AMERICAN POLITICAL THOUGHT
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Supplementary Material

Chapter 5: The Jacksonian Era – Democracy and Liberty

Lysander Spooner, **An Essay on the Trial by Jury** (1852)[1]

Lysander Spooner was raised on a small farm in Massachusetts and was trained as a lawyer. His legal practice was not particularly successful, and he spent part of his time challenging state education and licensing requirements for professionals as an unwarranted interference with the ability of the less-well-off to pursue a career. He then questioned the federal government's postal monopoly and started his own mail delivery business, but the government eventually forced him to shut it down. After that, he dedicated most of his time to his extreme Jeffersonian writings. His greatest fame came as an abolitionist. Unlike such abolitionists as William Lloyd Garrison, Spooner contended that slavery was inconsistent with the U.S. Constitution, an argument that won over Frederick Douglass. His economic views left him at odds with many of the former Whigs who created the Republican Party, however. He found himself further isolated during the Civil War, which he denounced as an act of imperialism. For him, the same natural-rights principles supported both secession and free labor. His disagreements with American actions during the war and Reconstruction fueled further radicalism in his own views, and he spent his last years writing in anarchist intellectual circles.

In the aftermath of the passage of the federal Fugitive Slave Act of 1850, many abolitionists were exploring the appropriate means of resistance. In that environment, Spooner offered his own argument in defense of the "right of juries to judge the justice of laws" and the duty of jury nullification when the state attempted to prosecute someone for violating an unjust or oppressive law. If juries were to serve their primary function of being "a palladium of liberty" and "a barrier against the tyranny and oppression of government" rather than "mere tools in its hands," then they must be willing to act as a legal check enforcing constitutional "limitations imposed upon the majority."

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It is this power of vetoing all partial and oppressive legislation, and of restricting the government to the maintenance of such laws as the *whole*, or substantially the whole, people *are agreed in*, that makes the trial by jury "the palladium of liberty." Without this power it would never have deserved that name.

The will, or the pretended will, of the majority, is the last lurking place of tyranny at the present day. The dogma, that certain individuals and families have a divine appointment to govern the rest of mankind, is fast giving place to the one that the larger number have a right to govern the smaller; a dogma, which may, or may not, be less oppressive in its practical operation, but which certainly is no less false or tyrannical in principle, than the one it is so rapidly supplanting. Obviously there is nothing in the nature of majorities, that insures justice at their hands. They have the same passions as minorities, and they have no qualities whatever that should be expected to prevent them from practicing the same tyranny as minorities, if they think it will be for their interest to do so.

[1] Excerpt taken from Lysander Spooner, *An Essay on the Trial by Jury* (Boston, MA: John P. Jewett & Company, 1852).

There is no particle of truth in the notion that the majority have a *right* to rule, or to exercise arbitrary power over, the minority, simply because the former are more numerous than the latter. Two men have no more natural right to rule one, than one has to rule two. Any single man, or any body of men, many or few, have a natural right to maintain justice for themselves, and for any others who may need their assistance against the injustice of any and all other men, without regard to their numbers; and majorities have no right to do any more than this. The relative numbers of the opposing parties have nothing to do with the question of right. And no more tyrannical principle was ever avowed, than that the will of the majority ought to have the force of law, without regard to its justice; or, what is the same thing, that the will of the majority ought always to be presumed to be in accordance with justice. Such a doctrine is only another form of the doctrine that might makes right.

When *two* men meet *one* upon the highway, or in the wilderness, have they a right to dispose of his life, liberty, or property at their pleasure, simply because they are the more numerous party? Or is he bound to submit to lose his life, liberty, or property, if they demand it, merely because he is the less numerous party? Or, because they are more numerous than he, is he bound to presume that they are governed only by superior wisdom, and the principles of justice, and by no selfish passion that can lead them to do him a wrong? Yet this is the principle, which it is claimed should govern men in all their civil relations to each other. Mankind fall in company with each other on the highway or in the wilderness of life, and it is claimed that the more numerous party, simply by virtue of their superior numbers, have the right arbitrarily to dispose of the life, liberty, and property of the minority; and that the minority are bound, by reason of their inferior numbers, to practice abject submission, and consent to hold their natural rights,—any, all, or none, as the case may be,—at the mere will and pleasure of the majority; as if all a man's natural rights expired, or were suspended by the operation of a paramount law, the moment he came into the presence of superior numbers.

