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DAVID A. SUPER

## Protecting Civil Rights in the Shadows

**ABSTRACT.** Beyond grand constitutional moments such as the New Deal and the civil rights era, the American people also remove other, less prominent issues from majoritarian politics. This process of petit popular constitutionalism resolves numerous important issues of government structure and is crucial for vulnerable groups seeking to implement and expand gains they made during grand constitutional moments.

In our two-party system, this gives groups three options. They may join one party's core constituency, attempt to position themselves as a swing constituency, or seek to establish their concerns as moral imperatives outside of partisan debate with the leadership of a few mainstream politicians of each party. Exerting influence as a core constituency or swing group requires coherence, communication, and group identity that many sets of vulnerable people lack. The alternative petit constitutional route typically requires paring back a group's objectives to essential aims that can win wide acceptance as moral imperatives across the political spectrum.

Since the 1960s, policy for means-tested public benefit programs has been torn between a partisan "welfare rights" track and a petit constitutional "anti-poverty" theme. The 1996 welfare law represented the final defeat of welfare rights in partisan politics. This leaves low-income people dependent on petit constitutionalism, following the same path that death penalty abolitionists and others took after being disowned by one or the other political party.

**AUTHOR.** Professor of Law, Georgetown University. The author is grateful for the thoughtful comments of Bruce Ackerman, Christine Jolls, David Luban, Jon Michaels, Amy Uelman, and the participants in the Yale symposium and in the Georgetown and University at Buffalo faculty workshops; the excellent research of Vivian Diokno, Monica Martinez, Nicholas Miller, Thanh Nguyen, and Kristen Valosky; and the perceptive editing of Sam Adriance, Andrew Hammond, and their colleagues.



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## INTRODUCTION

Bruce Ackerman's recent work provides a compelling account of the constitutional development of civil rights law in the two decades following *Brown v. Board of Education*,<sup>1</sup> centered on the three great civil rights statutes of the 1960s.<sup>2</sup> In the process, he deals a devastating blow to the conventional, if ahistorical, view that constitutional law only involves manipulations of our founding document and the modest number of formal amendments added since.

As important as it is, however, Professor Ackerman's account is incomplete in two crucial respects. First, it provides little explanation of how important issues such as civil rights are handled between constitutional moments. As he notes, constitutional moments are exceedingly rare. After grand constitutional conflicts come to an end, some other form of lawmaking is required to implement their outcomes and to address issues that were neglected. Text-dependent constitutional theorists have at least a superficially coherent explanation of this process: politicians do what they will and courts strike down attempts to transgress the document. Shifting the focus away from judicial review provides a richer, more inclusive, and more accurate account of constitutional formation in this country. But it also requires a more sophisticated explanation of how constitutionalism operates during the prolonged "down time." Institutional checking, through the separation of powers<sup>3</sup> and federalism,<sup>4</sup> provides a vehicle for implementing structural constitutional norms, such as those that arose out of the New Deal constitutional moment. This process is much less well understood, however, with respect to counter-majoritarian constitutional norms such as civil liberties and civil rights. To fulfill the promise of the constitutional moment Professor Ackerman describes in his recent work, we must understand how civil rights can advance both during periods of relatively brief mass engagement and

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1. 347 U.S. 483 (1954).

2. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

3. See, e.g., Jon Michaels, *The Rise and Fall of Administrative Separation of Powers*, 114 COLUM. L. REV. (forthcoming 2014) (on file with author) (finding that a new separation of powers, between political appointees, civil servants, and civil society, has constrained the administrative state in much the way that rivalries between the President, the courts, and Congress operate in the constitutional order).

4. See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (finding that the federal government's need of the states' help to implement its program empowers states to check federal power).

during periods with none at all, when “ordinary citizens return to the sidelines, focusing more emphatically on the pursuit of private happiness.”<sup>5</sup>

Second, Professor Ackerman, like most text-based constitutional theorists, largely limits his focus to grand constitutionalism. This is certainly understandable. Not all provisions of the U.S. Constitution are of equal importance: the Commerce Clause obviously affects our political lives far more than the Marque and Reprisal Clause.<sup>6</sup> And the principles laid down during the Civil Rights Revolution are of far greater importance than most other popular decisions, even transformative ones. Yet it would be a serious mistake to dichotomize political life between grand constitutional pronouncements on the most important issues facing the nation and simple majoritarian disposition of everything else. We prevent majoritarian politics from deciding many issues that are not widely seen as momentous. The numerous provisions of the U.S. Constitution ignored in most constitutional law classes and scholarship are something more than “junk DNA” for this country.

Similarly, popular constitutionalism is not confined to the protracted, all-consuming constitutional moments that Professor Ackerman describes. Just as *We the People* did not lose our constitutional voice on major issues in the twentieth century,<sup>7</sup> so too we did not give up removing more prosaic matters from everyday politics. Our founding document contains numerous petit constitutional provisions. So did the Reconstruction Amendments (in the middle sections of the Fourteenth Amendment). And so, too, we continue to move lower-salience aspects of our governance into and out of the majoritarian political sphere. Professors William Eskridge and John Ferejohn have described this process in general terms and provided a number of valuable case studies of petit constitutionalism expressed through super-statutes.<sup>8</sup> Most Americans, however, think far more about the content of legal rules than about those rules’ form: statutes, regulations, case law, or some combination. Lawyers should not presume to impose their conceptions of orderly governance on an electorate that focuses on statutes far less than lawyers do.<sup>9</sup>

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5. 3 ACKERMAN, *supra* note 2, at 46.

6. *But see* PAUL VERKUIL, *OUTSOURCING SOVEREIGNTY* 103 (2007) (discussing the Marque and Reprisal Clause).

7. *See* 3 ACKERMAN, *supra* note 2, at 17.

8. WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010).

9. *See* 3 ACKERMAN, *supra* note 2, at 32-35 (criticizing narrow-canon constitutionalism on this ground).

Just as Professor Ackerman makes a compelling case that broadening the constitutional canon enhances democracy, so too can other, more diminutive popular choices to remove issues from majoritarian control broaden real democracy. With elections fought out over small handfuls of issues,<sup>10</sup> showing unblinking reverence to decisions made by someone appointed by someone who was appointed by someone who was appointed by someone who never came close to addressing that question in her or his campaign<sup>11</sup> makes a mockery of real democracy.<sup>12</sup> Where We the People have come together to decide important issues of public policy through a focused, inclusive process—albeit ones less momentous than those typically addressed in grand constitutionalism—these judgments deserve respect and adherence. This essay contends that these decisions to remove issues from partisan debate are effectively a lesser form of constitutionalism.

Broadening our understanding of popular constitutionalism also is essential if we are to extend counter-majoritarian protection to a broader range of politically, socially, and economically marginalized groups. Only a small minority of the social and economic minorities in our country will succeed in galvanizing the nation sufficiently to produce a grand constitutional moment. Without petit constitutionalism, all those excluded would be left to the tender mercies of majoritarian politics. Although African Americans' subjugation holds a special place in U.S. history, they were by no means the only important group facing severe marginalization during the 1950s and since. Native Americans as well as Latinos and Latinas were subject to systematic racial discrimination, dispossession of property, and hate crimes. They were effectively blocked from political participation in areas where they might have had sufficient collective power to change their circumstances. Yet they largely failed to ignite constitutional moments of their own. Some of the achievements

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10. See DANIEL YANKELOVICH, *COMING TO PUBLIC JUDGMENT: MAKING DEMOCRACY WORK IN A COMPLEX WORLD* 165-66 (1991) (arguing that the electorate is capable of weighing no more than two or three issues at a time).
  11. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001) (giving numerous examples of such exercises of power, much of it by officials not even subject to Senate confirmation).
  12. At times, despite decades of making dubious claims of executive officials' democratic accountability to justify judicial deference, even the Court feels compelled to reject the "Princess and the Pea" theory that we can feel the pea of democracy no matter how many mattresses of appointments cover it. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (rejecting two-tiered appointment process that attenuates presidential control).

the Civil Rights Revolution won for African Americans benefited these groups too, but to the extent their needs and problems were different, they received little relief.<sup>13</sup> Women, LGBTQ people, religious minorities, people with disabilities, the very young and the very old, and low-income people received even less incidental protection while facing very real problems.

The fatigue and the desire to return to the entertainments of ordinary life that Professor Ackerman describes can work against groups trying to build on the achievements of a grand constitutional moment. Part of what allows a movement to successfully place a constitutional discussion on the political agenda is that that movement raises its concerns in a novel way. By the time other groups are seeking similar attention, the novelty of the appeal is gone, and with it, the opportunity to shape the public agenda. People remember Medgar Evers,<sup>14</sup> but not Juan de la Cruz.<sup>15</sup>

In practice, defending the social, economic, and political position of marginalized groups requires both effective maneuvering within the realm of elite politics and the ability to identify and sell clear, specific improvements during fleeting periods of broader public engagement. Pursuing both of these requirements together has at times proven problematic: efforts to empower communities previously marginalized from politics can be an awkward fit with the complex, often obscure, give-and-take of elite politics. And when the group's concerns do occasionally engage the public's attention, the scope of the group's pent-up need can make it difficult to refine and present an agenda for change that is focused enough to be politically viable in the limited amount of time before the public's attention wanes. In addition, although it has become fashionable to disparage civil rights litigation in general, and anti-poverty litigation in particular, such litigation can be vital for groups that lack the

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13. See, e.g., *Mathews v. Diaz*, 426 U.S. 67 (1976) (upholding the exclusion of the large numbers of Latinos and Latinas lacking U.S. citizenship from Medicare Part B); *Morton v. Mancari*, 417 U.S. 535 (1974) (addressing the conflict between statutes protecting dispossessed Native Americans and general civil rights legislation).
  14. Medgar Evers was an NAACP leader murdered by a sniper in Jackson, Mississippi, in 1963. See TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65*, at 108 (1998) (noting that “the murder of Medgar Evers changed the language of race in American mass culture overnight”).
  15. Juan de la Cruz was a United Farm Workers leader killed on a picket line in August 1973. His murder, and that of Naji Daifullah a few days before, led Cesar Chavez to end the grape workers' strike and put his faith in the second Grape Boycott. JACQUES E. LEVY, *CESAR CHAVEZ: AUTOBIOGRAPHY OF LA CAUSA* 505-10 (1975).

resources to protect and entrench the gains won during periods of broad public engagement.

Although this essay's focus is on civil rights, and specifically those of low-income people, the same dynamic affects civil liberties. The segment of the electorate that makes any particular liberty a major touchstone of its political outlook is typically quite small, analogous to a group pressing civil rights claims on its own behalf or on behalf of those with whom it sympathizes. These groups may find some relief in constitutional litigation, but for the most part they must make the same kinds of choices, described here, between participation in majoritarian politics and the pursuit of petit constitutional protection outside of ordinary politics.

This essay contends that, for marginal groups unable to seize the public imagination or struggling to preserve the gains achieved through grand constitutional politics, two very different options exist. One, which is widely recognized, is to immerse themselves in the rough-and-tumble of regular partisan politics. The other is to seek to achieve petit constitutional status for some of the norms important to them. Each path has characteristic opportunities and limitations.

