessings of liberty to themselves, (the whole people of the United States,) and their posterity." *Fourthly*, we must give it a meaning harmonizing with, instead of contradicting, or creating an exception to, all the general principles and provisions of the instrument. *Fifthly*, such a meaning must be given to it as will make the words, "all other persons," describe persons who are proper subjects of "representation" and of taxation *as persons*.

No one can deny that, at the time the Constitution was adopted, the most "common and obvious meaning" of the word "free," *when used by the whole people of a state or nation, in political instruments of a similar character to the constitution, and in connection with such designs, principles, and provisions are expressed and contained in the constitution*, was such as has been claimed for it in this argument, viz., a meaning describing citizens or persons possessed of some political franchise, as distinguished from aliens, or persons not possessed of the same franchise. ...

If the Constitution had purported to have been instituted by a part of the people, instead of the whole; and for purposes of injustice and slavery, instead of "justice and liberty"; and if "the general system of the laws" authorized by the Constitution, had corresponded with that intention, there would then have been very good reason for saying that "the most common and obvious meaning" of the word "free," *in such a connection*, was to describe free persons as distinguished from slaves. But as the constitution is, in its terms, its professed intent, and its general principles and provisions, directly the opposite of all this; and as the word "free" *has a "common and obvious meaning," that accords with these terms*, intent, principles, and provisions, its *most* "common and obvious meaning," *in such a connection*, is just as clearly opposite to what it would have been in the other connection, as its most common and obvious meaning, in the other connection, would be opposite to the meaning claimed for it in this. ...

2. But the rule fails to aid slavery for another reason. As has before been remarked, the word "free" is seldom or never used, even in common parlance, as the correlative of slaves, unless when applied to *colored* persons. A colored person, not a slave, is called a "*free* colored person." But the white people of the south are

never, in common parlance, designated as "*free* persons," but as *white* persons. A slaveholder would deem it an insult to be designated as a "free person," that is, using the word free in a sense correlative with slavery, because such a designation would naturally imply the *possibility* of his being a slave. It would naturally imply that he belonged to a race that was sometimes enslaved. Such an implication being derogatory to his race, would be derogatory to himself. Hence, where two races live together, the one as masters, the other as slaves, the superior race never habitually designate themselves as the "free persons," but by the appropriate name of their race, thus avoiding the implication that they *can* be made slaves.

Thus we find, that the use of the word "free" *was* "common," *in the law*, to describe those who were citizens, but it was *not* "common," either in the law, or in common parlance, for describing the white people of the south, as distinguished from their slaves. The rule, then, that requires the most common and obvious meaning of the word to be preferred, wholly fails to give to the word *free*, as used in the constitution, a meaning correlative with slaves. ...

Second Rule Cited for Slavery:

A second rule of interpretation, relied upon by the advocates of slavery, is that where laws are *ambiguous*, resort may be had to exterior circumstances, history, etc., to discover the probable intention of the law-givers.

But this is not an universal rule, as has before been shown, (under rule seventh,) and has no application to a question that can be settled by the rules already laid down, applicable to the words themselves. ...

The real or presumed intentions of that particular portion of the "people," who were slaveholders, are of no more legal consequence towards settling ambiguities in the constitution, than are the real or presumed intentions of the same number of slaves; for both slaves and slaveholders, as has been shown, (under rule sixth,) were, in law, equally parties to the constitution. Now, there were probably five or ten times as many slaves as slaveholders. Their intentions, then, which can be presumed to have been only for liberty, overbalance all the intentions of the slaveholders. ...

But further: The intentions of all parties, slaves, slaveholders, and non-slaveholders, throughout the country, must be presumed to have been precisely alike, because, in theory, they all agreed to the same instrument. ...

But it will be said that, in opposition to this current of testimony, furnished by the laws and known principles of the nation at large, we have direct historical evidence of the intentions of particular individuals, *as expressed by themselves at or about the time.*

One answer to this argument is, that we have no *legal* evidence whatever of any such intentions having been expressed *by a single individual in the whole nation.*

Another answer is, that we have no authentic *historical* evidence of such intentions having been expressed by so many as *five hundred individuals*. If there be such evidence, where is it? and who were the individuals? *Probably not even one hundred such can be named.* And yet this is all the evidence that is to be offset against the intentions of the whole "people of the United States," as expressed in the Constitution itself, and in the general current of their then existing laws.

