PSEUDO-DEMOCRACY IN A POST-RULE OF LAW ERA

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We are immersed in the ongoing transformation of a system that at best can be described as a pseudo-democracy in a Post-Rule of Law era in which formerly quasi-democratic systems—including the US—are devolving into unprincipled, fragmented and authoritarian surveillance societies. The challenge is how to inhibit what is occurring and protect and preserve the best of what we have had while shaping and incorporating the changes that must be accepted. The answer to our dilemma is far from clear.

In using the term pseudo-democracy we are bringing to the surface the idea that we often use the language of democracy too loosely in arguing about the political system we tend to think, or at least assert, exists in the United States. The reality of what Aristotle and the Greek political philosophers meant when using that term bears no resemblance to the system under which we operate in America, a system roughly one thousand times larger than that of Athens and far more complex, diverse and territorially vast than Aristotle could have imagined.

In The Politics, Aristotle warned against radical changes to a city-state that would result from growing beyond the size and composition needed for a dynamic but self-contained community. He explained his conclusion about the scale of successful political systems as follows, noting that systemic scale and purpose can be corrupted.

To the size of states there is a limit, as there is to other things, plants, animals, implements; for none of these retain their natural power when they are too large or too small, but they either wholly lose their nature, or are spoiled.

The distinction between the political system Americans call “democracy” is far different in kind and quality from that described by Aristotle. That ancient Athenian city-state democracy was a community numbering a few hundred thousand people contained within a small territory and with ethnically homogenous male membership. Its homogeneity and maleness is of course something that we would not accept as legitimate today but such conditions do help understand the radical distinction between that ancient idea of democracy and the version under which we attempt to operate. Aristotle’s idea was based on the assumption that such a political system was

1 See Aristotole, Politics, Bk. V, Ch. 3, at 164 (“Political revolutions also spring from a disproportionate increase in any part of the state.”) and Bk. VII, Ch. 6, at 235. Discussions of the loss of community can be found in Steve Sailer, “Fragmented Future: Multiculturalism doesn’t make vibrant communities but defensive ones,” The American Conservative, Jan. 15, 2007; Ali & Huntington, “Clash of Civilizations Revisited,” at 57-59; see also Samuel P. Huntington, Who Are We? The Challenges to America’s National Identity (2004), Samuel P. Huntington, The Clash of Civilizations and the Remaking of World Order (1996); Sam Roberts, Who We Are Now: The Changing Face of America in the Twenty-first Century (2004).

2 Aristotle, Politics, Bk. VII, Ch. 6, at 235.
sufficiently small in number and homogenous that it allowed those making choices to assess the merit and weight to be assigned to the arguments of those engaged in democratic discourse.

Aristotle’s concept of a democracy was also dramatically non-diverse. It was one limited both in the size of its population and to Athenian males with no participation by women, slaves or “barbarians.” The idea was that a limited group of like-minded people would be able to assess and evaluate the positions voiced by others in the process of making decisions. This is where the issue of scale and anonymity come into play because an informed democratic decision making process of the kind contemplated required that the voters could weigh the worth they should assign to the positions advocated by those making arguments pro and con a particular path of action.

This quite clearly has no connection to the arguments in the US where some advocate a simplistic “one person-one vote” system in which each person’s vote is entitled to the same weight as another’s. Legally this may be true. Factually and substantively nothing could be further from the truth and the degradation of intellect, intelligence, sense of community and the rise of selfishness and intensely competitive interest groups make a mockery of this premise. Whether anything can be done about what we have become as a political system is another matter.

To compel ourselves to be realistic about the immense gap between what was originally intended by the idea of democracy we only need to contrast Aristotle’s concept of the limited scale of a workable democratic system with the conditions existing in an America of 330 million citizens and residents spread over thousands of miles, with an array of multilayered political forms, numerous religious and anti-religious sects, and a mixture of ethnicities drawn from nations throughout the world whose citizens represent radically diverse values and beliefs. Regardless of the rhetoric of democracy and its “one person one vote” mantra, the system in which we are functioning bears no resemblance to that of Aristotelian Athens, other than having become a severely flawed system filled with anger, outrage, corruption, and a growing number of battles between warring interest and identity groups of all kinds.

Aristotle also warned that even though democracy was the best and fairest political form humans were likely to achieve, it had fundamental flaws that became more problematic as time passed. One of the most critical flaws is that once the majority understands it has the power to make laws that award its constituency the bulk of social goods at the expense of those who create those goods, it uses that power in increasing degrees at the expense of other members of the society who are not part of the majority. The nearly inevitable outcome is that the majority in a democracy become “takers” using and feeding on the efforts of others and subordinating their preferences while creating rationalizations for why it is necessary and fair to do so.