Like Professor Ackerman's account of popular grand constitutionalism, this essay gives only passing attention to textual petit constitutionalism. Instead, it undertakes a somewhat parallel inquiry into the means and consequences of popular petit constitutional decision-making. It proceeds as follows. Part I explores the options available to marginal groups in a two-party system, including the promise and drawbacks of petit constitutionalism. Part II traces how low-income people and their advocates have vacillated between regular politics and petit constitutionalism, with quite deleterious results. Part III concludes by briefly sketching some examples of other groups' experiences with each of these paths, including vulnerable populations as well as groups defined by their prioritizing particular civil liberties.

## **I. MARGINAL GROUPS IN A TWO-PARTY SYSTEM**

Conventional wisdom suggests that interest groups have two options in a two-party system: joining the core constituencies of one of the parties or attempting to position themselves as a swing group pursued by both sides.

In fact, groups have a third option, one that can play an important role in understanding outcomes that seem to defy standard public choice theory. In this third position, groups eschew clear alignment with either party and accept that they lack the numbers or coherence to function effectively as a swing group. Instead, they appeal on non-ideological grounds to what they assert are petit constitutional values about the nation's basic character. A modest number

of conscientious policymakers in both parties may elevate awareness of the group's concerns and help articulate why they should be regarded as fundamental. But the group's success rises or falls based on the effectiveness of these moral arguments.

This is the position that iconic leaders such as the Rev. Dr. Martin Luther King, Jr. and Thurgood Marshall adopted in the early years of their struggle when they had few reliable friends in either party. It is reflected in the American Civil Liberties Union's slogan "no permanent friends and no permanent enemies."<sup>16</sup>

This Part considers each of these three choices. Section A explores the opportunities and risks of vulnerable groups' engagement in the classic options of ordinary partisan politics. Section B then explores the workings of petit popular constitutionalism.

### *A. How Marginal Groups Can Impact Partisan Politics*

In our heavily majoritarian system, partisan politics is the primary means for advancing one's interests on large matters and small. Having influence on the party winning a clear majority can allow a group to pass transformative legislation, such as the Reagan, Gingrich, and Bush tax cuts or the Affordable Care Act; to select top executive officials; and to stock the high courts with like-minded judges. It also allows the group to control myriad smaller matters of policy, from the drafting of obscure legislative provisions to the issuance of administrative rules and executive orders and the appointment of trial judges.

In our two-party system, an interest group may obtain this influence in either of two distinct ways. First, it may become a swing constituency, inviting the major parties to bid for their support. The popular narrative of U.S. politics valorizes the swing constituency, and the news media attends to swing groups (and their constituents, often political independents) out of all proportion to their actual importance. We invest independence with Solomonic wisdom and treat swing groups as guarantors of moderation.<sup>17</sup>

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16. Press Release, ACLU, ACLU Announces Collaboration with Rep. Bob Barr; Says Conservative Congressman Will Consult on Privacy Issues (Nov. 25, 2002), <https://www.aclu.org/technology-and-liberty/aclu-announces-collaboration-rep-bob-barr-says-conservative-congressman-will->.

17. See, e.g., David S. Broder & Richard Morin, *Trying to Find Which Way 'Swing' Voters Will Go*, ALB. TIMES UNION, Sept. 25, 1988, at A3.

The reality is considerably less admirable. Independents tend to be among the least informed and the least sophisticated voters, and the swing groups that seek to marshal them are typically pursuing particularistic rather than national interests.<sup>18</sup>

Second, an interest group instead may become part of one major party's base. This allows them a broader role in helping to formulate that party's program and the opportunity to insert their partisans in public office and the party hierarchy. Thus, not only can the group shape the party's platform on major issues vital to the group, but this personalization of politics provides numerous opportunities to turn smaller policy decisions in its favor. Our political discourse is sometimes unkind to loyal adherents to a single political party, but that position has considerable practical compensation.

### 1. *The Preconditions to Effectiveness in Partisan Politics*

Both the swing position and integration into a party's base, however, require specific capability and conditions to be successful. Most obviously, for a group to occupy either position, it must be sufficiently numerous to interest the political parties. Does anyone know—or care—about the political leanings of Swiss Americans or the owners of exotic pets?

In addition, one or both parties must actually want the group's support. If the group's support will guarantee the enmity of a larger bloc of voters or contributors whose loyalties are also up for grabs, both parties may take pains to show the less powerful group the door.<sup>19</sup> Indeed, the parties may each accuse one another of relying on the pariah group. Neither party competes openly for the support of ex-offenders or Klansmen, and each denounces assertions that it does so covertly.

Functioning effectively in either position also requires strong group identity. This country has millions of bridge players, but until that identity comes to dominate those players' political behavior, few politicians will be courting the American Contract Bridge League. Political identities can evolve; evangelical Christians in the 1970s and 1980s, and LGBTQ people more

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18. Rebecca Berg, *Few Voters Are Truly Up for Grabs, Research Shows*, N.Y. TIMES, Aug. 16, 2012, <http://www.nytimes.com/2012/08/17/us/politics/pursuing-the-elusive-swing-voter.html>.

19. See, e.g., David Broder, *How Did High Hopes Come Down to This?*, CHI. TRIB., Oct. 30, 1988, [http://articles.chicagotribune.com/1988-10-30/news/8802120184\\_1\\_dukakis-strategy-natural-majority-party-democrats](http://articles.chicagotribune.com/1988-10-30/news/8802120184_1_dukakis-strategy-natural-majority-party-democrats) (reporting that Republican and most Democratic leaders believe that Democratic interest groups alienate swing voters).

recently, have politicized their identities and drawn corresponding partisan attention.

Beyond this sense of group identity and identification, being a swing group or an influential bloc within a party's core demands considerable coordination. For the parties to bid aggressively for a swing group's support, they must be convinced that the group will actually swing *en masse*. This requires either wide recognition of a few opinion leaders in the group or a sufficiently attentive membership to move in predictable directions in response to parties' and candidates' positions. Functioning as a member of a party's core calls for an even more difficult form of coordination; maintaining influence within the party requires bloc voting in primaries, financial contributions, or usually both. Keeping the group together without the guidance of party labels places especially great demands on the group's leaders to inform and mobilize their constituencies.

