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What Pildes Missed: The Framers, the True Impact of the Voting Rights Act, and the Far Right

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What Pildes Missed: The Framers, the True Impact of the Voting Rights Act, and the Far Right

David M. Kennedy*

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INTRODUCTION

I commend Professor Richard Pildes for offering such a creative and cogent discussion of polarization in contemporary American political life. I especially appreciate that he has brought such a calm, dispassionate, and admirably scholarly tone to a discussion that is too often—well, polarized. Yet I do wonder if in the effort to find a stable ground on which to conduct a constructive, nonpartisan discussion, he has avoided, or at least underemphasized, some dimensions of the subject that are notoriously stubborn as well as others that are famously volatile, perhaps even irremediable. Specifically, Professor Pildes appears to have underemphasized the degree to which the Framers confronted this polarization, overemphasized the effect of the Voting Rights Act on polarization, and overlooked a handful of factors that might prove significant in explaining polarization.

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I.

GOVERNANCE—ALWAYS AND INTENTIONALLY ABOUT CONFLICT

Let us start with the Constitution itself. James Madison pointedly noted in Federalist No. 51 that “if men were angels, no government would be necessary.”¹ Even Thomas Jefferson, perhaps the most sanguine member of the founding generation, said that when it came to questions of power, “let no more be heard of confidence in man, but bind him down from mischief with the chains of the Constitution.”²

Madison and the other authors of the Constitution understood the decidedly nonangelic, potentially mischievous, and always crooked timber of humanity, for whom they were laying down some basic rules of the governmental game. The founders may not have envisioned the emergence of political parties—indeed, to the extent they did, they feared their divisive effects. But they surely understood that the foundational charter they were crafting was meant to govern the behavior of people—people with divergent beliefs about policy and government. As Oliver Wendell Holmes, Jr., later observed, the Constitution was “made for people of fundamentally differing views.”³ The Founders, in sum, were under no illusions about humankind’s contentious nature, and entertained no dreamy ideas about the natural harmony of society. They might have regarded “polarization” as an odd term—though they understood its logic when they cautioned against the evils of “faction”—but they surely knew that politics is about differences.

The succeeding generation, in the first decades of the nineteenth century, introduced formally organized parties into the landscape of American institutions.⁴ Parties have been a fixture of our political life ever since. And parties, by their very nature, are organized around differences—whether the difference is described in terms of region, race, religion, moral conviction, ambition, or material circumstance. So “polarization” in its broadest, least judgmental sense, is simply a natural artifact of partisan political life—a necessary, inevitable part of the equation.

The extent of such polarization fluctuates over time. The upper bound is Civil War, when differences prove not merely irreconcilable by the usual means, but erupt into organized violence. American history knows such a case, and to be reminded of it is to put hand-wringing discussions about polarization in our own time in a context from which we might take some comfort. Even the sharpest critics of today’s political scene do not suggest that we are on the brink of a catastrophe like that of the 1860s.

1. THE FEDERALIST NO. 51 at 265 (James Madison) (Yale University Press ed., 2009).

2. 30 THOMAS JEFFERSON, *Kentucky Resolutions of 1798: Jefferson’s Draft*, in THE PAPERS OF THOMAS JEFFERSON, 529, 541 (Barbara B. Oberg ed., 2003).

3. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

4. See generally DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1814–1848* (2007).

But polarization has had lower bounds in our history as well: to a considerable measure in the founding generation, in the so-called Era of Good Feelings that followed the War of 1812, and as Professor Pildes points out—closer to our own time—during the two decades or so that followed the end of World War II. He might have noted that the Voting Rights Act of 1965, which figures so prominently in his account, provides some interesting supporting evidence for his argument that prior eras knew more consensus than our own. It passed in the House by a vote of 333 to 85, and in the Senate by 77 to 19.⁵ In both chambers most of the negative votes came from members of the majority Democratic Party. The Act's renewal in 2006 saw even stronger consensus (390 to 33 in the House, and 98 to 0 in the Senate)⁶ and that in the supposedly hyperpolarized moment of the Bush presidency.

It is no accident that polarization is a continuing theme in American government. For deep in the historical soil that underlies our entire political system is another legacy whose roots run back even beyond the founding era. The historian Henry Adams once described the origins of that legacy in this way:

The great object of terror and suspicion to the people of the thirteen provinces was *power*; not merely power in the hands of a president or a prince, of one assembly or of several, of many citizens or of few, but power in the abstract, wherever it existed and under whatever name it was known.⁷

That kind of fear animated the writing of the Constitution. To be sure, the Founders intended to erect a government somewhat more robust than the one shaped by the Articles of Confederation. But in the act of creating it they also jacketed their new creation with all kinds of safeguards against the arbitrary, or even vigorous, exercise of power. That is what the famous business of “checks and balances” that every American schoolchild encounters in civics class is all about. The Framers intentionally created many opportunities for governmental gridlock, in effect preferring polarization and paralysis to what they regarded as tyranny and despotism.

