

Give Up the Struggle Pt. I

by David Westling Revised June 2025

What kind of person is still of a mind to sit tight and let the already existing mechanism function unimpeded? This cohort might include those who have been bitten by various radical doctrines and wounded in the process in falling out of the frying pan and into the fire. I ask these once-bitten, twice-shy individuals to leave off thinking about the various failures of the more radical initiatives (read Communism, anarcho-syndicalism, the Jacobins, *Enrages* etc. etc.) which strutted for their hour on stage and then were heard from no more. These attempts failed, but not entirely. It is increasingly urgent now to focus on the import of this moment and what it requires. From the liberal's perspective it still seems to make sense to retreat into a form of wide-spectrum tolerance which is expressed in the bromide "whatever works for you", for it is difficult to defend the notion, once it is shorn of its connection to the Godhead, of taking a firm stand, to draw a red line and say, no further, since our suspicions become more and more confirmed every day that that *there is no abstract standard of evaluation that universally applies*. Consequently, we are reduced to a form of psychic dead reckoning. The stars are now forever occluded from our already enfeebled sight. This form of intellectual reckoning that depends on a sightline to the fixed stars in the Firmament, crystallized as the recourse to principles, precepts, dispassionately applied logical formulae, in short, the *will to objectivity*, opens up its own panoply of problems.

The big big blow of course to liberal progressivism was the election of Donald Trump to the American Presidency. Now the left-leaning liberals run around like chickens with their heads cut off and shout to the heavens, oh so ineffectually, "How did we get into this mess?" It should be obvious. "Democracy Can Plant the Seeds of its Own Destruction" as Thomas B. Edsall (*NYT* Oct 19, 2017), puts it in an article tracing the rise of Donald Trump and the progressive coarsening of our national dialogue. PoliSci prof at DePaul University, David Lay Williams, subsequently published a piece in the *Times* (dated June 7, 2019) called "Trump has made my political science students skeptical—of the Constitution". He has the good sense to use the Federalist Papers as a datum for his critique of our cherished political system. As in Williams' article, why not begin with Federalist 1? Here already the danger of demagoguery is broached by Alexander Hamilton, who acknowledges that the system proposed for the nascent US could constitute an irresistible encouragement to those who "begin their careers by paying an obsequious court to the people; commencing demagogues, and ending tyrants". We see such potential fulfilled in the rise of figures such as Donald Trump. He, of

course, is not the first of such figures in the US. The most prominent example besides our current Führer—I mean, President, has to be Joseph McCarthy, Senator from Wisconsin, who held that office for ten long years, from 1947 to 1957. Ah, those were the days. Huey Long (Governor of Louisiana 1928-32, Senator from Louisiana 1932-35) whose regime, according to the historian David Kennedy, was “the closest thing to a dictatorship America has ever known,” comes next to mind. And then there is the case of Benjamin Ryan Tillman, Governor of South Carolina and US Senator, who advocated black lynchings from the floor of the US Senate and was instrumental in disenfranchising blacks in SC for fifty years, all the way up to the Civil Rights Act of 1964, twenty years after his death. All this leaves us with the growing belief that the American system is, despite the concerted attempt at checks and balances, highly susceptible to manipulation by all manner of snake oil salesmen. It is almost as if P.T. Barnum was in on the creation of the Constitution. But then again, in a sense, he *was*.

One might at this juncture commend the wisdom of the Fathers in making this a republic and not a democracy, for this surely undercuts the tendencies of “pure democracies” to churn out one demagogue after another, except it didn’t work. Republicanism, in its instantiation as representative government, has served to distance the citizen a step further, as contrasted with, for example, Republican Athens, from participation in the affairs of state. The already initially implausible assertion by the Fathers that the representative structures in government will tend to encourage the best and brightest to serve puts its faith in the progressive instincts of the electorate, as “Publius” in Federalist 10 (in this case, James Madison) tries to argue, but has history borne out this belief?

Williams then moves to Federalist 55, where Publius attempts to demonstrate how the constitution will be able to prevent corruption due to the existence of the several branches of government. But it is clear now that the Executive Branch has been fashioned in such a way that it conserves the trump cards over the other two branches. Let us look at the now infamous Justice Department directive, by all appearances based in the principles of orthodox constitutional law, that stipulates that the President, while in office, cannot be charged with a crime. It would be difficult to argue for balance among the branches if it is indeed the case that the President cannot be charged with a crime while in office. The original discussion is contained in Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, “Re: Amiability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office (Sept. 24, 1973) (aka the “OLC Memo”). I will be referencing the Oct 16, 2000 commentary on this document contained in Opinions of the Office of Legal Counsel, Volume 24, by Randolph D.

