

# The Liberation From Textual Sovereignty: Thomas Jefferson and Lysander Spooner's Dismissal of United States Constitutional Authority

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**Abstract:** *A fundamental question debated by the representatives of the United States Constitutional Convention in 1787 was that of authority. Who shall govern? In a republic law is king; therefore the Constitution became the sovereign by the votes of 39 men who received their authorization to form such a document from a small percentage of the populace compromising the states they represented. Sixteen delegates refused to sign, while 15 others were not present. But, by what authority if any were the framers able to impel future generations to salute, obey, and confine 310 million present day Americans to the laws in the Constitution? Their disputation was both legal and philosophical as are modern day vociferations. A more philosophically radical question must be asked in regard to individuals wearied by United States constitutional coercion namely; does the constitution have any authority at all? At first glance one might resist such an inquisition as preposterous, however upon further review one finds two proponents of such thinking from the distant past, Thomas Jefferson and Lysander Spooner; one a former president of the United States and the other a lawyer and ardent abolitionist. In this article I will use Jefferson and Spooner's arguments to reexamine the question if the Constitution has any authority to oblige succeeding generations to its laws both philosophically and legally, as seen through eighteenth and nineteenth centuries understanding of natural law.*

**Keywords:** *Political Philosophy, Constitutionalism, Authority*

## 1. Introduction

A fundamental question debated by the representatives of the United States Constitutional Convention in 1787 was that of authority. Who shall govern? Emerging from the convention was a document that is both hallowed and abhorred by the people it claims supremacy over. In a republic law is king; therefore the Constitution became the sovereign by the votes of 39 men who received their authorization to form such a document from a small percentage of the populace compromising the states they represented. Sixteen delegates refused to sign, while 15 others were not present. The intention of the framers was to create a government that would ensure "the blessings of Liberty to ourselves and our Posterity." These words located in the preamble to the United States Constitution have forever covenanted domestic and foreign United States citizens to the laws therein. However, by what authority if any were the framers able to impel future generations to salute, obey, and confine 310 million present day Americans to the laws in the Constitution? Throughout United States history an American citizen's option to "opt-out" without consequence in any obligatory governmental program is virtually non-existent. In the United States, the desire for individual or collective secession whether it come in the form of draft dodgers, tax evaders, the occupy Wall-Street movement, or modern tea-partiers, are akin to the framers' ills with the crown. Their disputation was both legal and philosophical as are modern day vociferations. The Constitution continues to be the rallying cry of disenfranchised Americans, yet the Constitution is the very document law makers use to impose the mandatory laws, programs, and taxes disenfranchised Americans dispute. A more philosophically radical question must be asked in regards to individuals wearied by United States constitutional coercion namely; does the Constitution have any authority at all? At first glance one might resist such an inquisition as preposterous, however upon further review one finds two proponents of such thinking from the distant past, Thomas Jefferson and Lysander Spooner; one a former president of the United States and the other a lawyer and ardent abolitionist. Based on their arguments, the Constitution has no authority

to oblige succeeding generations to its laws both philosophically and legally, as seen through eighteenth and nineteenth centuries' understanding of natural law. [1]

## 2. Natural Rights

The signatories of the United States Constitution included Benjamin Franklin, James Madison, and Alexander Hamilton; framers fundamental to the establishment of the document. Missing from this list was one of the primary framers vacant from the convention whom inevitably would have been a major participant in forming the American philosophy of government, namely Thomas Jefferson. His absence was due to his diplomatic assignment in France, and one of his fundamental arguments of governance was not debated, that of, "Whether one generation of men has a right to bind another." Because Jefferson was not present at the convention, he was limited not only with his vote, but in presenting a philosophical viewpoint he deemed among the "fundamental principles of every government." In 1789 when Jefferson outlined his argument in a letter to James Madison, the Constitution was already voted on and signed; nevertheless Jefferson drafted in precise detail the merits of his disputation.

First among Jefferson's arguments against a generational binding Constitution reverts back to the idea of self-evident truths, language used in the Declaration of Independence of which he authored. Life, liberty, and the pursuit of happiness are intrinsically connected to Jefferson's supposition, "That the earth belongs in usufruct to the living, that the dead have neither powers nor rights over it." In other words, it is axiomatic for a free society that deceased lawmakers' dominion is buried with them, regardless of the utility of their statutes. To Jefferson, all men are born free; therefore the perpetuation of laws is in direct contradiction with the paragon of American government. Laws were meant, according to Jefferson, to decrease. [2]