**An Example of a Numerical Majority’s Attempted Power Grab**

An example of such an effort can be found in the reaction of numerous Democratic Party figures to the outcome of the 2016 Presidential election in which Donald Trump beat Hillary

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3 Aristotle, *Politics*.  

Clinton even though Clinton received the greater number of votes cast. His victory was due to the US Constitution’s Electoral College method of resolving outcomes based on the number of Electoral votes received on a state-by-state basis rather than the sheer number of popular votes. We explain the situation as follows.

The total popular vote in the election for those two candidates was 123,724,157. The overall vote was slightly larger due to several fringe candidates who received minuscule voter support. In the Clinton/Trump contest, Clinton received 62,523,126 votes and Trump 61,201,031, a popular vote in which Clinton received 1,322,095 votes more than Trump. In a one person one vote system of pure popular democracy or populism that would mean Clinton won and many Democrats were and remain outraged that under the actual legal structure of the American system under which national elections for president involving 50 states and the District of Columbia is not the “one person one vote” system that would have awarded their preferred candidate the election. This has led to demands that the Electoral College be abandoned and a simple national majority vote system be adopted.

The irony of the attack on the Electoral College process is that Democratic “populists” otherwise worship the concept of diversity. Although the US is not a simple “one-size fits all” culture, and is becoming even more diverse, those attacking the Electoral College system are not applying that diversity mantra to the different interests, economies, values and creeds of people living in the states of “Middle America”. The creation of the Electoral College system takes into account the fact that the US is comprised of a diverse set of political units called “states” whose residents have wide ranging differences and characteristics.

The Framers of the US Constitution recognized that a critical element in preserving and respecting America’s unique form was to recognize the diversity that existed across the vast spectrum of state interests to ensure that no single set of interests was able to overwhelmingly dominate the nation. As the US expanded territorially, ethnically, religiously, and economically this aim became even more important because regardless of our rhetoric we are “not one people” and have a range of interests and agendas.

The fact that Clinton received 1.3 million more votes that Trump needs to be looked at in terms of the specific distribution of the votes, not simply the raw total. Clinton, for example, had 3,446,251 more votes than Trump just in California. She received 860,000 more votes in Illinois, primarily in the Chicago area, and 1.4 million more than Trump in New York with that advantage concentrated in a four county area clustered around New York City. Ninety-three percent of District of Columbia voters (250,000 edge) opted for Clinton, and she had a 485,000 edge in New Jersey. Trump dominated a major part of the internal parts of the US, winning 30 states with 306 electoral votes to Clinton’s 20 and 232 electoral votes.

One insight to take away from this data is that there were situations in which huge margins were gained by both Clinton and Trump. This means that a voting constituency in specific areas manifested radically distinct preferences relative to other states. This
extreme gap in which one candidate received support by 2 to 1 or even seven or nine to one voting margins suggests significant diversity between voters in different locations.

This means that just in the areas indicated above Clinton had 6,441,000 more votes than Trump. It also means that in much of the rest of the US Trump “edged” Clinton by 5,150,000 votes. An important message to take away from the 2016 election results is that America is made up of areas of population representing very diverse preferences and values. The West Coast states (California, Oregon and Washington) are radically different from what we can call “Middle America”. The Northeast region (New York City, New England, New Jersey, Massachusetts and Connecticut) are equally so, as are the District of Columbia and the voting areas of Maryland and Northern Virginia that depend on the federal government.

The truth is that there is a strong probability that if the Electoral College system was eliminated and the US shifted to a total popular vote system, the West Coast, the urbanized Northeast and New England, and the District of Columbia metropolitan area including Northern Virginia and Eastern Maryland would control the rest of the country. It seems obvious that the proposal to do away with the Electoral College is a cynical attempt that mirrors what Aristotle warned about--numerical majorities in flawed democratic systems inevitably come to use that “one person one vote” power to award themselves benefits and expand their power. At the moment the Electoral College seems the only thing inhibiting that outcome.

There Is No Longer Any “Center” of Values and Principles In America Capable of Sustaining Anything Close to a True Democracy

We frequently hear that we are one nation, one group, and one community of interest linked in compassion, justice and sharing. This sounds wonderfully utopian but such proclamations have nothing to do with human nature, the reality of tribalism, and the subcultures we have created. Rather than growing together into a living, loving, caring and cooperating community, we are tearing things apart. US Representative Steve Israel indicated after a recent campaign that people are angry about everything, that respect for our basic institutions has largely disappeared and that, as local jobs on which they counted for decades evaporated, people feel helpless, frightened and outraged at what they see as their leaders’ betrayal. 4

US Supreme Court Justice Clarence Thomas recently addressed concerns about whether there is anything remaining of the core values we long considered essential parts of the “American Dream”. Thomas admitted he had fears about whether there any longer core values that held us together as a political community. When asked whether he was surprised at the extent of the rancor that seems to accompany any dispute about foundational issues he explained:

No, I’m not surprised. I mean, what binds us? What do we all have in common anymore? … [W]e always talk about *E pluribus unum*. What’s our unum now?