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If it be said that the majority should be allowed to rule, not because they are stronger than the minority, but because their superior numbers furnish a *probability* that they are in the right; one answer is, that the lives, liberties, and properties of men are too valuable to them, and the natural presumptions are too strong in their favor, to justify the destruction of them by their fellow-men on a mere balancing of probabilities, *or on any ground whatever short of certainty beyond a reasonable doubt.* This last is the moral rule universally recognized to be binding upon single individuals. And in the forum of conscience the same rule is equally binding upon governments, for governments are mere associations of individuals. This is the rule on which the trial by jury is based. And it is plainly the only rule that ought to induce a man to submit his rights to the adjudication of his fellow-men, or dissuade him from a forcible defense of them.

Another answer is, that if two opposing parties could be supposed to have no personal interests or passions involved, to warp their judgments, or corrupt their motives, the fact that one of the parties was more numerous than the other, (a fact that leaves the comparative intellectual competency of the two parties entirely out of consideration,) might, perhaps, furnish a slight, but at best only a very slight, probability that such party was on the side of justice. But when it is considered that the parties are liable to differ in their intellectual capacities, and that one, or the other, or both, are undoubtedly under the influence of such passions as rivalry, hatred, avarice, and ambition,—passions that are nearly certain to pervert their judgments, and very likely to corrupt their motives, all probabilities founded upon a mere numerical majority, in one party, or the other, vanish at once; and the decision of the majority becomes, to all practical purposes, a mere decision of chance. And to dispose of men's properties, liberties, and lives, by the mere process of enumerating such parties, is not only as palpable gambling as was ever practiced, but it is also the most atrocious that was ever practiced, except in matters of government. And where government is instituted on this principle, (as in the United States, for example,) the nation is at once converted into one great gambling establishment; where all the rights of men are the stakes; a

few bold bad men throw the dice (dice loaded with all the hopes, fears, interests, and passions which rage in the breasts of ambitious and desperate men,) and all the people, from the interests they have depending, become enlisted, excited, agitated, and generally corrupted, by the hazards of the game.

The trial by jury disavows the majority principle altogether; and proceeds upon the ground that every man should be presumed to be entitled to life, liberty, and such property as he has in his possession; and that the government should lay its hand upon none of them, (except for the purpose of bringing them before a tribunal for adjudication,) unless it be first ascertained, *beyond a reasonable doubt*, in every individual case, that justice requires it.

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The difference, in short, between the two systems, is this. The trial by jury protects person and property, inviolate to their possessors, from the hand of the law, unless *justice, beyond a reasonable doubt,* require them to be taken. The majority principle takes person and property from their possessors, at the mere arbitrary will of a majority, who are liable and likely to be influenced, in taking them, by motives of oppression, avarice, and ambition.

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Again, the doctrine that the minority ought to submit to the will of the majority, proceeds, not upon the principle that government is formed by voluntary association, and for an *agreed purpose*, on the part of all who contribute to its support, but upon the presumption that all government must be practically a state of war and plunder between opposing parties; and that in order to save blood, and prevent mutual extermination, the parties come to an agreement that they will count their respective numbers periodically, and the one party shall then be permitted quietly to rule and plunder, (restrained only by their own discretion,) and the other submit quietly to be ruled and plundered, until the time of the next enumeration.

Such an agreement may possibly be wiser than unceasing and deadly conflict; it nevertheless partakes too much of the ludicrous to deserve to be seriously considered as an expedient for the maintenance of civil society. It would certainly seem that mankind might agree upon a cessation of hostilities, upon more rational and equitable terms than that of unconditional submission on the part of the less numerous body. Unconditional submission is usually the last act of one who confesses himself subdued and enslaved. How anyone ever came to imagine that condition to be one of freedom, has never been explained. And as for the system being adapted to the maintenance of justice among men, it is a mystery that any human mind could ever have been visited with an insanity wild enough to originate the idea.

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It is indispensable to a "*free* government," (in the political sense of that term,) that the minority, the weaker party, have a veto upon the acts of the majority. Political liberty is liberty for the *weaker party* in a nation. It is only the weaker party that lose their liberties, when a government becomes oppressive. The stronger party, in all governments, are free by virtue of their superior strength. They never oppress themselves.

Legislation is the work of this stronger party; and if, in addition to the sole power of legislating, they have the sole power of determining what legislation shall be enforced, they have all power in their hands, and the weaker party are the subjects of an absolute government.

Unless the weaker party have a veto, either upon the making, or the enforcement of laws, they have no power whatever in the government, and can of course have no liberties except such as the stronger party, in their arbitrary discretion, see fit to permit them to enjoy.

In England and the United States, the trial by jury is the only institution that gives the weaker party any veto upon the power of the stronger. Consequently it is the only institution, that gives them any effective voice in the government, or any guaranty against oppression.