Moss, Assistant Attorney General, OLC, itself titled, “A Sitting President’s Amenability to Indictment and Criminal Prosecution,” with its succinct subheading “The indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the Executive Branch to perform its constitutionally assigned functions.” After examining other possible reasons that the President cannot be indicted while in office, which are rejected, such as “whether an immunity of the President from criminal proceedings can be justified on...the consideration that the President’s subjection to the jurisdiction of the courts would be inconsistent with his position as head of the Executive Branch,” the 1973 memo does indeed argue that the powers of the Executive Branch as outlined in the US Constitution requires that the President, and only the President, remain immune to prosecution while in office because the Executive Branch must be able to perform its constitutionally assigned functions without impediment. It “does not confer any immunity upon the members of Congress, but rather limits the complete immunity from judicial proceedings which they otherwise would enjoy as members of a branch co-equal with the judiciary. *Thus, in the absence of a specific textual provision withdrawing it, the President would enjoy absolute immunity*” [italics mine—dw]. “In addition, the textual silence regarding the existence of a presidential immunity from criminal proceedings may merely reflect the fact that it ‘may have been too well accepted to need constitutional mention (by analogy to the English Crown), and that the innovative provision was the specified process of impeachment extending even to the President.’ (Need I comment here that this assurance of redress has been undercut twice in recent years?) ‘Finally, the historical evidence bearing on whether or not an implicit presidential immunity from judicial process was thought to exist at the time of the Founding was ultimately ‘not conclusive.’” This brings us to the assertion contained in the subheading of the 2000 examination of the 1973 Memo, and the brief submitted two weeks after the original Memo by Robert Bork, Solicitor General, in the SG Brief of Oct 5, 1973, repeated its determination that the Framers assumed “that the nation’s Chief Executive, responsible as no other single officer is for the affairs of the United States, would not be taken from duties that only he can perform unless and until it is determined that he is to be shorn of those duties by the Senate.’ A proper understanding of the constitutional structure reflects this shared assumption; in this regard it is ‘noteworthy that the President is the only officer of government for whose temporary disability the Constitution provides procedure to qualify a replacement.’ This provision constituted a textual recognition ‘that the President is the only officer of government for whose temporary disability while in office incapacitates an entire branch of government.’”

Now, to me it does look like this is indeed the intention of the Framers and that Robert Bork did not misinterpret them. It is at this juncture that one might be

reminded of the chilling pronouncement by Thomas Hobbes, author of the *Leviathan*: “Power, not truth, makes the law.”

And there is another, arguably even more refractory obstacle: the extreme difficulty in effecting change within the constitutional framework. 'Publius' addresses this concern in Federalist 49. Relative ease in the amendment process, while addressing perhaps legitimate concerns in the populace against the excesses of government, would nevertheless “deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability.” The legitimacy of this assumption, however, presupposes that the system of checks and balances in the tripartite system of government continuously proves viable. If it does not, this stability easily segues into tyranny. After discussing Federalist 49, Williams offers the following observation: “Americans have been working for well over two centuries to build that “veneration” that successful governments require—yet Trump is eroding it. His election and subsequent behavior is diminishing respect for the entire system the Framers created. And once people lose faith in the constitutional order, politics can, as Publius suggested, spiral out of control.” The examples of abuse are piling up, and it becomes harder and harder to dismiss all these examples as just bad elements in a basically good system.