We have the pluribus. What’s the unum? Some people have decided that the Constitution isn’t worth defending, that history isn’t worth defending, that the culture and principles aren’t worth defending. And, certainly, if you are in my position, they have to be worth defending. That’s what keeps you going. That’s what energizes you.  

Given the intensity of the passions that are in play at every level of our society it is unlikely we can meet the challenges. We find ourselves in a situation of the kind C. G. Jung warned in asserting that intelligent discourse cannot exist in societies filled with anger and bitterness. Jung explained:

Rational argument can be conducted with some prospect of success only so long as the emotionality of a given situation does not exceed a certain critical degree. If the affective [emotional] temperature rises above this level, the possibility of reason’s having any effect ceases and its place is taken by slogans and chimerical wish-fantasies.

The United States has separated into fanatical fragments of identity groups. Unity, compromise and healing are impossible because, as Thomas notes, there is no “unum” that possesses sufficient power to bind us to a set of common principles. The situation is getting worse rather than better. Within ten to fifteen years we could face a social explosion with rising criminal activity and violence, militaristic repression, warring militias, vigilante groups and, in some instances, urban guerrilla warfare. We (the authors of this essay) are just now completing a book titled *The Artificial Intelligence Contagion: Can Democracy Withstand the Imminent Transformation in Work, Wealth and Social Order*? What that book argues is that we are in the midst of experiencing a set of fundamental concerns, including extreme job loss across a wide array of employment contexts that will put incredible strains on a system that is already in turmoil.

The implications for what we glibly refer to as “democracy” of what is projected to be a widespread destruction of jobs as much as 47% to 50% of work in the US and equivalent numbers in Europe in the next 10 to 15 years are profound and troubling. So is the fact that the returns from economic activity are shifting from labor to capital as AI/robotic systems increasingly come into use and unemployment soars to the point that Yuval Noah Harari warns in his brilliant book *Homo Deus* that we will develop a large “useless” class of people permanently out of work with many others trying to patch together uncertain “gig” work just to survive.

It is not only large-scale job destruction we must fear. The disintegration in community and economy we are already experiencing is being driven significantly by a combination of the Internet and Artificial Intelligence systems. The AI-facilitated social media has accelerated and intensified the disintegration of our social forms. Facebook’s former vice president for user

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growth, Chamath Palihapitiya, has stated that he feels “tremendous guilt” about Facebook. He explains: “[W]e have created tools that are ripping apart the social fabric of how society works. The short-term, dopamine-driven feedback loops we’ve created [including the hearts, likes, and thumbs up of various social media channels] are destroying how society works.” He added, “[There’s] no civil discourse, no cooperation; [only] misinformation, mistruth.”

Are We on the Verge of a New Civil War?

America is in trouble. The social civil war that began in the 1990s and has increasingly afflicted the US cannot and will not be “fixed”. We are caught inside an environment of hate, rage, and identity politics and have no way to escape the cage we have created. One report, hopefully overstated, indicates that the Department of Defense has begun planning strategies to deal with the possibility of widespread urban violence, unrest, and mass civil breakdown as “things fall apart, and the center cannot hold”. A report on a now unclassified DOD memo contains the following analysis:

[A] recently unclassified document from the United States Army reveals how future domestic turmoil may be regularly met by armed federal troops trained and equipped to quell dissent by any means possible. On August 15, the feds made public Army Techniques Publication (ATP) 3-39.33, a 132-page manual that describes, in great detail, how Armed Forces personnel can be utilized in response to civil disturbances that erupt within the boundaries of the continental U.S. “Civil unrest may range from simple, nonviolent protests that address specific issues, to events that turn into full-scale riots,” the manual states. “The level of violence is determined by the willingness of demonstrators to display and voice their opinions in support of their cause and the actions and reactions of the control force on scene.” [emphasis added]

The centers of power have become too diverse and divisive, the actors too focused on their own singular concerns, and the underlying broad-based set of social beliefs, principles and creeds so corrupted that there is no turning back and only a possibility of compromise. The US has fragmented into competing tribes and identity groups with limited education in or respect for the intricacies of democratic systems. Too many are possessed of the almost demonic ideological belief systems characteristic of true fanatics. The Internet has played a major role in enabling and building our growing social insanity and paranoia.

