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## John Coit Spooner: Defender of Presidents, by Dorothy Ganfield

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JOHN COIT SPOONER, DEFENDER OF PRESIDENTS. By Dorothy Ganfield Fowler. New York: University Publishers, Inc. 1961. Pp. ix, 463. \$6.00.

The period between the Civil War and World War I has much to offer the serious reader who seeks to understand the scope and the depth of our country, its historic goals and purposes, and the whither and the why of its future. Within half a century there had occurred a startling transformation in and of the United States. Externally, it changed into a creditor nation and a world power, if not yet a leader. Internally, the toll roads and canals had given way to the railroads, and the opening of the west created more problems than it solved. Economically the country was transformed into a nation of private giants, with empires rivalling the national and overshadowing the local. Judicially the courts had adopted the arguments of the entrepreneurs, and went even beyond the expectations of their pleaders. Legislatively the national Congress was, at the very least, beholden to the hidden persuaders, while locally the cash tinkled as it changed hands. Throughout the decades the farmer and the wage-earner fought to better themselves.

America was growing up, and as its joints lengthened and thickened there were concomitant creakings and groanings. Local and state governments had long interjected themselves in the economic affairs of men,<sup>1</sup> and into the period of which we speak the national judiciary had merely exercised a negative power whenever the national interests were threatened;<sup>2</sup> the Congress either slumbered or ignored. Whether of necessity<sup>3</sup> or design<sup>4</sup> the time was ripe, perhaps overripe, for positive leadership. The great transformation of the 19th century evolved erratically, with a pragmatic pluralism at its base. There were men who served in the transformation and some, perhaps, may even be said to have created. There was, however, no one outstandingly great man to lead his people into greener pastures, for the ship of state required too many oars and had a multiplicity of tillers.

From many pens have come interpretations of the alleged causes and the results,<sup>5</sup> and of the particular men who engaged in these events.

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1. FORKOSCH, *ANTITRUST AND THE CONSUMER* 211-232 (1956).

2. *E.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

3. *Wabash, St. L. & Pac. Ry. Co. v. Illinois*, 118 U.S. 557 (1886). See, for background, FORKOSCH, *op. cit. supra* note 1, at 189-198.

4. ALEXANDER HAMILTON, *Report on Manufacturers* in *WORKS* (1810) 3 vols.

5. *E.g.*, COMMONS AND OTHERS, *HISTORY OF LABOR IN THE UNITED STATES* (1921).

Historians and biographers have been labeled as either muckrakers<sup>6</sup> or glorifiers, so that any written portrait becomes suspect. There is a bias engendered merely by looking backward, for the average person exists in the present, wears blinders, sees through myopia, and thinks with environmental shackles (perhaps even financial grants) constricting his thoughts. It is the very few who can discard these impedimenta, and fewer still who can engage in dedicated research and writing. Even when this latter does occur there is the ultimate danger of becoming so immersed in the subject that halos or horns appear. The volume here reviewed belongs to the halo class, and it is unfortunate that so gifted a researcher and student<sup>7</sup> as Professor Fowler should have written so much of so little. This reviewer is writing as a lawyer, for lawyers, and of law. The jacket states: "It will be welcomed by every student of constitutional law . . . ." Unfortunately for the author of that blurb, here is one student of constitutional law who does not welcome the volume,<sup>8</sup> and yet, he does. For any book which brings to light unpublished papers of a United States Senator does serve a purpose, if but to make these available to others.<sup>9</sup>

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6. See volume's bibliography for references. Prof. Fowler calls "David Graham Phillips, the muckraker, [because he] claimed that the [1885 senatorial] election had been a fight between the two most important railroad systems in Wisconsin, that the Omaha crowd was the stronger, so Spooner was elected." (p. 78.) [Perhaps this writer's insertion of "because he" is not correct, but it is done to disclose that Fowler is aware of these opposing tendencies. That she is not above such an insertion is disclosed at p. 322: "Opposed to the bill were the labor organizations; they deluged Spooner with resolutions (form ones) of protest."] Phillips is apparently a muckraking "villain" to Prof. Fowler, and she rejects his accusations as false unfounded lies and unchecked repetitions. See pp. 3, 40, 78, 351-352. Why, therefore, does she repeat and give some degree of credence to his statements?

7. The "Bibliographical Notes," at pp. 397-414 are an excellent indication of the intensive and extensive research by Fowler. All biographers should be as thorough, and present their sources as here. As this is the only known biography of Senator Spooner, it must serve as the "definitive" one by default.

