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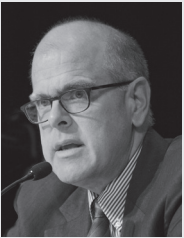
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The Roots of Our Partisan Divide

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American society today is divided by party and by ideology in a way it has perhaps not been since the Civil War. I have just published a book that, among other things, suggests why this is. It is called *The Age of Entitlement: America Since the Sixties*. It runs from the assassination of John F. Kennedy to the election of Donald J. Trump. You can get a good idea of the drift of the narrative from its chapter titles: 1963, Race, Sex, War, Debt, Diversity, Winners, and Losers.

I can end part of the suspense right now—Democrats are the winners. Their party *won* the 1960s—they gained money, power, and prestige. The GOP is the party of the people who lost those things.

One of the strands of this story involves the Vietnam War. The antiquated way the Army was mustered in the 1960s wound up creating a class system. What I'm referring to here is the so-called student deferment. In the old days, university-level education was rare. At the start of the First World War, only one in 30 American men was in a college or university, so student deferments were not culturally significant. By the time of Vietnam, almost half of American men were in a college or university, and student deferment remained in effect until well into the war. So if you were rich enough to study art history, you went to Woodstock and made love. If you worked in a garage, you went to Da Nang and made war. This produced a class division that many of the college-educated mistook for a moral division, particularly once we lost the war. The rich saw themselves as having avoided service in Vietnam not because they were more privileged or—heaven forbid—less brave, but because they were more decent.

Another strand of the story involves women. Today, there are two cultures of American womanhood—the culture of married women and the culture of single women. If you poll them on political issues, they tend to differ diametrically. It was feminism that produced this rupture. For women during the Kennedy administration, by contrast, there was one culture of femininity, and it united women from cradle to grave: Ninety percent of married women and 87 percent of unmarried women believed

there was such a thing as “women’s intuition.” Only 16 percent of married women and only 15 percent of unmarried women thought it was excusable in some circumstances to have an extramarital affair. Ninety-nine percent of women, when asked the ideal age for marriage, said it was sometime before age 27. None answered “never.”

But it is a third strand of the story, running all the way down to our day, that is most important for explaining our partisan polarization. It concerns how the civil rights laws of the 1960s, and particularly the Civil Rights Act of 1964, divided the country. They did so by giving birth to what was, in effect, a second constitution, which would eventually cause Americans to peel off into two different and incompatible constitutional cultures. This became obvious only over time. It happened so slowly that many people did not notice.

Because conventional wisdom today holds that the Civil Rights Act brought the country together, my book’s suggestion that it pulled the country apart has been met with outrage. The outrage has been especially pronounced among those who have not read the book. So for their benefit I should make crystal clear that my book is *not* a defense of segregation or Jim Crow, and that when I criticize the long-term effects of the civil rights laws of the 1960s, I do *not* criticize the principle of equality in general, or the movement for black equality in particular.

What I am talking about are the emergency mechanisms that, in the name of ending segregation, were established

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[Latin]: in the first place

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under the Civil Rights Act of 1964. These gave Washington the authority to override what Americans had traditionally thought of as their ordinary democratic institutions. It was widely assumed that the emergency mechanisms would be temporary and narrowly focused. But they soon escaped democratic control altogether, and they have now become the most powerful part of our governing system.

How Civil Rights Legislation Worked

There were two noteworthy things about the civil rights legislation of 1964 and 1965.

The first was its unprecedented concentration of power. It gave Washington tools it had never before had in peacetime. It created new crimes, outlawing discrimination in almost every walk of public and private life. It revoked—or repealed—the prevailing understanding of freedom of association as protected by the First Amendment. It established agencies to hunt down these new crimes—an expanded Civil Rights Commission, an Equal Employment Opportunity Commission (EEOC), and various offices of civil rights in the different cabinet agencies. It gave government new prerogatives, such as laying out hiring practices for all companies with more than 15 employees, filing lawsuits, conducting investigations, and ordering redress. Above all, it exposed every corner of American social, economic, and political life to direction from bureaucrats and judges.

To put it bluntly, the effect of these civil rights laws was to take a lot of decisions that had been made in the democratic parts of American government and relocate them to the bureaucracy or the judiciary. Only with that kind of arsenal, Lyndon Johnson and

the drafters thought, would it be possible to root out insidious racism.

The second noteworthy thing about the civil rights legislation of the 1960s is that it was kind of a fudge. It sat uneasily not only with the First Amendment, but with the Constitution as a whole. The Voting Rights Act of 1965, passed largely to give teeth to the 14th Amendment's guarantee of equal rights for all citizens, did so by creating different levels of rights for citizens of southern states like Alabama and citizens of northern states like Michigan when it came to election laws.

The goal of the civil rights laws was to bring the sham democracies of the American South into conformity with the Constitution. But nobody's democracy is perfect, and it turned out to be much harder than anticipated to distinguish between democracy in the South and democracy elsewhere in the country. If the spirit of the law was to humiliate Southern bigots, the letter of the law put the entire country—all its institutions—under the threat of lawsuits and prosecutions for discrimination.