Where what is needed is reasoned justice-based advocacy in response to glaring systemic inequities, we too often find demagogic, intensely activist, organized and vocal special interest identity collectives. They seek to achieve attention and support by virtue of the willingness of the mainstream media to focus on their most provocative claims. They are collapsed into camps we tend to refer to as “The Left” or “Progressives”, and “The Ultra-Conservative Right”.

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“Deplorables” or even “Nationalists”. Rather than honest discourse we have a vitriolic shouting matches and increasing violence.

The “New KKK”: The Internet is a Tool for Propaganda, Control and Repression, Social Division, Identity Intimidation and the Destruction of Intelligent Social Discourse

Tim Berners-Lee, considered the “Father of the Internet” has voiced his dismay about how his invention has evolved.

"For the first 15 years, most people just expected the web to do great things. They thought 'there'll be good and bad, that is humanity, but if you connect humanity with technology, great things will happen.... "What could go wrong? Well, duh: all kinds of things have gone wrong since. We have fake news, we have problems with privacy, we have problems with abuse of personal data, we have people being profiled in a way that they can be manipulated by clever ads.”

Internet anonymity is the equivalent of the terrorizing robes and hoods of the Ku Klux Klan. Anonymity should not be allowed except in the direst circumstances—at least in countries such as the US and those of Western Europe and the United Kingdom. Philip Hensher explains: “The possibility, and the dangers, of anonymity started to become apparent long before we all went online, and both have only continued to grow.” With rare exception, the granting of anonymity has been a serious mistake and should be eliminated. Peter Drucker described what is happening in our society as the “new pluralism”, explaining: “The new pluralism ... focuses on power. It is a pluralism of single-cause, single-interest groups—the “mass movements” of small but highly disciplined minorities. Each of them tries to obtain through power what it could not obtain through numbers or through persuasion. Each is exclusively political.”

If you have the courage of your convictions you should not be allowed to hide behind a mask whether it is physical or electronic. Anonymity and mob psychology are core causes of the malicious venom we see posted on what should have been an incredible tool for intelligent exchange and discussion. Cowards who would never dare to utter anything close to the venom they spew on the Internet in a face-to-face encounter or even when it could be attributed to them at a distance, are “enabled” by the electronic medium to the point of inanity, stupidity and viciousness. Concealed identity removes accountability because the “internal censor” of common sense and decency that controls our face-to-face communications has been destroyed.

11 Philip Hensher, “The bigger a community gets, the easier and more virulent anonymity becomes”, Guardian, 8/23/13; [http://www.theguardian.com/commentisfree/2013/aug/23/bigger-community-easier-virulent-anonymity](http://www.theguardian.com/commentisfree/2013/aug/23/bigger-community-easier-virulent-anonymity). He adds: “We are now much more anonymous than we used to be. We are less and less likely to know even our most immediate neighbours – one survey found that over 50% of us don’t even known their names. Robert D Putnam, in his celebrated 2000 study, Bowling Alone, found that everyday personal interaction had been on the decline in North America since 1950.”
Until now, people who harbored the worst, sickest or most contemptible thoughts, or who drew conclusions based on biases and ignorance, spoke only to their most trusted associates. Until empowered by the Internet and its grant of anonymity, along with the ability to expand their reach through access to cyberspace, they were apprehensive about revealing their true self. There was a fearful hesitance about communicating their views in “polite society” because they could not be certain the people they were speaking to face-to-face shared their prejudices or whether they would be immediately labeled as vile, bigoted or just flat out stupid.

The anonymity of the Internet has created a completely different sort of “connective tissue” than its creators anticipated. The “sickos”, zealots, and fanatics now have gained easy access to others who share their prejudices and visions—whether child pornography, race or religious bias, or some other volatile orientation. The Internet intensifies our social divisions by facilitating the creation of links between people who would never otherwise be able to “find” each other, allowing them to share their worst hates, perversions and fears. It does so because those who harbor such inner darkness and vindictiveness discover they aren’t alone in their twisted universes.

In a perverse and socially destructive way the Internet normalizes and legitimizes the way they think and how they look at people and the world. Finding out there are others like them is a freeing discovery that unleashes their ignorance, bias and hate in a closed universe of fanatical true believers. They are able to create their own identity communities where pathologies of hate and resentment receive positive reinforcement from those who are like-minded.

Access to the power of the Internet has stimulated communications that are vile, malicious, predatory and even insane. It has allowed criminals to expand their ability to harm, cheat and abuse. It has brought out the worst in humanity to the point where, even with all its incredible benefits, the Internet is the means by which we are becoming untrusting and irreversible cynics about society and other humans. Left to function in its current way, the Internet will cause the devolution of human society because it strips away essential illusions and ideals and allows us to see negative tendencies in humanity far too clearly.