8. For example, the author mentions that Spooner opposed a bill which prohibited yellow-dog contracts, that it nevertheless became law, and that the Supreme Court later declared it unconstitutional, citing *Adair v. U.S.*, 208 U.S. 161, 172 (1908). But why does Prof. Fowler omit reference to the subsequent 1932 legislation which the Supreme Court later upheld? For details, see FORKOSCH, *A TREATISE ON LABOR LAW* § 171-173 (1953).

9. This reviewer does not go into the birth, growing-up, education, early life and practice, etc. periods of Senator Spooner's career. While of interest they do not aid much in the type of review given here. Of the twelve chapters, the first two record his background, three brings Spooner up to and into the Senate in 1885, with four and five recording his politicking and Senate activities. Chapter six discloses his continued politicking and his legal work during the years between the Republican defeat in Wisconsin in 1890 and return to power in 1896, and seven through twelve are, respectively, "Return to the Senate (1896-1898)," "Spokesman for the President in the Senate (1898-1901)," "Advisor on Foreign Policy (1901-1904)," "Leader of the Stalwarts Against La Follette (1902-1904)," "Last Session in Congress (1905-1907)," and "Corporation Lawyer in New York City (1907-1919)." The meaty chapters are, of course, those con-

Exactly what does the volume here do, and why is it deficient? It is supposed to give us the life of a man, which it does to an appreciable extent, although it cannot be called the definitive work upon the subject.<sup>10</sup> More importantly, this volume attempts to identify a man's place in history. That this is not a task free from dispute is evident from the conflicting statements on the jacket and in the author's preface. The author's preface states that Spooner "continually disagreed with those in authority and proclaimed economic and political ideas which at that time were considered very radical, but which since then have received more or less general acceptance."<sup>11</sup> Yet the inside front jacket quotes a New York Times obituary of 1919 which states that Spooner was "a practical and constructive statesman rather than . . . an oracle of political principles. . . ." Biographer Fowler implies Spooner's "ideas" were of considerable importance, whereas the Times implies he had little of them but was a "practical and [therefore] constructive" Senator. What did Senator Spooner accomplish?

The inside front jacket states that "Among them [the Spooner amendments and compromises] can be counted still those which modified importantly the Sherman Anti-Trust Act, the Interstate Commerce Act, and the Pure Food and Drug Act, as well as the Spooner Amendment, which enabled Theodore Roosevelt to acquire for the U.S.A. the Panama Canal Route." The major, if not only, contribution to the Sherman Act by Senator Spooner is described as "an amendment which made it possible for the government to bring into court the larger trusts."<sup>12</sup> The Spooner amendment permitted a writ of injunction to be served anywhere in the United States, thereby enabling one suit to be brought against scattered defendants instead of many suits throughout the nation. This was a procedural device, not a substantive one. In

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cerned with Spooner's work in the Senate; and these are not overly-long. Unfortunately, many pages of trivia detract from the soundness of such a work, *e.g.*, at p. 161 Fowler mentions Spooner's taste in food while on a European trip, and the dollar costs of Spooner's clothes.

10. To the present this biography certainly has more in it concerning Senator Spooner than has any other, *i.e.*, more detail, greater familiarity with papers, etc.; and does a more competent job than does any other. Still, insofar as the interplay between the Senator and his colleagues is not given in depth, there is much more to be written. The social, economic, and political aspects of the nation with which the Senator likewise contended are not explored so as to understand whatever influence he exerted upon the national structure. Too many gaps require plugging, and too much of the presently unknown is needed before Spooner himself can be really assessed. However, is this criticism not able to be levelled at practically all biographical studies?

11. P. vii.

12. "He thought the efficacious remedy against trusts would not be criminal prosecution, but the vigorous and drastic use of the writ of injunction." (p. 128). Spooner's foresight is questionable in the light of the 1914 legislation, and especially the recent criminal prosecutions against the electrical companies which ended in jail sentences.

other words, Spooner's contribution did not partake of, or contribute to, the basic "idea" behind antitrust. Exactly what did the Senator think of these antitrust "ideas"?