Many groups pursuing their aims within partisan politics lack many of these capabilities and, as a result, face almost constant frustration. Part II will show that low-income people are particularly ill-equipped to pursue these modes of advocacy.

## 2. *Comparing the Benefits and Risks of Being Swing and Core Constituencies*

Parties' core constituencies have a greater bandwidth of influence, which may be important if their members have copious needs. That position is more difficult to maintain effectively, as noted above, and it also faces considerably greater risks. A group's persistent alignment with one party leaves the other party free to attack the group in the hope of securing support from the group's opponents.

When the group's chosen party is out of power for whatever reason, the groups' members will be highly vulnerable. This is particularly true for groups with determined opponents, who will tend to congregate in the opposing party's base. With the growth of national political party identities, interest groups have greater difficulty adopting inconsistent affiliations across states. This leaves Democratic constituencies perpetually at risk in red states and Republican constituencies persistently exposed in blue ones. Many policy programs take different amounts of time to install and to dismantle. Thus, for example, the Affordable Care Act will require virtually the entire two-term Obama presidency to enact and bring to operational equilibrium, yet neither repealing it nor dismantling its infrastructure would pose any particular operational challenges. Conversely, the Gingrich and Bush tax cuts were enacted and implemented quickly, but unwinding them would require imposing financial pain on large numbers of voters as well as complicated

transition rules. Groups whose programs are readily uprooted during partisan alternations will be at great risk if they become members of a party's base.

In addition, if the party's other constituents come to see a group that has been in the partisan core as a liability, the group has little leverage. The most it can plausibly threaten in the short term is that its constituents will decline to vote or contribute.<sup>20</sup> But a swing group of only half the size can have the same political influence by threatening to flip to the other party.<sup>21</sup> And if the other party's platform is inimical to the group's interests, even abstinence will not be a realistic threat. Even in the longer term, if the opposing party's coalition includes many people hostile to the group's members, everyone will recognize that the group has nowhere to go and hence has little leverage.

These risks may be acceptable to groups pursuing a longer-term ideological agenda whose vital interests are not immediately threatened if a few elections go to the hostile party. Thus, some environmentalists and leftists effectively abstained in the 2000 election by voting for Ralph Nader in the hopes of disciplining the Democratic Party.<sup>22</sup>

A special set of problems arise when several marginal groups simultaneously seek to become core members of either political party's coalition. In this situation, sympathetic legislators can be seen as a kind of scarce, communally owned resource. Many, especially in close districts, can afford to support some but not all of these groups' causes without alienating too many marginal voters and losing their seats. Perhaps they could vote to

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20. Parties ordinarily have little reason to develop programs attractive to the core constituencies of their opponents. If a party becomes aware of a possibility to recruit a segment of the other's base, it may try to modify its positions but may be constrained by members of its own base hostile to the group it seeks to attract. Republicans seeking African American and Hispanic votes, and Democrats trying to increase their Catholic support, have encountered this problem. See, e.g., Bruce Lambert, *Suozzi Calls for "Common Ground" on Reducing Abortions*, N.Y. TIMES, May 11, 2005, at B5 (describing pro-choice groups' criticism of Democratic county executive calling for bipartisan cooperation to promote alternatives to abortions); William March, *Jeb Bush's Hedging on Immigration Resonates*, TAMPA TRIB., Mar. 11, 2013, <http://tbo.com/news/politics/jeb-bushs-hedging-on-immigration-resonates-b82461747z1> (describing criticism of a prospective GOP presidential candidate for seeming to shift his stance on immigration).
  21. For example, having 500 voters switch to the other party has the same net effect as losing 1,000 voters who stay home.
  22. See Ken Foskett, *Nader a Growing Risk for Gore in the Northwest, Environmental Bloc Could Cost the Vice President the Election, Democratic Strategists Say*, ATL. JOUR.-CONST., Oct. 23, 2000, at A4 (describing environmentalists' anger that Vice President Gore did not take more forceful positions on some issues).

limit the death penalty, to support same-sex marriages, to regulate greenhouse gases, or to increase the inheritance tax, but not all four. If each interest group in the party's base maintains a claim on these legislators' votes, the result is a sort of tragedy of the commons in which the legislators are overexposed, lose, and become of no use to anyone. Each group's consumption of the legislators' political capital has negative externalities on each of the others.

A classic response to this sort of problem is private ownership, but applying that concept to these legislators is challenging. In the near term, the legislator "owns" her or his vote. But legislators' limited mandates make them far more like tenants than owners. Moreover, legislators elected in a partisan election also are representatives of their parties, which in turn are "owned" by their core constituencies. They are subject to primary challenges or to the elimination of fundraising assistance should they alienate their parties. Party leaders may try to ration usage of their legislators' votes by limiting what comes to a vote, but the opposing party often can force votes on amendments. And party leaders, too, are "owned" by the various elements of their partisan bases.

Without a good mechanism for picking which causes to abandon, legislators and party leaders will act based on how many votes they expect to lose by supporting each group's agenda, each group's potential to punish the party by withholding money and votes, or their subjective sense of which cause is most important. Legislators may misjudge how many hard votes they can afford to cast and lose their seats. If various legislators make disparate choices, no group may win a majority in the legislature even though the legislators each weakened themselves with some hard votes.

Coordinating demands among the groups within a party's base is likely to prove difficult, too. Legislators one group wants to reward will be on another group's list for punishment. Each group will be better off if it makes aggressive demands while other groups show restraint, but as in the game of chicken, the party will face disaster if no groups swerve. If the groups' constituencies of voters or funders overlap partially, they may be leery of confronting one another directly. More generally, building the ideological fervor crucial to the capacity to punish deviant legislators reduces groups' capacity to moderate their demands, thus increasing the likelihood of future collisions.