In believing that laws have a "natural expiration date," Jefferson consequentially formulated his argument for constitutional expiry in economic terms. [3] Roughly one fourth of Jefferson's letter to Madison outlined a mathematical equation that concluded 19 years to be the, "Term beyond which neither the representatives of a nation nor even the whole nation itself assembled, can validly extend a debt." The rationale used in Jefferson's 19 year limit is a direct result from practical knowledge obtained in France, and the burden of debt forced onto Frenchman unborn:

But with respect to future debts; would it not be wise and just for that nation [United States] to declare in the Constitution they are forming that neither the legislature, nor the nation itself can validly contract more debt, than they may pay within their own age, or within the term of 19 years? And that all future contracts shall be deemed void as to what shall remain unpaid at the end of 19 years from their date? This would put the lenders, and the borrowers also, on their guard. By reducing too the faculty of borrowing within its natural limits, it would bridle the spirit of war, to which too free a course has been procured by the inattention of money lenders to this law of nature, that succeeding generations are not responsible for the preceding.

As of today, the sixth of September 2015, the United States national debt for defense and wars is over 586 billion dollars, it is clear the philosophy of government Jefferson envisioned would circumvent the state from occurring perpetual economic enslavement, and potential wars would more easily be eluded. [4] The 19 year usufruct also held true to a, "Perpetual Constitution, or even a perpetual law . . . Every Constitution, then, and every law, naturally expires at the end of 19 years." The thought of enforcing any law or borrowing money beyond the 19 year duration was for Jefferson an act of coercive state control based on false pretensions of natural rights. Attacking the purse enabled Jefferson to provide a logical foundation for his main disputation for perpetual jurisprudence, that of self-evident truths.

One might think after Jefferson's political life, which included Governor of Virginia and the President of the United States from 1801-1809, his philosophy of Government in regards to the Constitution would perhaps change based on empirical evidence. This however is not the case as witnessed in an 1813 letter to John Wayles Eppes, then chairman of the Committee on Ways and Means, in which Jefferson reiterates his philosophical argument presented to James Madison 24 years earlier. [5] Jefferson asks Eppes, "What is to hinder them [federal government] from creating perpetual debt . . . some societies give it an artificial continuance, for the encouragement of industry." The answer to Jefferson's inquiry is nature's law. Jefferson's understanding of natural law and the relationship between it and the Constitution considered, "Each generation as a distinct nation, with a right, by the will of its majority, to bind themselves, but none to bind the succeeding generation,

more than the inhabitants of another country.” How a country would function based on such a system of government was of no consequence because Jefferson fervently proclaimed no living individual or group of individuals composed as a “government” had a right to covenant the unborn to their individual or collective precepts. The observations of Jefferson throughout his public life reinforced his political ideology. The question of what are natural laws or rights according to the framers is essential in understanding Jefferson’s philosophy.

Jefferson’s argument is contingent upon the belief of natural rights and natural law. Without understanding eighteenth century American ideas on these two premises, one can simply dismiss Jefferson’s celebrations as lawless utopias. Philip Hamburger, Yale Law Professor and historian, outlines five cardinal components in eighteenth century American natural law cognizance. The first factor states, “Natural liberty was the undifferentiated freedom individuals had in the state of nature or the absence of government.” The first amendment is an example of this. Freedom of speech, religion, or the press could be exercised in communities where no government is found, and as such would be categorized as a natural right. To fully illustrate Hamburger’s first distinction of a natural right he explains the difference between natural rights and acquired rights. Acquired rights are those, “Existing only under civil government . . . the right of a sheriff to retain his position, notwithstanding his political views, could only be had under government and therefore was distinguished as an acquired right.” Habeas Corpus by similar logic is an acquired right, and the right of self-defense comprised a natural right. Free speech as guaranteed in the bill of rights was therefore viewed as a “civil guarantee of a natural right.”

Second, mankind’s natural rights “were understood to be subject to natural law.” Man’s ability to reason about certain rights was understood by the framers. The most inferred example of self-evident natural rights is in the golden rule, man would, “Preserve his natural liberty by voluntarily not doing to others what he would not have them do to him.” Injuring others weakened one’s own ability to preserve himself. Mankind’s ability to reason incorporated natural laws that did not require a set of drawn up statutes. Natural laws were simply understood by every human being.