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Still, no one was too worried about that. It is clear in retrospect that Americans outside the South understood segregation as a regional problem. As far as we can tell from polls, 70-90 percent of Americans outside the South thought that blacks in their part of the country were treated just fine, the same as anyone else. In practice, non-Southerners did not expect the new laws to be turned back on *themselves*.

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The Broadening of Civil Rights

The problem is that when the work of the civil rights legislation was done—when *de jure* segregation was stopped—these new powers were not suspended or scaled back or reassessed. On the contrary, they intensified. The ability to set racial quotas for public schools was not in the original Civil Rights Act, but offices of civil rights started doing it, and there was no one strong enough to resist. Busing of schoolchildren had not been in the original plan, either, but once schools started to fall short of targets established by the bureaucracy, judges ordered it.

Affirmative action was a vague notion in the Civil Rights Act. But by the time of the Supreme Court’s 1978 *Bakke* decision, it was an outright system of racial preference for non-whites. In that case, the plaintiff, Alan Bakke, who had been a U.S. Marine captain in Vietnam, saw his application for medical school rejected, even though his test scores were in the 96th, 94th, 97th, and 72nd percentiles. Minority applicants, meanwhile, were admitted with, on average, scores in the 34th, 30th, 37th, and 18th percentiles. And although the Court decided that Bakke himself deserved admission, it did not do away with the affirmative action programs

that kept him out. In fact, it institutionalized them, mandating “diversity”—a new concept at the time—as the law of the land.

When European governments of the past bypassed their constitutions by declaring emergencies, it was on the grounds of a military threat or a threat to public order. In America as it has evolved since 1964, we declare *moral* emergencies: people are suffering; their rights are being denied. America can’t wait anymore for the democratic process to take its course.

Meanwhile other groups, many of them not even envisioned in the original legislation, got the hang of using civil rights law. Immigrant advocates, for instance: Americans never voted for bilingual education, but when the Supreme Court upheld the idea in 1974, rule writers in the offices of civil rights simply established it, and it exists to this day. Women, too: the EEOC battled Sears, Roebuck & Co. from 1973 to 1986 with every weapon at its disposal, trying to prove it guilty of sexism—ultimately failing to prove even a single instance of it.

Finally, civil rights came to dominate—and even overrule—legislation that had nothing to do with it. The most traumatic example of this was the Immigration Reform and Control Act of 1986. This legislation was supposed to be the grand compromise on which our modern immigration policy would be built. On the one hand, about three million illegal immigrants who had mostly come north from Mexico would be given citizenship. On the other hand, draconian laws would ensure that the amnesty would not be an incentive to future migrants, and that illegal immigration would never get out of control again. So there were harsh “employer sanctions” for anyone who hired a non-citizen. But once the law passed, what happened? Illegal immigrants got their amnesty. But the penalties on illegal hiring turned out

to be fake—because, to simplify just a bit, asking an employee who “looks Mexican” where he was born or about his citizenship status was held to be a violation of his civil rights. Civil rights law had made it impossible for Americans to get what they’d voted for through their representatives, leading to decades of political strife over immigration policy that continues to this day.

A more recent manifestation of the broadening of civil rights laws is the “Dear Colleague” letter sent by the Obama Education Department’s Office for Civil Rights in 2011, which sought to dictate sexual harassment policy to every college and university in the country. Another is the overturning by judges of a temporary ban on entry from certain countries linked to terrorism in the first months of the Trump administration in 2017.

These policies, *qua* policies, have their defenders and their detractors. The important thing for our purposes is how they were established and enforced. More and more areas of American life have been withdrawn from voters’ democratic control and delivered up to the bureaucratic and judicial emergency mechanisms of civil rights law. Civil rights law has become a second constitution, with powers that can be used to override the Constitution of 1787.

The New Constitution

In explaining the constitutional order that we see today, I’d like to focus on just two of its characteristics.

First, it has a *moral* element, almost a metaphysical element, that is usually more typical of theocracies than of secular republics. As we’ve discussed, civil rights law gave bureaucrats and judges emergency powers to override the normal constitutional order, bypassing democracy. But the key

question is: Under what conditions is the government authorized to activate these emergency powers? It is a question that has been much studied by political thinkers in Europe. Usually when European governments of the past bypassed their constitutions by declaring emergencies, it was on the grounds of a military threat or a threat to public order. But in America, as our way of governing has evolved since 1964, emergencies are declared on a moral basis: people are suffering; their newly discovered rights are being denied. America can't wait anymore for the ordinary democratic process to take its course.

A moral ground for invoking emergencies sounds more humane than a military one. It is not. That is because, in order to justify its special powers, the government must create a class of officially designated malefactors. With the Civil Rights Act of 1964, the justification of this strong medicine was that there was a collection of Southern politicians who were so wily and devious, and a collection of Southern sheriffs so ruthless and depraved, that one could not, and was not morally obliged to, fight fair with them.