It is the constant effort of the advocates of slavery, to make the constitutionality of slavery a historical question, instead of a legal one. In pursuance of this design, they are continually citing the opinions, or intentions, of Mr. A, Mr. B, and Mr. C, as handed down to us by some history or other; as if the opinions and intentions of these men were to be taken as the opinions and intentions of the whole people of the United States; and as if the irresponsible statements of historians were to be substituted for the constitution. If the people of this country have ever declared that these fugitive and irresponsible histories of the intentions and sayings of single individuals here and there, shall constitute the constitutional law of the country, be it so; but let us be consistent, burn the Constitution, and depend entirely upon history. It is nothing but folly, and fraud, and perjury, to pretend to maintain, and swear to support, the constitution, and at the same time get our constitutional law from these irresponsible sources.

If every man in the country, at the time the constitution was adopted, had expressed the intention to legalize slavery, and that fact were *historically* well authenticated, it would be of no legal importance whatever – and why? Simply because such external expressions would be no part of the instrument itself.

Suppose a man sign a note for the payment of money, but at the time of signing it declare that it is not his intention to pay it, that he does not sign the note with such an intention, and that he never will pay it. Do

all these declarations alter the legal character of the note itself, or his legal obligation to pay? Not at all – and why? Because these declarations are no part of that particular promise which he has expressed by signing the note. So if every man, woman, and child in the Union, at the time of adopting the constitution, had declared that it was their intention to sanction slavery, such declarations would all have been but idle wind – and why? Because they are no part of that particular instrument, which they have said shall be the supreme law of the land. If they wish to legalize slavery, they must say so in the constitution, instead of saying so out of it. By adopting the constitution, they say just what, and only what, the constitution itself expresses. ...

Third Rule Cited for Slavery:

A third rule of interpretation, resorted to for the support of slavery, is the maxim that "Usage is the best interpreter of laws."

If by this rule be meant only that the meaning to be applied to a word in a particular case ought to be the same that has usually been applied to it in other cases of a *similar nature*, we can, of course, have no objection to the application of the rule to the word "free"; for usage; as has already been shown, will fix upon it a meaning other than as the correlative of slaves. ...

But if the rule requires that after a particular *law* has once, twice, or any number of times, been adjudicated upon, it must always be construed as it always has been, the rule is ridiculous; it makes the interpretation given to a law by the courts superior to the law itself; because the law had a meaning of its own before any "usage" had obtained under it, or any judicial construction had been given to it.

It is the original meaning of the constitution itself that we are now seeking for; the meaning which the courts were *bound* to put upon it from the beginning; not the meaning they actually have put upon it. ... All constructions put upon it by the courts or the government, *since the instrument was adopted*, come *too late* to be of any avail in settling the meaning the instrument had at the time it was adopted ...

We charge the courts with having misinterpreted the instrument from the beginning; with having violated the rules that were applicable to the instrument before any practice or usage had obtained under it. This charge is not to be answered by saying that the courts have interpreted it *as they have*, and that that interpretation is now binding, on the ground of usage, whether it were originally right or wrong. The constitution itself is the same now that it was the moment it was adopted. It cannot have been altered by all the false interpretations that may have been put upon it. ...

But perhaps it will be said, that by *usage* is meant the practice of the people. It would be a sufficient answer to this ground to say, that usage, against law and against right, can neither abolish nor change the law, in any case. ...

Fourth Rule Cited for Slavery:

A fourth rule of interpretation, relied on for the support of slavery, *is that the words of a law must be construed to subserve the intentions of the legislature.* So also the words of a contract must be construed to subserve the intentions of the parties. And the constitution must be construed to subserve the intentions of "the people of the United States."

Those who quote this rule in favor of slavery, *assume* that it was the intention of "the people of the United States" to sanction slavery; and then labor to construe all its words so as to make them conform to that assumption.

But the rule does not allow of any such assumption. It does not supersede, or at all infringe, the rule that "the intention of the legislature is to be collected from the words they have used to convey it." This last rule is obviously indispensable to make written laws of any value; and it is one which the very existence of written laws proves to be inflexible; for if the intentions could be assumed independently of the words, the words would be of no use, and the laws of course would not be written. ...

It is perfectly idle, fraudulent, and futile, to say that the people did not agree to the instrument *in the sense* which these rules fix upon it; for if they have not agreed to it in that sense, they have not agreed to it at all. The instrument itself, as a *legal* instrument, *has no other sense*, in which the people *could* agree to it. And if the people have not adopted it in that sense, they have not yet adopted the *constitution*; and it is not now, and never has been, the law of the land.

There would be just as much reason in saying that a man who signs a note for the payment of five hundred dollars, does not sign it in the legal sense of the note, but only in the sense that he will not pay, instead of the sense that he will pay, so much money, as there is in saying that the people did not agree to the constitution in its legal sense, but only in some other sense, which slaveholders, pirates, and thieves might afterwards choose to put upon it. ...