Third, to protect natural liberty civil law was instituted. Members of the Constitutional Convention and the individuals they represented were willing to turn over a portion of their natural liberty to government, “In order to obtain the protection of government and its laws for the remainder.” Moreover one’s natural right to defend one’s family and property by force of arms was retained under civil government but with a caveat; only to the extent permitted by the Constitution and other civil laws. [6]

The framers also allotted certain axiomatic rights to be written into civic laws, but never intended citizens would not be able to appeal to natural rights not written into the Constitution. According to Suzanna Sherry, “The architects of our constitutional system assumed that appeals to natural law would continue despite the existence of a written Constitution.” [7] Supreme Court cases from 1789 until almost 1820 viewed cases from a natural justice angle as well as to the written Constitution. For example, Supreme Court Justice Joseph Story invalidated Virginia’s attempt to revoke legislatively an earlier legislative grant of land to the plaintiffs. By what written law was he able to invalidate Virginia’s claims? Story based his decision on, “The common law . . . the common sense of mankind and the maxims of eternal justice . . . to the principles of civil right . . . upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the Constitution of the United States.” Natural rights were not completely surrendered to the Constitution much less to future generations.

The fourth American nineteenth century understanding of civil law was a reflection of natural law. “Civil law was expected to adopt and enforce rules that approximated the constraints implied by natural law.” Put differently, civil law can only exist with implied natural laws, without the latter the former is baseless. The framers used natural law as the foundation for forming the Constitution.

Lastly, “If civil laws generally reflected natural law, and if, as noted above, natural liberty was understood to be subject to natural law, then there was no tension or inconsistency between a natural right and the civil laws regulating it.” The zeitgeist of the nineteenth century American representative, juxtaposed natural rights with civil law, and created a document contingent upon both parameters. Civil laws formed for penalizing individuals in cases of fraud and defamation could be described as, “Compatible with the natural right of free speech and press.” Again, natural law is the foundation for civil law. Civil law when not based on such

fundamentals led precisely toward what the framers feared, namely tyranny. By natural laws reflection in civil law, the framers carefully formed a document committed to the preservation of individual liberty. However, by binding future generations to the Constitution Jefferson believed it violated these five premises understood by the framers.

It must be noted that Jefferson had serious misgivings with the initial Constitution, and had he been part of the convention most likely would not have signed the initial document. Jefferson's qualms were quieted with the induction of the Bill of Rights in 1791, yet he remained ascertained to his position in regards to generational begetting of government. To those who would dismiss his argument as anarchic or ludicrous, Jefferson indicates, "At first blush it may be rallied as theoretical speculation; but examination will prove it to be solid and salutary." So convinced was Jefferson he related his inquiry to the, "Ruinous errors of this quarter of the globe [Europe], which have armed despots with means not sanctioned by nature for binding in chains their fellow-men." Jefferson pleaded with Madison to, "Turn this subject in your mind" knowing Madison's station in the United States and by doing such Jefferson's philosophy would be forced into the discussion of which he could not take part.

### 3. An Unconstitutional Constitution

Not only was Jefferson's argument not sufficiently discussed, by 1820 the reliance on natural law in the courtroom was virtually non-existent. Cases referring to natural law, or natural rights not specifically outlined in the Constitution no longer had merit, thus elevating the Constitution to the absolute authority. This dominance was largely unquestioned until 1870 when an ardent abolitionist and lawyer took Jefferson's philosophy to a more radical level, arguing the Constitution has no authority at all, thus attempting to reign in the Constitution's expanding control after the Civil War. Lysander Spooner, author of many works including, *The UnConstitutionality of Slavery, Poverty: It's Illegal Causes and Legal Cure, and A Plan for the Abolition of Slavery and to the Non-Slaveholders of the South*, produced a legal argument to the newly formed post-civil war United States of America entitled, *No Treason the Constitution of No Authority*. Spooner's legal arguments therein, provide Jefferson's philosophy with an effectual voice against hereditary compliance to outdated laws.

According to Spooner, "The Constitution has no inherent authority or obligation." His first argument is based on two factors, that of contractual and natural law. The only authority the Constitution maintains is between, "Man and man, and it does not so much as even purport to be a contract between persons now existing. It purports, at most, to be only a contract between persons living eighty years ago." Spooner uses the language of the Constitution to support these claims the framers state in the pre-amble namely, "We the people of the United States . . . secure the blessings of liberty to ourselves and our posterity." At most argues Spooner, this statement is only legally binding based on contractual agreements to those who signed the document. The phrase "we the people" means the people then living, and the phrase "our posterity" is not valid for two reasons. First, the written language in the Constitution nowhere implies the framers right, authority or power, and second they had, "No natural power or right to make it obligatory upon their children. It is not only plainly impossible, in the nature of things that they could bind their posterity, but they did not even attempt to bind them." Reverting back to Hamburger's first point on natural law, in absence of government would the framers be able to force such a contract on their future posterity let alone 310 million present day Americans? Of the five points made by Hamburger in regards to natural law, the third is the only argument the framers have in their favor namely; Americans gave up portions of their natural liberty to form the government. "To our posterity" cannot be legally binding based on contractual and natural law, argues Spooner. The Constitution therefore has no authority to any individual except to those who signed it, and those they represented. [8]