For all of these reasons, at least some interest groups that might think it natural to be within one or another party's base would be well-advised to pursue a different strategy. And as Part II discusses, low-income people are particularly vulnerable to almost all of these risks.

### B. *Petit Popular Constitutionalism*

Petit constitutionalism, like Professor Ackerman's popular grand constitutionalism, reflects the modern reality that partisan divisions have increasingly replaced regional ones. Thus, fundamental lawmaking now depends upon reaching broad agreement including significant members of both partisan coalitions rather than ratification by a super-majority of states. In each case, the point is to confirm that a broad majority of the country regards the point in question as not just being valid, but also important enough to constitutionalize.

A petit constitutional moment occurs when a firm consensus forms that a particular principle or value cannot be questioned without placing oneself firmly outside of the respectable range of political opinion. Professors Eskridge and Ferejohn offer one model for generating petit constitutional law through super-statutes.<sup>23</sup> In their account, the process has three steps: (1) a new statutory policy displaces the common law or a prior statutory regime, (2) the new policy is reached through a widely publicized deliberative process, and (3) that new policy becomes entrenched over time.<sup>24</sup>

This is fine as far as it goes, but it is incomplete. On many occasions, We the People make petit constitutional law with only incidental incorporation of statutes—or none at all. And at times, the driving force is not thoughtful deliberation but strong, simultaneous gut reactions. That these collective moral expectations of our leaders take on constitutional character—delegitimizing those that ignore or dispute them—should come as no surprise in a nation that defines itself by ideals rather than by an ethnicity.

Just as grand constitutionalism can loosely, and somewhat ahistorically, be divided into structural and individual rights aspects, the same is true of petit constitutionalism. The U.S. Constitution did not win ratification on the strength of the detailed procedures for what we now call “pocket vetoes” or the two-witness requirement for treason convictions, but those provisions have the same force as the Presentment and Due Process Clauses. Professor Ackerman's account of popular grand constitutionalism similarly encompasses changes to both the structure and powers of the national government during the New Deal and the Civil Rights Revolution from the 1950s to the 1970s. Its petit cousin similarly may be divided.

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23. ESKRIDGE & FEREJOHN, *supra* note 8, at 6-8.

24. *Id.* at 26.

### 1. *Constitutional Structure*

Petit popular constitutionalism finds numerous examples, often quite prosaic, in the structure of government. Thus, for example, no public official of either party could refuse to attempt to rescue stranded climbers on Mt. McKinley even if the climbers had disregarded Park Service warnings. Nothing in the written Constitution even arguably creates these positive rights; no statute, much less a super-statute, imposes such a burden. But our popular constitution has a norm requiring government to attempt to save the lives of even the most foolhardy of our peers.

Similarly, nothing in the written Constitution imposes any obligations on the federal government to look after the welfare of our diplomats posted overseas. Yet popular understandings of the duties of the president dictate otherwise. President Carter's inability to protect or obtain the release of our diplomats in Tehran was seen as every bit as much of a failure of constitutional duty as if he had failed to deliver a State of the Union message.<sup>25</sup> Republicans' persistent attacks on the Obama Administration's failure to protect our people in Benghazi reflect an appreciation of this constitutional principle.

A more significant petit constitutional moment occurred over the past few years concerning the federal debt limit. When the federal government first approached the debt limit in 2011, congressional Republicans denied they had an unqualified duty to act and insisted they were free to demand concessions as they would on most other legislative proposals. President Obama reluctantly agreed, accepting the crippling budget cuts of sequestration. By 2013, the President was prepared to assert that Congress did have such a categorical duty and to refuse to engage on the specifics of budgetary legislation (on which the electorate might have sympathized with the Republicans). After polls showed a decisive swing against Congress, Speaker Boehner twice brought unconditional debt limitation legislation to the House that the great majority of his own party opposed,<sup>26</sup> while Senate Minority Leader McConnell chided his caucus for

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25. See Steven R. Weisman, *For America, a Painful Reawakening*, N.Y. TIMES, May 17, 1981, <http://www.nytimes.com/1981/05/17/magazine/for-america-a-painful-reawakening.html> (describing the electorate's loss of faith in President Carter over the failure).

26. Cristina Marcos & Paul M. Krawzak, *Battle Over, but "War" Continues*, CQ WKLY. 1756-58, Oct. 21, 2013. Speaker Boehner thus not only violated the Boehner Rule, requiring dollar-for-dollar offsets for increases in the debt limit, but also the Hastert Rule, allowing consideration only of legislation supported by a majority of the majority.

forgetting the lessons of previous failed efforts to leverage government shutdowns.<sup>27</sup>

This illustrates the general pattern of popular petit constitutionalism. One branch of the federal government, or one or more states, will assert either that it is not obliged to undertake a function traditionally assigned to it or that another entity has some particular duty. Another branch or level of government will contradict that assertion, not on the merits of the policies at issue, but as a general matter of law. The contestants resort to We the People. Because the pragmatic U.S. electorate is notoriously averse to deciding questions as matters of principle,<sup>28</sup> the most common result is a failure to make constitutional law at all: the electorate either refuses to intervene decisively or resolves the dispute on its underlying substantive merits. The electorate's aversion to needless higher lawmaking both deters and disappoints attempts at overreaching. When a resolution is rendered, however, the defeated entity hastily retreats and proceeds without regard to its usual partisan commitments.