The Effects of Scale and Diversity on Democracy and the Rule of Law

The myth, magic and mystery of the Rule of Law provide its power and authenticity. The Rule of Law has allowed us to attenuate the connection between coercive power and our action in a way that keeps dictators and authoritarian abuse by controlling groups and self-aggrandizing majorities at bay. In doing so it has enhanced the power of the individual to make choices consistent with that person’s preferences. This has opened up a space between the wielders of power and the individuals governed by that power.

Western society has little else than law to mediate between the individual, the community and the potential abuses of centralized governmental power. Law is the primary method for regulating the allocation of social goods, rights and duties. But law as a transparent rational method will never by itself possess the moral force necessary to sustain itself as a Rule of Law.
system. The Rule of Law needs its myths, and relies on “suspended disbelief” and the mystery of Oz behind the concealing curtain.\(^\text{13}\)

As we wrote in *Hypocrisy & Myth: The Hidden Order of the Rule of Law*, the Rule of Law has lost a key part of its identity because many of the most important myths, principles and beliefs on which the Rule of Law depends have been destroyed or scorned as deluded faith.\(^\text{14}\) This has fragmented our sense of being part of a relatively homogenous community as we become dedicated to identity-based issues that make us ideological adversaries. In the midst of the diversity and chaos of American society we are not likely to invent a new set of shared values other than at the most general and meaningless levels. Our social complexity, competition over power to impose our preferences on others, or to defend against those who would impose their agendas on us, means that we have entered an era best described as the *Post-Rule of Law* and pseudo-democracy.

A new version of the Rule of Law is needed but it is unlikely that whatever we will be able to design will be sufficient to meet the challenges. The problem is not the technical language of law, but the widening disintegration of underlying faith in the legitimacy and fairness of application of law. Unless this faith exists we have only the superficial trappings of the Rule of Law without the deep moral substance and faith required to energize, protect and sustain the system. It becomes a Rule by Law and sheer political power rather than the Rule of Law in which we all accept the outcomes reached through process and evidence even if we did not “win” the determination.

A combination of individual merit, civic virtue, and submission to a common set of values were dominant principles. But to what extent can we identify principled and essential elements that have survived the shifts dictated by the combinations of ideologies and cultural complexity? As Jung and others have warned, this includes the effects on honest discourse produced by the scale and diversity of the political system, its complexity, the emergence of a wide range of multicultural value systems that do not fit neatly into the political system into which they have entered.

It also faces the effects of communication technologies that not only allow the widespread and instantaneous transfer of information, but facilitate the dissemination of vitriol, malice, half truths and deliberate lies. These instrumentalities have been created by the combination of the Internet, Artificial Intelligence algorithms, and the surveillance and data-mining powers of the communications instrumentalities. As we are now discovering they provide enormous manipulative power to those who control those systems.

The myths and principles of the Rule of Law as Lockeian “umpire” resolving through its processes social disputes provide the core of the system’s power. For Locke, the function of the Rule of Law was one in which properly followed and fair processes that are accepted as legitimate eliminates or diminishes the need for the use of direct physical force to the resolution of society’s conflicts. This depends upon a belief in the Rule of Law’s fairness, objectivity and authenticity and that is what we are destroying. If there is no special reason to obey the law

\(^{13}\) See Erving Goffman, *The Presentation of Self in Everyday Life*, at 68-70.

beyond pure coercion or religious morality, the “losers” will challenge the right of the “winners” to whatever advantage they have received on the basis of disagreement about merit, desert, or unearned privilege.

The fabric of belief in the principles of the Rule of Law is increasingly tattered. With this realization, groups have mobilized to seize control of the institutions of power and this further undermines our democratic system. They have done this in an attempt to impose their preferred positions on the proper distribution of social resources (and incidentally force those out of power to pay for their preferred distribution scheme) or defend their preferred system of distributive justice against attack. John Fonte describes what is happening with disapproval. Fonte makes a distinction between “cultural” and “liberal” democracy.

As Fonte states, “liberal democracy is a combination of two theories: liberalism (individual rights) and democracy (popular sovereignty). Thomas Jefferson declared that ‘the first principle of republicanism [democracy] is Lex Majoris Partis’ -- majority rule or popular sovereignty -- because without some form of majority rule a people would not be sovereign or self-governing. Today the majoritarian principles of liberal democracy are increasingly under attack in the name of supranational and subnational ideals.”