Stitch those historical factors together, and they amount to a fairly compelling case that some measure of polarization is an enduring structural feature not only of our political system, but, more broadly, of our political culture. It is in the national DNA. The Founders wrote a constitution on the premise that differences were part of the natural order of things. Succeeding generations have organized political parties around the same premise. The

5. 111 CONG. REC. 11,752 (1965) (Voting Rights Act of 1965: Roll Vote No. 96); *Id.* at 16,285–86 (Voting Rights Act of 1965: Roll Vote No. 179).

6. 152 CONG. REC. 14,303 (2006) (Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006: Roll Vote No. 374); *Id.* at 15,325 (2006) (Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006: Roll Vote No. 212).

7. HENRY ADAMS, *The Session: 1869–1870*, in HISTORICAL ESSAYS 367, 368 (Bernhard Fabian et al. eds., 1973).

political paralysis that is so often decried as polarization's most baleful consequence is in fact a normal condition and an altogether anticipated and deliberate result of a constitutional system whose cardinal objective is the containment of power.

II.

WHEN IS POLARIZATION A PROBLEM? WHOM DOES IT BOTHER MOST?

So if partisan polarization is a constant feature of American politics, its degree is what concerns us. Indeed, polarization is of interest only insofar as it conduces to paralysis. It is not surprising, then, that polarization disproportionately concerns those who are more committed to positive, active government, especially in times of crisis that seem to demand more active, positive government.

Are we in such a moment now? Professor Pildes has nicely documented the shrinking center in the current political scene, especially with respect to legislative elections and congressional voting behavior. However, his generally regretful conclusions about that disappearing center might be slightly tempered by recalling that the two nominees in the last *presidential* election, Barack Obama and John McCain, did *not* represent the most extreme views in their respective parties. So at least at that level, voters in both parties showed a willingness to seek the middle ground—or, in technical parlance, to identify and woo the fabled “median voter”—as the key to electoral victory. Thus, although paralysis through political polarization is a legitimate concern for some groups, there does not yet appear to be cause for them to panic.

III.

EXPLAINING TODAY'S HYPERPOLARIZATION: PILDES'S VOTING RIGHTS ACT THEORY IS NOT PROVED

If, then, we are currently experiencing a continued “high” in partisan polarization, how can it be explained? Professor Pildes rightly makes short shrift of the notion that polarization today is simply a function of some peculiarly divisive personalities coming to the fore. His comparisons of Nancy Pelosi and Karl Rove are provocative, and in the end persuasive. So is his prediction that Barack Obama may well suffer George W. Bush's fate of being electorally and therefore programmatically driven back upon his party's “base” because there are “too few persuadable voters out there.”⁸ The strictly party-line votes in the 111th Congress on the stimulus and health care bills suggest as much.

Much more persuasive than the personality theory, but no less provocative, is Professor Pildes's argument that it is principally history that accounts for the situation in which we find ourselves. To explain the passing of

8. Richard H. Pildes, *Why The Center Does Not Hold: The Causes Of Hyperpolarized Democracy In America*, 99 CALIF. L. REV. 273, 283 (2011).

the post–World War II era of substantially centrist politics, he points to the Voting Rights Act of 1965 (VRA). This was an historical event that allowed hyperpolarization—what he calls the true, “steady state of American democracy”—to emerge.⁹ If this is true, then the prior periods of relatively low partisan polarization must have been simply distorted moments stemming from exclusionary suffrage practices. Professor Pildes’s theory is stimulating and creative, but is neither complete nor proven.

Professor Pildes offers an argument contrasting the easy simplification of the sort found in Paul Krugman’s recent book, *The Conscience of a Liberal*, which says that the rise of the right and the consequent escalation of partisan combat “can be summed up in just five words: Southern whites started voting Republican.”¹⁰ Inter alia, that crude formulation overlooks that the modern-day southern Republican electorate is significantly composed of in-migrants to the region. That “replacement South” demographic cohort has as much to do with the changing political orientation of the region as does the disillusion of indigenous southern whites with the party of their fathers, emphasized by Krugman, that apparently resulted when the Democratic Party became the principal political vehicle for the accomplishment of the civil rights movement’s agenda.

Krugman and Professor Pildes alike focus on the South as the most likely place to look for an explanation of recent polarization, and they both put race at the center of the analysis. But where Krugman paints with the broadest of brushes, Professor Pildes may be said to be something of a pointillist in his emphasis on the VRA. His argument is fresh and stimulating, but perhaps not ultimately convincing nor sufficiently proved.