Leaving aside the argument that Trump is as much a symptom as a cause of our present predicament, indeed it has been apparent almost since the beginning of the Republic that there are inherent flaws in the American political system which are sufficiently grave to cause the American experiment to founder. This set of problems is examined in writings by Henry D. Thoreau, Alexis de Tocqueville, and H. L. Mencken, to cite three salient examples. Thoreau’s “Civil Disobedience” of 1849 points out that, among other things, it is folly to rely on aggregate will in all matters not subject to what he calls “expediency” in charting the course of policy:

After all, the practical reason why, when the power is once in the hands of the people, a majority are permitted, and for a long period continue, to rule is not because they are most likely to be in the right, nor because this seems fairest to the minority, but because they are physically the strongest. But a government in which the majority rule in all cases cannot be based on justice, even as far as men understand it. Can there not be a government in which majorities do not virtually decide right and wrong, but conscience? - in which majorities decide only those questions to which the rule of expediency is applicable? Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislation? Why has every man a conscience, then? I

think that we should be men first, and subjects afterward. It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have a right to assume is to do at any time what I think right. It is truly enough said that a corporation has no conscience; but a corporation of conscientious men is a corporation with a conscience. Law never made men a whit more just; and, by means of their respect for it, even the well-disposed are daily made the agents of injustice. A common and natural result of an undue respect for law is, that you may see a file of soldiers, colonel, captain, corporal, privates, powder-monkeys, and all, marching in admirable order over hill and dale to the wars, against their wills, ay, against their common sense and consciences, which makes it very steep marching indeed, and produces a palpitation of the heart. They have no doubt that it is a damnable business in which they are concerned; they are all peaceably inclined. Now, what are they? Men at all? or small movable forts and magazines, at the service of some unscrupulous man in power?

Men first, and subjects afterward. Is a man anything more than a movable fort and magazine, at the service of some unscrupulous power? But the liberal regime, in its heart of hearts, does not admit of such a thing as a man who acts only according to his own conscience, and this condition exposes one of the principal flaws in the liberal order: the unstable status of the citizen/subject, which I discuss further on.

Mencken's "The Disease of Democracy" is even more pointed in its criticism of this hallowed concept of popular self-rule. "There is first, the mob, theoretically and in fact the ultimate judge of all ideas and the source of all power. There is, second, the camorra of self-seeking minorities, each seeking to inflame, delude and victimize it: The political process thus becomes a mere battle of rival rogues." And, examining the democratic process from a relational perspective, Mencken offers the following:

There is the art of the demagogue, and there is the art of what may be called, by a shotgun marriage of Latin and Greek, the demaslate. They are complementary, and both of them are degrading to their practitioners. The demagogue is one who preaches doctrines he knows to be untrue to men he knows to be idiots. The demaslate is one who listens to what these idiots have to say and then pretends that he believes it himself. Every man who seeks elective office under democracy has to be either the one thing or the other and most men have to be both. The whole process is one of false pretences and ignoble concealments. No educated man stating plainly the elementary notions that every educated man holds about the matters that principally concern government, could be elected to office in a democratic state, save perhaps by a miracle. His frankness would arouse fears, and those fears would run against him; it is his business to arouse fears that will run in favour of him. Worse, he must not only consider the weaknesses of the

mob, but also the prejudices of the minorities that prey upon it. Some of these minorities have developed a highly efficient technique of intimidation. They not only know how to arouse the fears of the mob; they also know how to awaken its envy, its dislike of privilege, its hatred of its betters.

Now we are getting to the heart of the matter. What is the demagogue without his or her complement, the duped mob? It's a mere bromide to assert that the demagogue is created from the mind and soul of the mob. Thoreau would maintain that brute force as embodied in sheer number becomes the principal determinant in the course of human events. And so it is *the people*, or some significant faction of it, that lies at the heart of democracy's problem. From this vantage point, one sees that the warpings we are involved with today are part and parcel of the liberal project as envisaged by Locke, Mill and Jefferson.

Perhaps the most well-known critique of democracy and the American political system in particular is that of Alexis de Tocqueville, whose *Democracy in America* of 1835 is examined in scholarly circles as much or more than the Federalist Papers themselves. Chapter XV on the "Tyranny of the Majority" is particularly eye-opening, as any American undergraduate political science student knows. He tells a story of a "striking instance of the excesses that may be occasioned by the despotism of the majority" in American society. It was in Baltimore during the War of 1812.

At the time, the war was very popular in Baltimore. A newspaper that had taken the other side excited, by its opposition, the indignation of the inhabitants. The mob assembled, broke the printing-presses, and attacked the house of the editors. The militia was called out, but did not obey the call, and the only means of saving the wretches who were threatened by the frenzy of the mob was to throw them into prison as common malefactors. But even this precaution was ineffectual; the mob collected again during the night; the magistrates again made a vain attempt to call out the militia; the prison was forced, one of the newspaper editors was killed upon the spot, and the others were left for dead. The guilty parties, when they were brought to trial, were acquitted by the jury.