Settlements achieved in this manner preoccupy the electorate less and hence make a significantly less indelible mark on our constitutional fabric than do grand constitutional moments. Even casual students of U.S. history know about Reconstruction, the New Deal, and the Civil Rights Revolution; although it is far more recent, many have forgotten, or never learned about, the 1995 government shutdowns.<sup>29</sup> Reversing the achievements of grand constitutional decision-making would require a massive, prolonged new constitutional moment; in a couple of decades, however, one or the other party might try shutting down the government again to extort policy concessions, betting that its opponent cannot mobilize the electorate's collective memory.

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27. Ruth Marcus, Op-Ed, *A Moment for Flexibility by Democrats*, WASH. POST, Oct. 18, 2013, [http://www.washingtonpost.com/opinions/ruth-marcus-a-moment-for-flexibility-by-democrats/2013/10/18/27b6770c-3827-11e3-ae46-e4248e75c8ea\\_story.html](http://www.washingtonpost.com/opinions/ruth-marcus-a-moment-for-flexibility-by-democrats/2013/10/18/27b6770c-3827-11e3-ae46-e4248e75c8ea_story.html).

28. See YANKELOVICH, *supra* note 10, at 171-74 (finding that accommodating rather than selecting between competing values is the dominant mode of public decision-making).

This same instinct has given us a divided federal government in thirty-three of the forty-six years since the 1968 election. (President Carter enjoyed a Democratic Congress for his four years in office, Presidents Clinton and Obama had majorities in both chambers for their first two years, and President George W. Bush had a Republican Congress for five of his first six years in office.)

29. This abbreviated lifespan actually characterized a few textual petit constitutional rules as well. The Guarantee Clause's purpose and utility was largely forgotten once the founding generation left the scene; the Fourteenth Amendment's provisions on Confederate debt were soon forgotten.

## 2. *Individual Rights*

The process for initiating popular petit constitutionalism around individual rights follows a somewhat different track. Those seeking to constitutionalize a norm—whether concerned with the well-being of a particular group or changing the rights of everyone in this country—recruit champions within each political party. These are unlikely to come from the party’s top leadership, who focus primarily on areas in which their parties can differentiate themselves from one another. Indeed, the requisite willingness to work across party lines is more likely to be found in members of the respective party caucuses with limited aspirations for higher positions. The champions must, however, retain enough credibility within their parties to deter others in their party from attacking the cause.

The role of these transpartisan champions is quite different from that of swing voters, whom a dominant party typically extracts from the most ideologically congenial wing of its opponent. Presidents Reagan and George W. Bush won approval for their tax cuts by picking off a handful of Democrats; three Republicans gave President Obama the votes he needed to pass the 2009 stimulus law. But in each case, the legislation remained fiercely contested by the opposing party: the defectors provided votes but not legitimacy, and the underlying initiative may not have been moderated at all. Many petit constitutional moments lack the breadth and intensity of *positive* engagement that characterizes grand constitutionalism, but the leadership of core members of each party’s coalition, and the excising of features offensive to each party’s core, allows the minimization of *negative* engagement on the issue. In a grand constitutional moment, a broad, intense, sustained positive force may overwhelm an equally intense opposition; petit constitutional settlements occur by eliminating rather than crushing opposition.

The engagement of these champions, and the narrowing of proposals to the point that both parties will engage, is the pivotal part of the process. Afterwards, Congress may enact a transformative super-statute after inclusive deliberation and entrench it over time.<sup>30</sup> But the consensus program can become concretized in other ways, such as the broad embrace of a Court decision.

The transaction between groups and politicians is fundamentally different in petit constitutionalism. Groups advocating expansion of the petit

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30. See ESKRIDGE & FEREJOHN, *supra* note 8, at 26 (describing this process).

constitutional canon generally cannot offer policymakers partisan gain beyond the incremental reputational benefit of being perceived as honorable and conscientious. For example, civil libertarians usually have not been a politically significant group for whose allegiance politicians must compete. Outside of suburban Washington and a few districts with large military bases, federal employees are not a political force of much concern to members of Congress. The African American vote in the 1950s was somewhat more substantial, but any overt, concerted attempts to appeal to it would send a larger, better-organized bloc of white racists in the opposite direction.

Instead, groups seeking help entrenching their priorities as petit constitutional principles offer only the satisfaction of fulfilling the broader responsibilities of their offices. This same motivation, honor, has traditionally been thought to be paramount in the judicial branch and among civil servants. Of course, some legislators really do fit the simplistic model of vote and contribution maximizers, just as some judges and bureaucrats are ideological hacks. Yet without a broader sense of professionalism and duty on the part of legislators, numerous important but low-profile public functions would never be funded.

On occasion, successful engagement in the political process as a swing group can morph into a status protected by petit constitutionalism. For decades, politicians of both parties lived in fear of offending World War II veterans and their spouses, and many were punished at the polls for doing so. To protect themselves, many adopted expansive rhetoric about taking care of the elderly, honoring the “Greatest Generation,” and the like. Even though that generation’s numbers have ebbed beyond the point of direct political significance, the longstanding, bipartisan celebration of its virtue makes any of its recognized interests effectively unassailable. A similar migration from a position within the core of one partisan coalition would be far more difficult.

The petit constitutional strategy has serious limitations. In particular, ad hoc coalitions of a few conscientious Democrats and a few conscientious Republicans lack the power to accomplish what some core or swing constituencies can. Yet pursuing these modest gains requires its proponents to abandon partisan politics and all of the policy gains and personal power that party alignments can bring: a group cannot ride petit constitutionalism as far as it will go and then alight to join a partisan coalition (or even become a swing group). Aligning temporarily or permanently with either party would put the group’s supporters within the other party in an untenable position, at best as mavericks and more likely as traitors. Whether those supporters abandon the

cause or accept ostracism within their party, they will no longer be able to protect the advances the group won through petit constitutionalism. This also means that the gains sought must be modest enough not to conflict with either party's basic program.