Fonte sees the change as a result of the fragmentation into identity groupings whose members have primary loyalty to the group rather than to the interests of the overall community. A result is the emergence of powerful fragments of political interest entirely focused on their own group’s agendas in competition with others’ agendas. Fonte captures the implications of a split into niches of distinct cultures in commenting on a social studies academic who questioned whether “a civic culture founded upon a uniform philosophical heritage has a moral right to judge actions inspired by alternative heritages.” He suggests that: “cultural democrats reject the view that liberal-democratic values should be, as they put it, “privileged,” determining the rules of the civic culture. Instead, they depict civic culture as an arena of “contestation” and “negotiation” among competing values, worldviews, peoples, and cultural groups.”

The argument regarding the legitimacy of “privileging choices” must be done carefully and transparently. From a descriptive perspective it is impossible to deny the validity of important parts of what Fonte describes as “cultural democracy”. Cultural democracy, reformulated as a form of defensive and reformist political organization by historically disadvantaged interest groups that have been treated unjustly, is a recognition that achieving corrective justice in a system that has acted in an unjust manner requires focused strategic and cooperative actions by those who have been wronged.

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15 Walter Berns represents one faction when he observes in criticizing Roe v. Wade: “what were we taught by Roe v. Wade? [We learned] That the Constitution is on the side of the big battalions or, at least, the most strident battalions. That an up-to-date judiciary is contemptible because it is nothing but a political body but, unlike a political body ... it pretends not to be. And we were also taught the necessity to form battalions of our own, which ... is being done on a massive scale.” Berns, supra note Error! Bookmark not defined., at 55.
16 Fonte, at 48.
17 Id.
18 Id. at 49-50.
The challenge, however, is how do we know when such politicized organization is seeking to correct past injustices or, having gained strategic power through organization, is implementing agendas that attempt to use that newly gained power to “privilege” the identity group’s members against others who have not in any way been responsible for the injustice. Since we know power corrupts and that members of factions act in ways that seek to benefit their members and diminish the power and benefits for non-members, the danger to the society as a reasonably coherent and fair community of interests is, how do we preserve the principles of balance and fairness of treatment with those of corrective justice?

The cultural democracy approach in some ways mistakes description of a problem for its solution. It describes the increasingly clannish identity group fragmentation we are experiencing and then, rather than trying to bridge the differences, expands them. In doing so, extreme identity group fragmentation converts society into conflicting sects engaged in internecine struggles to acquire larger pieces of a finite “pie” of social goods and opportunities.19

In challenging this strategy as destructive it is not absurd to restate the claim that all healthy national cultures require some set of shared values beyond the starkness of legal power and authority. This is our dilemma. The struggle we are experiencing is whether there are any values on which we can agree in the first instance and, if so, whether those values are strong enough to protect some form of the Rule of Law against the ultimately corrosive effects of identity-driven leftist cultural-democrats or rightist groups who care only about achieving their own agendas and are unwilling and unable to engage in the kinds of social compromises that have been and essential characteristic of the Rule of Law.

Cultural-democracy advocates confuse or mistake division and divisiveness for a false ideal, making arguments that justify their own claims to power while undermining those of others and the health of the overall political system. This can be viewed in several ways. One is that some of the cultural-democrats are politically-driven post-modernists, and even nihilists, who see the existing regime as so corrupt and unjust that they seek to unravel it even to the point that its core integrity collapses and a new and better system somehow emerges like the Phoenix from the ashes.

As romantically absurd as this assertion appears it nonetheless describes the intent of European Nihilists who, while they had no idea of what might emerge on the other side of the “event horizon” generated by the Black Hole of Nihilism, nonetheless felt justified in believing that we would find ourselves in a new, different and inevitably “better” political dimension after the collapse of traditional society. Such beliefs resurrect Marx’s conviction that the state would ultimately “wither” away because in the natural goodness of the Proletariat there would be no need for the State’s institutions and authority.

Our innocence about the behavior of those in power brings to mind an old science fiction story on the Twilight Zone television show hosted by Rod Serling in which the Earth was visited

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19 Allman argues: “living in a large society is a delicate balance of costs and benefits that sometimes results in some people’s lives being worse, not better. The rise of civilization represents not a march of inevitable progress but a desperate shift in human behavior that was an attempt to survive amidst challenging new surroundings. The changes brought by the social upheaval caused myriad problems, and continues to pose the ultimate question of whether the human species can survive.” Allman, at 222.
by a powerful and seemingly kind race of aliens who were honored worldwide for their generosity and compassion. The aliens soon began to transport millions of Earthlings to their home planet, a pilgrimage viewed by the Earthlings as further indication of benevolence and compassion shown by an advanced race toward Earth’s population. The only problem was that after entering the alien spaceship in preparation for the journey, humans discovered the alien document describing how the aliens were dedicated to “serving man” turned out to be a cookbook.