But this is not all. It is probable that, as matter of fact, four fifths, and, not unlikely, nine tenths, of all those who were legally parties to the constitution, never even read the instrument, or had any definite idea or intention at all in regard to the relation it was to bear, either to slavery, or to any other subject. Every inhabitant of the country, man, woman, and child, was legally a party to the constitution, else they would not have been bound by it. Yet how few of them read it, or formed any definite idea of its character, or had any definite intentions about it. Nevertheless, they are all *presumed* to have read it, understood it, agreed to it, and to have intended just what the instrument legally means, as well in regard to slavery as in regard to all other matters. ...

The whole matter of the adoption of the Constitution is mainly a matter of assumption and theory, rather than of actual fact. Those who voted against it, are just as much presumed to have agreed to it, as those who voted for it. And those who were not allowed to vote at all, are presumed to have agreed to it equally with the others. So that the whole matter of the assent and intention of the people, is, in reality, a thing of assumption, rather than of reality. Nevertheless, this assumption must be taken for fact, as long as the constitution is acknowledged to be law; because the constitution asserts it as a fact, that the people ordained and established it; and if that assertion be denied, the constitution itself is denied, and its authority consequently invalidated, and the government itself abolished. ...

It is not the intentions men actually had, but the intentions they constitutionally expressed; that make up the Constitution. And the instrument must stand, as expressing the intentions of the people, (whether it express them truly or not,) until the people either alter its language, or abolish the instrument. If "the people of the United States" do not like the constitution, they must alter, or abolish, instead of asking their courts to pervert it, else the constitution itself is no law.

Finally: If we are bound to interpret the constitution by any rules whatever, it is manifest that we are bound to do it by such rules as have now been laid down. If we are *not* bound to interpret it by any rules whatever, we are wholly without excuse for interpreting it in a manner to legalize slavery. Nothing can justify such an interpretation but rules of too imperative a character to be evaded. ...

24. Power of the General Government Over Slavery

It is a common assertion that the general government has no power over slavery in the states. If by this be meant that the states may reduce to slavery the citizens of the United States within their limits, and the general government cannot liberate them, the doctrine is nullification, and goes to the destruction of the United States government within the limits of each state, whenever such state shall choose to destroy it.

The pith of the doctrine of nullification is this, viz., that a state has a right to interpose between her people and the United States government, deprive them of its benefits, protection, and laws, and annul their allegiance to it.

If a state have this power, she can of course abolish the government of the United States at pleasure, so far as its operation within her own territory is concerned; for the government of the United States is nothing, any further than it operates upon the persons, property, and rights of the people. If the States can arbitrarily intercept this operation, can interpose between the people and the government and laws of the United States, they can of course abolish that government. And the United States constitution, and the laws made in pursuance thereof, instead of being "the supreme law of the land," "anything in the constitution or laws of any state to the contrary notwithstanding," are dependent entirely upon the will of the state governments for permission to be laws at all. A state law reducing a man to slavery, would, if valid, interpose between him and the constitution and laws of the United States annul their operation, (so far as he is concerned,) and deprive him of their benefits. It would annul his allegiance to the United States; for a slave can owe no allegiance to a government that either will not, or cannot protect him. ...

The preamble expressly declares that "We the people of the United States" establish the Constitution for the purpose of securing justice, tranquility, defence, welfare, and liberty, to "ourselves and our posterity"

This language certainly implies that all "the people" who are parties to the constitution, or join in establishing it, are to have the benefit of it, and of the laws made in pursuance of it. The only question, then, is, who were "the people of the United States"?

We cannot go out of the constitution to find who are the parties to it. And there is nothing in the constitution that can limit this word "people," so as to make it include a part, only, of "the people of the United States." ... The United States government, then, being in theory, formed by, and for the benefit of, the whole "people of the United States," the question arises, whether it have the power of securing to "the people" the benefits it intended for them. Or whether it is dependent on the state governments *for permission* to confer these benefits on "the people"? This is the whole question. And if it shall prove that the general government has no power of securing to the people its intended benefits, it is, in no legal or reasonable sense, a government. ...

As the government is bound to dispense its benefits impartially to all, it is bound, first of all, after securing "the public safety, in cases of rebellion and invasion," to secure liberty to all. And the whole power of the government is bound to be exerted for this purpose, *to the postponement, if need be,* of everything else save "the public safety, in cases of rebellion and invasion." And it is the constitutional duty of the government to establish as many courts as may be necessary, (no matter how great the number,) and to adopt all other measures necessary and proper, for bringing the means of liberation within the reach of every person who is restrained of his liberty in violation of the principles of the constitution.

We have thus far, (in this chapter,) placed this question upon the ground that those held in slavery are constitutionally a part of "the people of the United States," and parties to the Constitution. But, although this ground cannot be shaken, it is not necessary to be maintained, in order to maintain the duty of Congress to provide courts, and all other means necessary, for their liberation.