The Act mandated so-called “preclearance” of any changes to voting procedures in nine states with historic records of discrimination against certain categories of voters (Alaska, Alabama, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia) and in several counties and townships in California, Florida, New York, North Carolina, and South Dakota.¹¹

The VRA clearly had an impact on the level of partisan polarization, particularly when it was amended to require the practice of creating safe minority districts. The number of African American representatives from Southern states increased from five to seventeen as a result of the redistricting that followed the 1990 census. As Professor Pildes acknowledges, an increase of just twelve representatives from such districts is hardly enough to change the political complexion of Congress. But the “second-order” effect of that kind of redistricting, he points out, also makes it more difficult to create other competitive districts, because more liberal voters have been drained from neighboring

9. *Id.* at 288.

10. PAUL KRUGMAN, *THE CONSCIENCE OF A LIBERAL* 178 (2007).

11. *Section 5 Covered Jurisdictions*, THE U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Mar. 27, 2011).

areas to create the “safe” minority seat.¹² One district wins, as it were, but if what one is trying to achieve is a legislature composed of moderates who have been elected by that celebrated median voter and can therefore find some grounds for compromise, then everybody loses in the end. Increasing “safe” seats increases partisan polarization, as those seats become home to elections won or lost based on the dominant party’s more extreme base.

Yet this argument places too much weight on the VRA as an explanation for the current degree of polarization. The Supreme Court’s 1993 decision in *Shaw v. Reno* significantly tempered the effects of the VRA by subjecting the process of racial gerrymandering to the constitutionally stringent test of strict scrutiny.¹³ This measurably slowed the rate of increase in minority-only seats in the first election that followed the redistricting mandated by the 2000 census.¹⁴ And even allowing for the “second-order” effects that Professor Pildes describes, one has to ask just what is the magnitude of the effect in question? That there has been an effect is not at issue. But is it sufficiently large to account for the entirety, or even the majority, of the polarization we see?

Answering that question with more rigorous empirical evidence makes up an ambitious research agenda. It seems intuitive that changing the “safe-minority” redistricting rule could only have significant impact in states where the partisan divide was already about even. In a preponderantly Democratic state like California, for example, packing a few VRA districts with Democrats might actually make the remaining districts *more* competitive. In other words, whether redistricting will yield districts that are more or less competitive is a question highly contingent on the particularities of the case. We here encounter once again what has been described as the first principle of political science: “it depends.”

IV.

EXPLAINING TODAY’S HYPERPOLARIZATION: FACTORS PILDES LEFT OUT

Professor Pildes has perhaps focused too much on institutional factors and too swiftly cast out of the discussion the substantive content of American politics today. For example, I referred earlier to the Civil War. One would have a heavy burden of proof to carry if one wished to explain that systemic breakdown of the usual political process without mentioning slavery.

Similarly, we cannot fully grasp the divisiveness of our own political moment without acknowledging the salience of issues that are by their very nature polarizing. These issues elude the capacity of a political system designed to reconcile differences and have many of the properties that slavery had in the nineteenth century. They include abortion and gay marriage, to take the two

12. Pildes, *supra* note 8, at 316.

13. See 509 U.S. 630, 643–44 (1993).

14. JOINT CTR. FOR POLITICAL & ECON. STUDIES, ANNUAL REPORT 6 (2002), available at <http://www.jointcenter.org/index.php/content/download/2527/16364/file/2002-annual-report.pdf>.

most conspicuous examples, though one might easily add issues of war and peace. These matters are all highly emotionally charged and ideologically grounded. They simply do not lend themselves to the kind of compromising that is the stuff of “normal” politics. They might be called Solomonic issues, where the interests at stake are indivisible and the only solutions acceptable to stakeholders are unitary, not comprehensive.

Additionally, polarization affects different political camps differently. What we have today might be characterized as “asymmetric polarization.” The conservative right is much more demographically and culturally homogenous and much less inclined to compromise on value-laden social issues than the much more heterogeneous Democratic Party.

Finally, among the factors that underwrote the halcyon days of harmony and bipartisanship in the post-war era was a phenomenally well-performing economy. It is no accident that the substantial fulfillment of the civil rights agenda, after a century of postponement, took place in that context of shared affluence, rising expectations all around, and great national self-confidence. Conversely, much of the acrimony that crept into our political culture after the 1960s has reflected the much more constrained economic circumstances of that later period. The historian David M. Potter made the point half a century ago, in a still-remarkable book about the American national character, *People of Plenty*, where he argued that economic abundance has proved to be a kind of preemptive emollient, softening social contestations that in other contexts might have proved much sharper and more difficult to resolve.¹⁵ In our own uncertain economic circumstances, that is a lesson worth revisiting as we try to think about the prospects for our political system.

15. DAVID M. POTTER, *PEOPLE OF PLENTY: ECONOMIC ABUNDANCE AND THE AMERICAN CHARACTER* (1954).