**Fragmentation, Self-Interest and Ignorance**

Naïveté and political romanticism are one problem, but absolute self-centeredness aimed at the advance of one’s specific ideological agenda is another. When the two come together, as they sometimes do even to the point of fanaticism, power is a frightening and distorting phenomenon. We have developed numerous incantations expressed in symbolic political language that divide us into increasingly fragmented units of interest. In this “mode” of discourse we are unwilling to communicate because we are engaged in interest group politics rather than intellectual discourse, and we are increasingly unable to communicate because we lack the shared language and values essential to the enterprise.

The consequences of our society fragmenting into concentrated identity groups cannot be overstated. Identity-groups that see their members as wronged or threatened create allegiances among members that demand a kind of group-referenced loyalty. Those not part of that “belief collective” immediately become “the other” and are treated as outsiders. Those who disagree with the agenda or fail to provide affirmative support become the “enemy.”

We have gained the ability to deconstruct all the assumptions and claims of our social machinery without bothering to develop the insights and skills required to sustain and reconstruct essential institutions and principles. We delight in finding the “feet of clay” in those who were our beacons of excellence and substitute gross celebrity for principle, integrity and heroism. We are trapped in a quasi-religious struggle for political power.

We are not really enlightened, fully rational, beings but operate through belief systems that act as receivers that only receive specific frequencies. David Ausubel explains that “existing cognitive structure … an individual’s organization, stability and clarity of knowledge … is the principal factor in the learning and retention of meaningful new material.” Ausubel’s point is that we perceive, integrate and interpret our world based on the structures put in place during our formative years. The “settings” gained from our education, biases, experiences and the like determine what data will be received from the outside world as well as how the material allowed into the particular mini-universe of each core belief is interpreted.

Such behavior indicates we will be unable to construct a workable synthesis for social and political action that might conceivably satisfy opposing camps because they either refuse to

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listen to alternative views or interpret what they hear in terms different than what was intended.\textsuperscript{23} Call it “turning a blind eye” or a “deaf ear” but the simple and unfortunate truth is that we are inherently “deaf,” “blind” and “dumb” to that which we do not choose to hear, see or speak when it contradicts or is even only inconsistent with our personal beliefs, agendas and allegiances.

This means the conflicts we are experiencing will intensify because the competing agendas cannot be harmonized through reasoned discussion or negotiation. This challenges and denies the core integrity of the Rule of Law. Once obedience to procedure and the dictates of whoever controls official power are the only recognized values in an Instrumentalist state, we are left with a struggle among competing factions to control the institutions of power. This struggle for power among factions occurs because it is the only way we can protect what we believe from others’ dominance, or gain the power to impose our worldviews and preferences on others.\textsuperscript{24} That is where we now find ourselves and signals the end of the classically liberal version of the Rule of Law.

Given the intensity and depth of the issues over which we are fighting there is little chance that a values-based rapprochement can be achieved between the warring factions. Mark Cooray describes what has changed and what has been lost.

The opposition to moral values is mounted by those who argue that the source of our public values must be wholly secular. The supporters of this view refer to “value neutrality” and “pluralism”. This is not the reality. What is taking place … is not a battle for value neutrality. It is a war for the dominance of a new morality, based on equality, social justice and relativism, over the old moral values. Pluralism in the development of western civilisation has never meant toleration of all forms of conduct. It has meant pluralism within the context of a certain shared morality. The idea that such a morality is inappropriate for our public policy is a relatively modern phenomenon.\textsuperscript{25}

It is helpful to return to the ideas of interest group organization and corrective justice in order to understand the tensions, limits, damage and appropriateness of extreme fragmentation in the society. It is unquestionable that change was needed in the interest of fairness and justice. Of course many people will not feel comfortable with the aggressiveness of identity-group based action, but that tension is something any society seeking to serve justice must and should endure when rectifying historical wrongs. Some will be threatened by the fact of conflict and change in itself. Others will be threatened because they in fact possess the values and attitudes that produced the injustices.

\begin{itemize}
\item Allman suggests: “One problem with maintaining cooperative behavior among a great number of people is that often the costs to society of a single defection—cutting into a long line, cheating on one’s income tax, or dumping one’s trash into a lake—are spread out among a large number of people. No one is hurt very much by any single defection, even though over time the group as a whole suffers.” \textsc{Allman}, at 223. This is another version of the tragedy of the commons with the rule of law as the endangered commons.
\item Cooray, \textsc{Error! Bookmark not defined.}.
\end{itemize}
Some do not resist changes aimed at achieving corrective justice. These inevitably include hard choices regarding distributions of social goods, rights and duties that place pressure on innocent people who themselves did no wrong. The problem occurs when identity groups abuse power after having gained a significant share. As seems almost inevitable for human societies, those gaining power too often become oppressors themselves by wielding their power in inappropriate ways or for purposes that go beyond the reasonable limits of corrective justice. This struggle for power through control of the primary institutions through which law is created, interpreted and applied—the judicial, legislative and the executive branches of government—has caused our “fragile fiction” of the Rule of Law to become progressively weaker.