After his resignation in 1907 from public life, the Wisconsin Senator opened law offices in New York City. As Professor Fowler puts it, "He was anxious to make money, and was making it . . . ."<sup>13</sup> By 1915 Spooner's offices had become sufficiently large to consist of six partners, to become the recipient of much "Wall Street" business, and to give a view of the former Senator's antitrust "ideas." One of his first antitrust cases went back to happenings while Spooner was in the Senate, and when he "refused" to appear for Edward H. Harriman in the 1901-1904 events which culminated in the government's victorious Northern Securities Case. Now, however, Spooner successfully represented Harriman in the latter's refusal to answer questions of the Interstate Commerce Commission concerning his railroad stock purchases.<sup>14</sup> Shortly thereafter, at Theodore Roosevelt's instigation, the Attorney General brought suit to dissolve the connection of Harriman's Union Pacific with other railroads. The court held it to be an "illegal combination under the Sherman Anti-Trust Act."<sup>15</sup> Attorney Spooner then suggested a plan for the dissolution of the combination, which the court rejected by saying "the large stockholders might be able to acquire the shares of the small stockholders."<sup>16</sup> Another trust case of Spooner's was that involving the Hamburg-American Steamship Line in which the former Senator contended, albeit unsuccessfully, that the Sherman Antitrust Act did not apply to foreign commerce.<sup>17</sup> For this defense his estate eventually received fifty thousand dollars. Then, says Fowler,

Spooner appeared in several other cases concerning the Sherman Anti-Trust Act. In most of these he supported a narrow interpretation of the act. In one case he maintained that the purchase of futures was not illegal, for the Sherman Act was not an instrument to curb the profits of an individual. The court, however, declared that an attempt to corner the cotton market was an illegal combination in restraint of trade, since its object had been to control and enhance the price of cotton and that therefore it had affected interstate commerce. In another case Spooner denounced the criminal penalties provided for in the

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13. P. 374.

14. P. 381.

15. P. 382.

16. P. 383.

17. Pp. 383-384.

Sherman Act. He said that he had always disapproved of them, since the aim of the act was to punish conspiracies on a common-law basis. In this case his viewpoint was accepted by the court. In one case, however, Spooner tried to obtain a broader interpretation of the act. He contended that the system whereby a company holding a patent required licensees to join with other licensees in a combination or pool to control prices and output was in violation of the Sherman Act. The court, however, declared that, although the patented articles were a monopoly, they were not articles of trade or commerce in the meaning of the act because, since they were patented, they were not articles in connection with which people were entitled to freedom of trade.<sup>18</sup>

Finally, on antitrust legislation, Spooner's views of President Wilson's "five brothers" proposals was to "call them five pups. If they are made into law, what will be the situation? The business of the United States, — yours and everybody elses' — will be in a strait jacket."<sup>19</sup>

What can we say of Spooner's "ideas" on antitrust? From the above excerpts, he blew as the wind dictated, and a financial wind at that. He changed from a narrower to a broader interpretation. He defended when he could, and he attacked when advisable. His "practical" bent in advancing the jurisdictional amendment to the Sherman Act is admittedly admirable and adequate, but it does not raise Spooner to the level of Sherman, Hoar, Kenna, George, and the others—not by a long shot.

We turn next to the Interstate Commerce Commission Act of 1887 and Spooner's amendments and compromises thereto, as mentioned so reverently by the blurb on the inside front jacket. Exactly what did Spooner do "which modified importantly" this statute? According to Fowler, next to nothing. Spooner did propose an amendment to the proposed bill, which amendment the Senate adopted; but the conference bill "reversed the procedure" on the long and short haul discrimination by the railroads<sup>20</sup> and this eventually became the enacted clause.<sup>21</sup> In

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18. Pp. 384-385. It should be noted, however, that Spooner's "broader interpretation" is the one accepted today. See, e.g., Forkosch, *Economics of American Patent Law*, N.Y.U.L.Q. REV. 157, 406 (1940), and Forkosch, *Licensee Estoppel in Patent Law*, 20 TEMPLE L.Q. 515 (1950).

19. Pp. 385-386.

20. P. 88.

21. Spooner opposed the "absolute prohibition" of the Cullom Senate bill which outlawed "charging more for a short haul than a long haul under any circumstances." (p. 87.) His amendment gave the Commission power to prohibit such discrimination, provided, the agency did not use the power to deprive a community of its competitive advantages.

other words, Spooner's accomplishment concerned a procedural, and not substantive, aspect of the Act; and even then the amendment merely sought to soften a substantive prohibition rather than to propose anything new.<sup>22</sup>