Who exactly did the signers of the Constitution represent? By present day standards, every adult regardless of education, land ownership, race, and gender are represented in the United States Congress by their elected official. Yet, when the Constitution in 1791 was adopted into law with the addition of the Bill of Rights, the only individuals allowed to participate in the voting process were property owning white males, with one exception in New Hampshire where both white male adults, and white male property owners could participate. Women, blacks, non-property owning white males in the majority of the states, and Native Americans were among those not represented in 1791; nevertheless they were expected to comply with the newly formed laws. In 1856, white males regardless of property ownership on a national level were given the right to vote. [9] In 1870, when Spooner published his argument, the ratification of the 15th amendment gave blacks the right to

vote, however women, Mexican-Americans, Asian-Americans, and Native Americans were excluded. On paper the 15th amendment gave blacks the right to vote, but in reality their representation was silenced until close to a century later with the Voting Rights Act of 1965. Representation based on voting is the American peoples' voice upon which lies the very essence of American government. Of those who signed the Constitution what percentage of the populace did they represent? [10]

In 1870, elementary to Spooner's disputation is representation; assumed consent is not viable in a republican form of government, therefore who can vote and who actually votes are essential elements in upholding the statutes of the Constitution. Spooner claims:

At the present time [1870], it is probable that not more than one-sixth of the whole population are permitted to vote. Consequently, so far as voting is concerned, the other five-sixths can have given no pledge that they will support the Constitution. Of the one-sixth that are permitted to vote, probably not more than two-thirds (about one-ninth of the whole population) have usually voted. Many never vote at all . . . . Therefore, on the ground of actual voting, it probably cannot be said that more than one-ninth or one-eighth, of the whole population are usually under any pledge to support the Constitution.

Without statistical evidence, Spooner's numbers are flawed, nevertheless he adjoins two past and present concerns in regards to representation. In Spooner's day only a certain percentage of the populace could and did vote. Modern day America with all of her progress in terms of representation continues to witness lackluster voter turnout; thereby affirming Spooner's debate of constitutional authority based on individuals who actually cast a vote in favor or against constitutional representation. One can argue Spooner would agree with C. Wright Mills that Americans, "Feel that they live in a time of big decisions; they know that they are not making any . . . there must be an elite of power." Mill's assumption is based on a group of individuals who control the economic, political, and military domain, whereas the Constitution according to Spooner reigns supreme deriving its consent for authority on the backs of less than one eighth of the populace. Only a small portion of individuals can be proven to have voluntarily approved America's monarch, therefore its authority is inconspicuous. [11]

Second to Spooner's legal argument assumes the payment of taxes to be a premise of constitutional legitimacy. Defrayal of one's money is also a false premise for assumption of constitutional authority because paying taxes cannot be proven to be voluntarily contributed, argues Spooner. The theory of the Constitution is, "That all taxes are paid voluntarily; that our government is a mutual insurance company . . . that each man makes a free and purely voluntary contract with all others who are parties to the Constitution, to pay so much money for so much protection." No doubt American citizens enjoy relative protection under the Constitution, but that can in no way prove Americans voluntary consent to such security. "The fact is that the government, like a highwayman, says to a man: 'Your money, or your life.' And many, if not most, taxes are paid under the compulsion of that threat." Because taxation is compulsory and cannot be proven to be voluntary, it is false to arrogate ones allegiance to the Constitution and the laws therein based on coercion.

Lastly, the only Constitution Spooner believes would be lawful is one of consummate voluntary agreements; because this would satisfy the merits of natural law. The government of the United States of America is, "Little less than a government of assassins. Under it, a man knows not who his tyrants are . . . the man to whom he would most naturally fly for protection, may prove an enemy, when the time of trial comes." In the case of African Americans, Native Americans, draft dodgers in Vietnam, tax evaders, the current occupiers of Wall Street, and numerous other disenfranchised Americans, Spooner's fears have become a reality. Therefore Spooner sets the stage for what he believes would be the only lawful Constitution. He affirms members of the United States, "Will consent to No Constitution, except such an one as we are neither ashamed nor afraid to sign; and we will authorize no government to do anything in our name which we are not willing to be personally responsible for." This consent must be given according to Spooner in an environment where an individual is neither disgraced nor coerced in his or her dissent or acclamation. Under a government based on such an agreement the responsibility is pinned on the individual. Everyone is contractually attached to the statutes therein agreed upon, thus fulfilling Jefferson's desires in the Declaration of Independence that, "Governments are instituted among men, deriving their just powers from the consent of the governed." This contractual Constitution would cement Jefferson's argument against a generational binding Constitution by allotting individuals the option to sign or not sign the document.