The participants in the movement toward justice and equality have over the last fifty years demanded access, opportunity and fair treatment according to rules that were not originally designed with them in mind. Many of the demands were and are matters of corrective justice. But all choices of consequence have effects on the system. We must be careful to recognize the need to avoid excessive injustices in pursuing justice because that produces a corrosive social acid that etches the system. One of those consequences can be erosion of principled ideals essential for sustaining the fiber of the Rule of Law.

Recognition of the need to be honest and realistic about how humans operate in society provided the foundation for Aristotle’s description of the distinctions between “pure” and “imperfect” forms of government. In comparing the forms he concluded that, while democracy was in fact an imperfect form it was the best we could achieve. The Rule of Law as a facilitator of justice and a strong buffer against the inevitable abuses of governmental power is an equally imperfect form within the complex American democracy. It is flawed, and it has allowed terrible injustices to occur. Its voices have often ignored or, as with Dred Scott and his tragic story in which the Supreme Court obscenely treated a human as property, acted in ways that offended the essence of the Rule of Law and the principles of liberty, humanity and justice. But some version of the Rule of Law, even a Post-Rule of Law version is the best we can achieve.

The question we face is that since we have argued the Rule of Law possesses interacting dynamism between its Ideal dimensions and the conditions of specific cultures in which it applies, what is the new cultural content and form of the American Post-Rule of Law? The deep changes in values and structure we are experiencing, although not unique in American legal history, nonetheless represent a dangerous and exciting trend. It is one in which political parties seek to entrench themselves and achieve political dominance and power over all opposition. The problem is not law as an instrument, but loss of the diffusion of power and the internal systemic balance the Rule of Law generates. The consequence is a resort to power in and for itself with no care or awareness of the damage being done to the political system.

Max Lerner prefaced Mill’s On Liberty with the observation that Mill reformulated the ideas of social freedom. He discusses the rise of creeds that demand obedience according to

26 We can go back to Aristotle's description of the origins of the State as springing from the family, add to that his concept of a democracy that was limited both in the size of its population and to Athenian males with no participation by women, slaves or "barbarians." Aristotle, Politics.
27 See Aristotle's discussion of the attributes of various forms of political regimes in Book III, Ch. 7 and Book VI of The Politics.
their terms and “compress” a society’s discourse and political behavior. This includes a suppression of the individual aimed at compelling the person toward acceptance of the dominant creed. It also includes the inevitable consequence of a majority’s use of its power to restrict the individual whenever the person would go in a direction inconsistent with the majority.

Here we would also argue for a definition of “majority” that is not limited to a simplistic numerical concept but involves the holders of a majority in the sense of being in control of the key levers of the system’s political power. In this way, the leaders of the Communist Party of the former Soviet Union did not in any way represent a numerical majority of citizens of the USSR. The Soviet “majority” existed in the sense that they were the majority due to their possession of the system’s power and the ability to control all aspects of the system of governance and behavior. In any event, Lerner reminds us that one lesson offered by Mill:

[I]s to see that the enemies of human freedom may be found in the attitudes of the people themselves, and that the tyranny of the majority may be as hostile to the expression of a man’s life and temperament as the tyranny of the state. He saw history as a kind of circulation of creeds, each of which demanded acceptance from the individual: no sooner is one swept away, then another starts forming, and—after a period of transition in which the latitude for opinions is relatively great—the new one is established and solidified, and exercises the same “power of compression” as the other.”

The Rule of Law is a method for mitigating the inexorable tendency of any group to abuse significant power in ways designed to benefit them and disadvantage others. Nor in a finite system need there be an intention to disadvantage others because all undeserved or excessive allocations of social goods to oneself necessarily operate to impose disadvantages and negative duties on others. The apparent or real intent can be pristine or virtuous but the imposition of burdens and denial of opportunities to others not of the favored group is nonetheless unjust. When we allow identity groups to gain excessive control of the levers of power and to recreate the world solely in accord with their preferences and agendas, they will distort the balance of the Rule of Law in ways at least as harmful as those they criticize. This is what is now occurring.

**Lord Acton Was Correct**

Acton is known for the statement that: “All power corrupts and absolute power corrupts absolutely.” The fuller context is even more useful for analyzing the behavior of any powerful group. Acton states: “Liberty is not a means to a higher political end. It is itself the highest political end ... liberty is the only object which benefits all alike, and provokes no sincere opposition ... The danger is not that a particular class is unfit to govern. Every class is unfit to govern [emphasis added].”

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29 Id.