On the other hand, this approach has distinct advantages over partisan politics. Most obviously, it is a strategy available to groups unable to function effectively within the partisan arena.<sup>31</sup> It also affords a measure of immunity against partisan attacks; its separation from each of the two parties limits the utility of either party attacking the group, and the engagement of some leaders from each party assures the presence of respected voices in each party's councils opposing efforts to build a strategy around such attacks. Staying separate from either party obviates the need to form conceptually awkward and potentially unstable coalitions.<sup>32</sup> Existing outside of the partisan landscape also may tamp down cynicism when advocates make uncontroversial moral arguments. And the achievements of petit constitutionalism are less vulnerable to devastation when an unsympathetic party holds a stable majority.

The relative power of political and petit constitutional advocacy may seem paradoxical. We recognize constitutionalism as our system's highest form of law and imagine it as far more powerful than ordinary legislation. And, indeed, the textual and popular results of grand constitutionalism dominate the legal landscape. Yet groups can pursue far more ambitious agendas through ordinary politics than through petit constitutionalism. The key to disentangling this paradox is differentiating strength from breadth. A group pursuing constitutional status—petit or grand—must narrow its demands to achieve the necessary super-majoritarian support; it trades the abandoned elements of its program for what it hopes will be the entrenchment of the remaining elements. Thus, for example, Franklin Roosevelt had the votes to enact more aggressively redistributionist legislation than the Social Security Act. He chose a relatively modest version to ensure that it would become entrenched and unassailable.<sup>33</sup>

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31. See *supra* Subsection I.A.1.

32. For example, both abortion rights advocates—who support individual choice on whether to terminate pregnancies—and teachers' unions—who generally oppose individual choice on whether to receive publicly subsidized education in private schools—serve as core members of the Democratic constituency. This prevents the Party from defining itself coherently as pro- or anti-libertarian.

33. See ESKRIDGE & FEREJOHN, *supra* note 8, at 175-76.

## II. PARTISAN POLITICS, PETIT CONSTITUTIONALISM, AND LOW-INCOME PEOPLE

The politics of economic and social deprivation in this country have long been strangely bifurcated. Concern about “poverty” has been bipartisan and led to positive, if often ineffectual, policies. By contrast, the politics of “welfare” have been vitriolic and commonly partisan. The politics of welfare are characterized by rights-talk on the left and denunciations of presumption on the right; discussions of poverty focus on human needs, albeit sometimes in a patronizing or insensitive manner. The National Welfare Rights Organization, organized by people at the periphery of the Civil Rights Movement in the 1960s, was devoted to building political power among low-income people; the very notion of rights to welfare infuriated many moderates and conservatives. By contrast, organizations addressing poverty are treated as noble.

This bifurcated response to an essentially unitary problem reflects two very different political strategies. Welfare policy has become enmeshed in partisan politics, specifically with the welfare rights movement seeking a place in the Democratic Party’s base. Anti-poverty advocates, on the other hand, have sought to avoid partisanship and constitutionalize the principle that society must respond to extreme poverty at least to the extent of preventing severe hardship.

Welfare rights as a concept was likely doomed to be part of partisan struggle—and to fare badly in that struggle—for several reasons. “Welfare” remains a heavily racialized concept with much of the electorate for many reasons.<sup>34</sup> The Civil Rights Movement bequeathed to the welfare rights movement much of the seething ill-will it had generated but all too little of its support: when it became socially unacceptable to express open contempt for people of color, shifting animus to welfare recipients presented an appealing alternative to many. In addition, welfare became identified specifically with idleness, an assumption fed by racial stereotypes<sup>35</sup> and seemingly supported in reality after President Reagan won changes in Aid to Families with Dependent Children (AFDC) rules that effectively disqualified most parents working outside the home.

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34. MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* (1999).

35. See Joe Soss et al., *The Hard Line and the Color Line: Race, Welfare, and the Roots of Get-Tough Welfare Reform*, in *RACE AND THE POLITICS OF WELFARE REFORM* 225 (Sanford E. Schram et al. eds., 2003).

The pivotal question has been whether the toxic politics of “welfare” would absorb and hopelessly contaminate efforts to help low-income people in other ways or whether it could be a foil for those efforts, something from which other programs could effectively distinguish themselves. Any program can be attacked, and any large program will inevitably have shortcomings. In-kind programs’ lower profiles, however, allowed them to blend into the background while their advocates focused on the noble goal of reducing poverty rather than the intricacies of their management.<sup>36</sup> This relative invisibility made these programs difficult to manage through partisan, majoritarian politics<sup>37</sup> but superb vehicles for implementing a non-partisan petit constitutional consensus against allowing extreme poverty.

During most of the last half-century, this political separation has been reflected in a separation of programs and laws, with cash assistance programs responding to partisan welfare politics and in-kind assistance programs falling under the anti-poverty rubric. Of course, this dichotomy does not withstand serious scrutiny: welfare is an anti-poverty program, and many of the most reviled features of welfare—including limited individual entitlements<sup>38</sup>—are also present in many in-kind programs. This incoherence has periodically allowed the temporary collapsing of the line between welfare and anti-poverty policy and the shifting of programs across that line.