One aspect of Spooner and Jefferson's compelling argument they fail to substantiate is if residency implies consent. Obviously the Constitution did not represent every individual, but if one takes up residence or is born in a particular area of the United States, one could argue this particular individual is subject to the laws within their local without contractual agreements. Randy E. Barnett explains consent of residency this way, "Just as you are bound to obey your employer (within limits) because you consented to work at your job . . . you are bound to obey the referee (within limits) when you consented to play basketball in a league, you are bound to obey the commands of government." The Constitution is applicable in much the same way. One could always leave one's job or the basketball team and by the same logic, one could by way of migration leave the country. Barnett calls this the "love it or leave it version of consent." By the same logic, if one was to remain on the continent, one has tacitly recognized the laws of the government; therefore abidance is agreeability to the statutes of one's locality. Spooner and Jefferson make no argument with this important side of the debate, yet residential consent lacks the criteria inherent to voluntary agreements.

In the case of the employer and the referee, one has no doubt impliedly consented to conform to whatever policies and rules associated with both parties; however it is folly to assume the said participant's conformity to the Constitution is voluntary. Unlike being employed or participating in organized sports, individuals born in the United States are never asked to make an oath to sustain the Constitution, except in cases of public service and individuals immigrating to the United States. Immigrants are required to make an explicit oath, nevertheless, "Those born within the boundaries of the United States are not asked or required to take an oath promising to obey the laws." For natural born citizens perhaps residency implies consent. What would happen if a natural born citizen refused to take an oath to the Constitution; expulsion from the country, imprisonment? Herein is the false assumption by the government that individuals born within the boundaries of the United States swore allegiance to comply with the laws in the Constitution of their own volition. [12]

Another compelling argument opposing both Spooner and Jefferson consists of the essentiality for a Constitution in a democratic society. Axel P. Gosseries argues, "The fact that the object of a Constitution is so fundamental that no state, no democratic life, no distributive choices between generations can take place without having such institutional rules in place first." In other words, to even have a forum for Spooner and Jefferson's arguments, pre-conditions must first be in place for effectual democratic debate. In a community without government Spooner and Jefferson could debate until they were blue in the face, but efficacious change within the community would have no foundation. This argument however only tells an individual why we need constitutions; it does not however tell why constitutions are so inflexible. [13]

Lastly, how is one to represent the unborn without setting up some form of representation for the future? Without constitutional protections an individual is born without a birthright. Undoubtedly the framers had this in mind by the very document they created. Their intentions were to protect themselves and their "posterity" from abuses they experienced under British rule. Invoking generational guarantees may be considerably noble; however the reference to future generations in enacting questionable policies has unquestionably been abused. For example, the expulsion of Saddam Hussein was based on the premise of protecting future generations, both Iraqi and American. George W. Bush in a meeting with Tony Blair argued, "We owe it to future generations to deal with this problem, and that's what these discussions are all about." Too often in foreign and domestic policy, well intentioned presidents and legislatures unreasonably bind the living in hopes of a brighter future and consequently cripple unborn citizens with financial liabilities and losses of civil liberties. [14]

#### 4. Conclusion

The Constitution holds the highest office in the United States of America, and as such must continue to be debated. Tabloids are laced with scandals of presidential and congressional blunders, yet the Constitution fends off potential decenters akin to the Holy Bible in Ancient Rome. Thomas Jefferson and Lysander Spooner placed the blame of bad policy, coercive state control, and the destruction of natural rights not on one man, but a document signed by a few men. Jefferson was virtually silent about what might happen if the Constitution according to his 19 year plan would expire, but he arguably did so deliberately. By pinpointing in precise detail what might happen if the Constitution was to decrease or to set up a quasi-emergency Constitution, would have been another attempt to stranglehold generations unborn. Jefferson arguably would have agreed with Chief Justice Thurgood Marshall, that the Constitution the framers devised "was defective from the start." [15] Jefferson was convinced that the living must decide their fate. Lysander Spooner abhorred the idea of assumed

consent, and saw it as a violation of natural rights. Presuming that Americans are in adherence to every statute in the Constitution is an adulterated form of governmental control, and elevates the law above the individual upon which the Constitution attempts to protect. As past and present protestors in the United States aim their vociferations at presidents, politicians, judges, and corporations, the Constitution sits in the background asserting its power by playing both sides of the debate, thereby avoiding the question of whether it is a legitimate philosophical and legal sovereign.

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