What of the Pure Food and Drug Act, which Spooner is likewise alleged to have "modified importantly"? Fowler couples a discussion of the oleomargarine bill (color and tax) with the pure food and drug bill. As to the former, she writes that Spooner's successful advocacy was a special-interest one, spearheaded by lobbies, and opposed by labor. He "defended the constitutionality of the bill and declared that without a federal law it was almost impossible for the states that had laws regulating the sale of oleomargarine (there were thirty-two of them) to enforce their laws."<sup>23</sup> As to the pure food and drug bill, Fowler writes that Spooner opposed it with vigor. Generally, Spooner believed that "the states could deal with that problem more effectively than the federal government and that Congress was passing too many laws paternalistic in character."<sup>24</sup> Specifically, Spooner insisted that the words "knowingly" and "willfully" be inserted in the bill. In other words, when the Senator from the dairy state of Wisconsin desired an oleo bill, the states were ineffective and needed federal help. With regard to a pure food and drug bill, however, the states were effective and did not need federal help. The Senator's specific objections to the latter bill were complied with and the bill finally became law against the Senator's general wishes. "That [bill]," writes Fowler, "and the meat inspection bill . . . were revolutionary in that they marked the first major excursion of the federal government into the field of protection of the health of the citizens, thereby encroaching on the police powers of the states."<sup>25</sup> So that in this "revolutionary" area we find Spooner supporting and getting enacted what later was denounced and reversed (the oleo bill), and opposing what was later still further extended and enforced (the pure food and drug bill). From a legal point of view, the addition of "knowingly" to the pure food and drug bill did strengthen it, and to this degree Spooner deserves credit. How much discredit, however, should he otherwise receive in this area?

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The conference reversed this procedure by forbidding the discrimination but giving the Commission power to grant exceptions. See pp. 87-88.

22. Fowler does write (p. 89, n. 67) that Spooner suggested two measures during the 50th and 51st Congresses, one procedural and the other substantive, to "give the I.C.C. control of telegraph companies." Both "were included in the Mann-Elkins Act of 1910."

23. Pp. 332-333.

24. P. 331.

25. Pp. 334-335.

How did Senator Spooner otherwise fare in Congress, and what else did he do? Obviously a reviewer cannot recount the details of the many years a Senator serves, nor can much more than a "once-over-lightly" effort be made. The preceding details are not completely representative of Senator Spooner's views and conduct. Professor Fowler does justice to her biographee in pointing out that one of Spooner's first amendments, rejected by the Senate Committee on Public Lands but adopted on the floor by a vote of 33 to 13, "was designed to protect not the rights of his client but those of his adversary"<sup>26</sup> in the courts. And while she quotes from President Roosevelt's comments to Spooner, *e.g.*, "you were the biggest man around,"<sup>27</sup> and "By George, I congratulate myself and the country that you are in the Senate,"<sup>28</sup> she also writes that he opposed the President in defending the rights and privileges of the Senate.<sup>29</sup> Spooner was indeed a member of "The Four," *i.e.*, Senators Aldrich, Allison, Platt and Spooner, who dominated the Senate; but his contribution, as Albert Beveridge noted, consisted in being "the spokesman who sallied forth in the shining armor of his genius when the occasion called for a defense of the machine."<sup>30</sup>

"Which was the real Spooner? Was he the great statesman his admirers called him or one of the 'enemies of the Republic,' as the muck-rakers dubbed him?"<sup>31</sup> So queries Professor Fowler at the outset of her volume. Her question is self-answered, for her volume becomes a brief for "the great statesman" concept. To this reviewer the Senator was neither one nor the other. As the pages of this biography disclose, Spooner was average. The unknown Senator from Wisconsin was a good, not great, legislator; an excellent lawyer and tactician, but in company with many others; a conservative Republican in a Senate of like-minded individuals; a hard fighter and a shrewd politician who won but also lost. In other words, Spooner cannot be denigrated, but neither can he be exalted. Even when such a distinguished author attempts the impossible, her effort must of necessity fall short of its mark. As an-

26. P. 82.

27. P. 282.

28. P. 283. However, she also points out that Roosevelt's words might be construed as "plea or flattery." (p. 282.) See also p. 309.

29. Pp. 292-293. How did Spooner fare locally? It suffices to remark that he was a bitter opponent (enemy?) of La Follette, and that by 1902 "Relations between the two . . . had become increasingly bitter. It was now a fight to the finish." (p. 300.) In other words, a disjunctive "either-or" had materialized, and history records that the La Follette forces ultimately won, *e.g.*, see pp. 311, 312-13, and 317. The Governor became a U.S. Senator in 1905 (being sworn in on January 4, 1906, escorted by Spooner) with Spooner retiring in 1907 and opening law offices in New York.

30. Pp. 213-214.

31. P. 4.

other biographical chapter in the turn of the century, however, and for further illuminating the shadows behind us, the volume is invaluable. Unquestionably well-written and organized, it is good reading for the lawyer, the historian, the economist, and the politician—in other words, for all of us.

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