Suffrage, however free, is of no avail for this purpose; because the suffrage of the minority is overborne by the suffrage of the majority, and is thus rendered powerless for purposes of legislation. The responsibility of officers can be made of no avail, because they are responsible only to the majority. The minority, therefore, are wholly without rights in the government, wholly at the mercy of the majority, unless, through the trial by jury, they have a veto upon such legislation as they think unjust.

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There is still another reason why the weaker party, or the minority, should have a veto upon all legislation which they disapprove. *That reason is, that that is the only means by which the government can be kept within the limits of the contract, compact, or constitution, by which the whole people agree to establish government.* If the majority were allowed to interpret the compact for themselves, and enforce it according to their own interpretation, they would, of course, make it authorize them to do whatever they wish to do.

The theory of free government is that it is formed by the voluntary contract of the people individually with each other. This is the theory, (although it is not, as it ought to be, the fact,) in all the governments in the United States, as also in the government of England. The theory assumes that each man, who is a party to the government, and contributes to its support, has individually and freely consented to it. Otherwise the government would have no right to tax him for its support,—for taxation without consent is robbery. This theory, then, necessarily supposes that this government, which is formed by the free consent of all, has no powers except such as *all* the parties to it have individually agreed that it shall have: and especially that it has no power to pass any laws, except such as *all* the parties have agreed that it may pass.

This theory supposes that there may be certain laws that will be beneficial to *all*,—so beneficial that *all* consent to be taxed for their maintenance. For the maintenance of these specific laws, in which all are interested, all associate. And they associate for the maintenance of those laws *only*, in which *all* are interested. It would be absurd to suppose that all would associate, and consent to be taxed, for purposes which were beneficial only to a part; and especially for purposes that were injurious to any. A government of the whole, therefore, can have no powers except such as *all* the parties consent that it may have. It can do nothing except what *all* have consented that it may do. And if any portion of the people,—no matter how large their number, if it be less than the whole,—desire a government for any purposes other than those that are common to all, and desired by all, they must form a separate association for those purposes. They have no right,—by perverting this government of the whole, to the accomplishment of purposes desired only by a part,—to compel any one to contribute to purposes that are either useless or injurious to himself.

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But it will, perhaps, be said that if the minority can defeat the will of the majority, then the minority *rule* the majority. But this is not true in any unjust sense. The minority enact no laws of their own. They simply refuse their assent to such laws of the majority as they do not approve. The minority assume no authority over the majority; they simply defend themselves. They do not interfere with the right of the majority to seek their own happiness in their own way, so long as they (the majority) do not interfere with the minority. They claim simply not to be oppressed, and not to be compelled to assist in doing anything which they do not approve. They say to the majority, "We will unite with you, if you desire it, for the accomplishment of all those purposes, in which we have a common interest with you. You can certainly expect us to do nothing more. If you do not choose to associate with us on those terms, there must be two separate associations. You must associate for the accomplishment of your purposes; we for the accomplishment of ours."

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But, it may be asked, how can the minority be trusted to enforce even such legislation as is equal and just? The answer is, that they are as reliable for that purpose as are the majority; they are as

much presumed to have associated, and are as likely to have associated, for that object, as are the majority; and they have as much interest in such legislation as have the majority. They have even more interest in it; for, being the weaker party, they must rely on it for their security,—having no other security on which they can rely. . . .

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That the limits, within which legislation would, by this process, be confined, would be exceedingly narrow, in comparison with those it at present occupies, there can be no doubt. All monopolies, all special privileges, all sumptuary laws, all restraints upon any traffic, bargain, or contract, that was naturally lawful, all restraints upon men's natural rights, the whole catalogue of *mala prohibita*, and all taxation to which the taxed parties had not individually, severally, and freely consented, would be at an end; because all such legislation implies a violation of the rights of a greater or less minority. This minority would disregard, trample upon, or resist, the execution of such legislation, and then throw themselves upon a jury of the whole people for justification and protection. In this way all legislation would be nullified, except the legislation of that general nature which impartially protected the rights, and subserved the interests, of all. The only legislation that could be sustained, would probably be such as tended directly to the maintenance of justice and liberty; such, for example, as should contribute to the enforcement of contracts, the protection of property, and the prevention and punishment of acts intrinsically criminal. In short, government in practice would be brought to the necessity of a strict adherence to natural law, and natural justice, instead of being, as it now is, a great battle, in which avarice and ambition are constantly fighting for and obtaining advantages over the natural rights of mankind.