That pattern has perpetuated itself, even as the focus of civil rights has moved to American institutions less obviously objectionable than segregation. Every intervention in the name of rights requires the identification of a malefactor. So very early on in the gay marriage debate, those who believed in traditional marriage were likened to segregationists or to those who had opposed interracial marriage.

Joe Biden recently said: "Let's be clear: Transgender equality is the civil rights issue of our time. There is no room for compromise when it comes to basic human rights." Now, most Americans, probably including Joe Biden, know very little about transgenderism. But this is an assertion that Americans are not going to be permitted to advance their knowledge by discussing the issue in public or to

work out their differences at the ballot box. As civil rights laws have been extended by analogy into other areas of American life, the imputation of moral non-personhood has been aimed at a growing number of people who have committed no sin more grievous than believing the same things they did two years ago, and therefore standing in the way of the progressive juggernaut.

The second characteristic of the new civil rights constitution is what we can call *intersectionality*. This is a sociological development. As long as civil rights law was limited to protecting the rights of Southern blacks, it was a stable system. It had the logic of history behind it, which both justified and focused its application. But if other groups could be given the privilege of advancing their causes by bureaucratic fiat and judicial decree, there was the possibility of a gradual building up of vast new coalitions, maybe even electoral majorities. This was made possible because almost anyone who was not a white heterosexual male could benefit from civil rights law in some way.

Seventy years ago, India produced the first modern minority-rights based constitution with a long, enumerated list of so-called "scheduled tribes and castes." Eventually, inter-group horse trading took up so much of the country's attention that there emerged a grumbling group of "everyone else," of "ordinary Indians." These account for many of the people behind the present prime minister, Narendra Modi. Indians who like Modi say he's the candidate of average citizens. Those who don't like him, as most of the international media do not, call him a "Hindu nationalist."

We have a version of the same thing happening in America. By the mid-1980s, the "intersectional" coalition of civil rights activists started using the term "people of color" to describe itself. Now, logically, if there really is such a thing as "people of color," and if they are demanding a larger share

of society's rewards, they are *ipso facto* demanding that “non-people of color” get a smaller share. In the same way that the Indian constitution called forth the idea of a generic “Hindu,” the new civil rights constitution created a group of “non-people of color.” It made white people a political reality in the United States in a way they had never been.

If there is such a thing as “people of color,” and if they are demanding a larger share of rewards, they are *ipso facto* demanding that “non-people of color” get a smaller share. In the same way that the Indian constitution called forth the idea of a generic “Hindu,” our new civil rights constitution made white people a political reality in America in a way they had never been.

Now we can apply this insight to parties. So overpowering is the hegemony of the civil rights constitution of 1964 over the Constitution of 1787, that the country naturally sorts itself into a party of those who have benefitted by it and a party of those who have been harmed by it.

A Party of Bigots and a Party of Totalitarians

Let's say you're a progressive. In fact, let's say you are a progressive gay man in a gay marriage, with two adopted children. The civil rights version of the country is everything to you. Your whole way of life depends on it. How can you back a party or a politician who even wavers on it? Quite likely, your whole moral idea of yourself depends on it, too. You may have marched in gay pride parades carrying signs reading “Stop the Hate,” and you believe that people who opposed the campaign that made possible your way of life, your marriage, and your children, can only have done so for terrible reasons. *You* are on the side of the glorious marchers of Birmingham, and *they* are on the side of Bull Connor. To you, the other party is a party of bigots.

But say you're a conservative person who goes to church, and your seven-year-old son is being taught about “gender fluidity” in first grade. There is no avenue for you to complain about this. You'll be called a bigot at the very least. In fact, although you're not a lawyer, you have a vague sense that you might get fired from your job, or fined, or that something

else bad will happen. You also feel that this business has something to do with gay rights. “Sorry,” you ask, “when did I vote for this?” You begin to suspect that taking your voice away from you and taking your vote away from you is the main goal of these

rights movements. To you, the other party is a party of totalitarians.

And that's our current party system: the bigots versus the totalitarians.

If either of these constitutions were totally devoid of merit, we wouldn't have a problem. We could be confident that the wiser of the two would win out in the end. But each of our two constitutions contains, for its adherents, a great deal worth defending to the bitter end. And unfortunately, each constitution must increasingly defend itself against the other.

When gay marriage was being advanced over the past 20 years, one of the common sayings of activists was: “The sky didn't fall.” People would say: “Look, we've had gay marriage in Massachusetts for three weeks, and I've got news for you! The sky didn't fall!” They were right in the short term. But I think they forgot how delicate a system a democratic constitutional republic is, how difficult it is to get the formula right, and how hard it is to see when a government begins—slowly, very slowly—to veer off course in a way that can take decades to become evident.

Then one day we discover that, although we still deny the sky is falling, we do so with a lot less confidence. ■