The constitution, by providing for the writ of *habeas corpus*, without making any discrimination as to the persons entitled to it, has virtually declared, and thus established it as a constitutional principle, that, in this country, there can be no property in man; for the writ of *habeas corpus*, as has before been shown, necessarily involves a denial of the right of property in man. By declaring that the privilege of this writ "shall not be suspended, unless when, in cases of rebellion or invasion the public safety may require it," the constitution has imposed upon Congress the duty of providing courts, and if need be, other aids, for the issuing of this writ in behalf of all human beings within the United States, who may be restrained on claim of being property. Congress are bound by the Constitution to aid, if need be, a foreigner, an alien, an enemy even, who may be restrained as property. And if the people of any of the civilized nations were now to be seized as slaves, on their arrival in this country, we can all imagine what an abundance of constitutional power would be found, and put forth, too, for their liberation. ...

If these opinions are correct, it is the constitutional duty of Congress to establish courts, if need be, in every county and township even, where there are slaves to be liberated; to provide attorneys to bring the cases before the courts; and to keep a standing military force, if need be, to sustain the proceedings.

In addition to the use of the *habeas corpus*, Congress have power to prohibit the slave trade between the states, which, of itself, would do much towards abolishing slavery in the northern slaveholding states. They have power also to organize, arm, and discipline the slaves as militia, thus enabling them to aid in obtaining and securing their own liberty. ...

Appendix B. Suggestions to Abolitionists

[This section is the one in which the difference between Spooner's 1840s views and his 1850s-60s views is perhaps most striking.]

Those who believe that slavery is unconstitutional, are the only persons who propose to abolish it. They are the only ones who claim to have the power to abolish it. Were the entire North to become abolitionists, they would still be unable to touch the chain of a single slave, so long as they should concede that slavery was constitutional. To say, as many abolitionists do, that they will do all they constitutionally can towards abolishing slavery, is virtually saying that they will do nothing, if they grant, at the same time, that the Constitution supports slavery. ...

To talk of amending the constitution, by the action of three fourths of the states, so as to abolish slavery, is to put off the matter to some remote and unknown period. While abolitionists are amusing themselves with

these idle schemes for abolishing slavery without the agency of any adequate means, slaves are doubling in numbers every twenty-five years, and the slave power is rapidly increasing in numbers, wealth, and territory. To concede that this power is entrenched behind the Constitution, is, in the minds of practical men, to concede the futility of all efforts to destroy it. And its effect is to dissuade the great body of the North from joining in any efforts to that end. The mass of men will insist upon seeing that a thing can be done, before they will leave the care of their other interests to assist in doing it. Hence the slow progress of all political movements based on the admission that slavery is constitutional. ...

The people of the North want simply to know if they can do anything for the abolition of slavery, without violating their constitutional faith. For this alternative they are not prepared, (as I admit they ought to be, if they had ever pledged themselves to the support of slavery ;) but they are prepared for almost anything short of that. At any rate, they are prepared to stand by the Constitution, if it supports liberty. ... Who would not sign a petition praying Congress to inform the people whether the Supreme Court of the United States have ever given any, and if any, what, valid reasons for holding slavery to be constitutional? ...

In order that these appeals to Congress, the State legislatures, and the courts, may be effectual, all representatives, senators, and judges should be furnished with all the evidence on which abolitionists rely for proving slavery unconstitutional. ...

Some timid persons may imagine that if this question be pressed to a decision, and that decision should be against slavery, the result will be a dissolution of the Union. But this is an ignorant and ridiculous fear. The actual slaveowners are few in number, compared with the slaves and non-slaveholders of the South. The supposed guaranty of the constitution to slavery is the great secret of their influence at home, as well as at the North. It is that that secures their wealth and their political power. The simple agitation of the question of the unconstitutionality of slavery will strike a blow at their influence, wealth, and power, that will be felt throughout the South, and tend to separate the non-slaveholders from them. It is idle to suppose that the non-slaveholders of the South are going to sacrifice the Union for the sake of slavery. Many of them would hail as the highest boon a constitutional deliverance from slaveholding oppressions. And when the question shall be finally settled against the constitutionality of slavery, the slaveholders will find themselves deserted of all reliable support; the pecuniary value of their slaves will have vanished before the prospect of a compulsory emancipation; and this slave power, that has so long strode the country like a colossus, will sink into that contempt and insignificance, both at home and abroad, into which tyrants, so mean and inhuman, always do sink, when their power is broken. They will hardly find a driver on their plantations servile enough, or fool enough, to go with them for a dissolution of the Union. ...