This state of affairs, then, the tyranny of the majority, a supine Congress, and the tendency to sclerosis, creates a witches' brew of malady and mendacity which, by some miracle, had not, up to the beginning of the second decade of the twenty-first century, crossed the line into tyranny in the US on a nationwide scale. Is there any reason to be confident that this is still true? Surely, we do not live in a world where such forces as the Nazi Gestapo or the absolute control of the individual that obtains in North Korea hold sway here. But such things do not happen all at once. There are forces which retard this development in America, and they are far from

negligible. Unfortunately these forces remain disordered, even incoherent. The forces of political absolutism are on the march and gaining by leaps and bounds. And it is just the sclerosis inherent in our Constitution, incorporated by design, which does so much to make people sit tight and let the system take us where it may. The standard wisdom holds sway—we must leave it to the electoral process to work things out. This while we move with increasing speed towards something profoundly unfree that will be for all intents and purposes irreversible.

I will say it again: the crisis is not just in our constitution. It is a crisis of liberalism itself. It is a crisis of law, not merely unjust laws but of the questionable nature of the law as an institution. Power, not truth, makes the law. Justice is tipped in the interest of the stronger. These old chestnuts take on magnified significance in our era where the imperial presidency threatens to shake free from the increasingly flimsy bonds that still hold it. A critique of liberalism from a perspective outside of socialism as it is typically construed and from capitalism as well becomes not a mere desideratum but a necessity.

A signal problem as viewed from within the confines of the liberal ethos is that of the status of the individual that exists within its purview. Specifically I call the reader's attention to the notion of the *citizen*, and of *nationhood*. 'Citizen' is a highly labile concept and tends to retain the cultural atavism of the law in general, devolving into the notion of the *subject*. Before 1787, even in America, "citizen" and "subject" were treated as synonyms. After the enactment of the Federal Constitution of 1787 the usage of "subject" in this context was discontinued, resulting from an emerging political philosophy which emphatically rejected any tinge of colonialism. As Maximilian Koessler, in his essay "'Subject', 'Citizen', 'National' and 'Permanent Allegiance'" puts it, "The term 'subject' was brushed aside as a leftover from the feudal law, where it referred to the vassals of a lord, bound by the duty of allegiance to respect him as their master. However, one of the ingredients of the feudal theory of subjection survived: the concept of allegiance still forms a tautological part of our statutory definition of nationality." The note Koessler provides pertaining to this passage is of especial interest. "In *Baumgartner v. United States*, 322 U. S. 665, 673 (1944), Mr. Justice Frankfurter, *per curiam*, after citing *Schneiderman v. United States*, 320 U. S. 118 (1943), and similar cases, announced, 'Allegiance to this government and its laws, is a compendious phrase to describe those political and legal institutions that are the enduring features of American political society. We are here dealing with a test expressing a broad conception—a breadth appropriate to the nature of the subject matter, *being nothing less than the bonds that tie Americans together in devotion to a common fealty*'" [italics mine-dw]. The citizen/subject is thus considered, in the

eyes of the Defenders of the US Constitution, as indeed congruent with the medieval conception of the relationship of a vassal to his lord. Moreover, one is, within the jurisdiction of such a regime, committed to the notion that in modern states the obligations of the national to the nation are *unconditional*. They are not contingent upon the State's compliance with corresponding duties. As such, the term *citizen*, with its connotations of rights-bearing autonomous individuals is undercut. *Allegiance*, as it is construed within the US legal system, makes the *citizen* a *subject*. Koessler, in the above-cited essay, at this juncture brings our attention to a definition of citizenship attempted by the Harvard Research on Nationality, being “the status of a natural person who is attached to the state by the tie of allegiance.” At this juncture one recalls the reasoning with regard to the nature of the relationship of the individual to the State by the Fascist theorist Carl Schmitt, who said, “Through the acknowledgement of the supra-personal dignity of the State, the single, concrete individual disappears. For the state is a servant either of the individual or Right. Since only the latter is correct, the state is prior to the individual, just as Right is prior to the state; and just as continuity of the state proceeds only from Right, the continuity of the individual who lives in the state flows only from the state.” Or as the 20th century philosopher Karl Löwith puts it: “The state is not a human construction but on the contrary the state makes a construction out of every human being.”