In the 1960s, Lyndon Johnson launched the War on Poverty with a wide range of initiatives that deliberately excluded welfare—and delayed efforts to eliminate an ill-conceived cap on welfare payments that threatened to bring the system crashing down just as the Civil Rights Revolution broke down the barriers that previously denied benefits to African Americans.<sup>39</sup> Richard Nixon sent Congress proposals to “aid the poor” and to “reform welfare”; the former initiatives passed with bipartisan support<sup>40</sup> while the latter died in a firestorm

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36. See, e.g., CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES* 64-74 (1997) (describing the earned income tax credit).
37. See, e.g., SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* 36-47 (2011) (finding low-salience programs are less likely to induce political activism by their recipients).
38. See David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 636-40 (2004) (offering alternative definitions of “entitlement”).
39. David A. Super, *The Quiet “Welfare” Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1278 (2004).
40. Among his most important achievements were expanding food stamps into a nationwide program, replacing inadequate state categorical programs with Supplemental Security

of controversy.<sup>41</sup> Jimmy Carter had parallel experiences.<sup>42</sup> In 1981, when Ronald Reagan sought broad cuts to social programs, he tried to relocate the boundary between the two realms so that most anti-poverty spending would be considered welfare; by mid-decade, the boundary had shifted back to its prior position and the slashed programs began to recover fiscally and politically.<sup>43</sup> In 1994, Newt Gingrich's Contract with America tried an even more aggressive boundary-shifting game, achieving even larger cuts in the near-term and triggering an even stronger movement to restore in-kind programs after the welfare and anti-poverty political cultures once again separated.<sup>44</sup> On the other hand, in some states, cash assistance programs have had little partisan valence, allowing them to be governed in part by the petit constitutional principle of avoiding severe hardship.<sup>45</sup>

Although the separation is incomplete and not wholly consistent over time, the simultaneous operation of ordinary political advocacy and petit constitutional advocacy with respect to essentially the same problem provides a valuable natural experiment for comparing the two. Section A examines the ordinary politics of welfare as a means of protecting low-income people. Section B assesses the contributions of petit constitutionalism.

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Income for the low-income elderly and people with disabilities, and the establishment of the Section 8 voucher program that separated housing assistance from residence in large, often-decrepit housing projects. See MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 266-68 (1986).

41. Nixon's Family Assistance Plan (FAP), designed by liberal Democratic sociologist Daniel Patrick Moynihan, would have substituted a federal payment of \$2,400 per year for states' bureaucratic administration of AFDC, which commonly had much lower benefit levels. Conservatives criticized this as an expansion of the federal government and a benefit expansion for single mothers; welfare rights advocates attacked the benefit level as inadequate and its modest work requirements as coercive. WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 340-42 (5th ed. 1994).
42. Carter's Basic Jobs and Incomes Program resembled FAP in many respects, including its provision of a federal floor on benefits for low-income people. It was even broader in that it reached those without children. It was defeated by the same Right-Left pincer that crushed FAP. See KATZ, *supra* note 40, at 269; TRATTNER, *supra* note 41, at 355-58. On the other hand, Carter won a dramatic expansion of the food stamp program, reaching large numbers of the working poor for the first time. See Super, *supra* note 39, at 1278-79.
43. *Id.* at 1279.
44. *Id.* at 1283-87.
45. See, e.g., Paula Wade, *Sundquist Walks Fine Line on Welfare*, COM. APPEAL, Feb. 11, 1996, at B7 (describing the moderate welfare proposals of a conservative Tennessee governor drawing criticism only from the extreme right).

### A. *Low-Income People's Challenges in Leveraging Partisan Politics*

Low-income people certainly are numerous. But that, by itself, is not enough to make them an effective interest group in partisan politics. Subsection 1 explains how low-income people lack each of the major qualities described in Part I as essential to effective navigation of partisan politics, either as a swing group or as a member of one party's base. Subsection 2 then summarizes the disastrous history of partisan welfare politics, culminating ironically in a petit constitutional moment—for the other side.

#### 1. *Low-Income People's Fundamental Weakness as an Interest Group*

First and foremost, low-income people have lacked the coordination required to exert power in partisan politics. No national leader or organization has sufficiently wide acceptance among low-income people to be able to move large numbers of their votes by signaling support or antipathy for candidates or parties. State politics similarly lack recognized opinion leaders of low-income people. Developing recognizable, reliable leadership for low-income people is difficult because the very qualities that can cause someone to be an effective leader also are likely to allow them to exit the group affected by anti-poverty policies. Those continuing to have low incomes are likely to be confronting serious material hardships that distract them from their advocacy.<sup>46</sup> The paucity of internal party leaders identifying primarily with low-income people leaves them with few means of disciplining wayward politicians. Few primaries frame clear differences on policy toward low-income people, and most of those are “down-ballot,” requiring coordination and mobilization that is far beyond low-income people's advocates' capacity. Although presidential races more readily capture broad attention—and Presidents Carter, Obama, and particularly Clinton all proposed substantial

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46. See *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (finding former welfare recipients with no income too distracted by their struggles to find the basic necessities of life to pursue challenges to their terminations); DAVID ZUCCHINO, *MYTH OF THE WELFARE QUEEN: A PULITZER PRIZE-WINNING JOURNALIST'S PORTRAIT OF WOMEN ON THE LINE* (1999) (describing the arduous and degrading work a welfare rights advocate had to do to support herself and her children); see also MICHAEL B. KATZ, *WHY DON'T AMERICAN CITIES BURN?* 178-200 (2012) (finding that urban elites have found effective means to divide and manage the marginalized).

cuts in programs for low-income people<sup>47</sup> – the costs of challenging incumbent presidents are very high.<sup>48</sup> Only President Carter faced serious primary opposition, and that said relatively little about his performance in this area (which was far better than that of President Clinton).

In addition, a large fraction of low-income people do not primarily identify as such. Some of those with low incomes at any given time are only transitorily in distress and continue to identify with their prior (and presumed future) status.<sup>49</sup> This is a country, after all, in which almost everyone likes to identify as being “middle class.” Others may be too ashamed to want their economic position to define them as voters. Still others may have other, stronger identities based on their race, ethnicity, religion, or other attributes. This diversity of outlooks also prevents the development of a consensus on a programmatic agenda; some low-income people support greater transfer or human capital development programs, others may see their problems as originating in racial or gender discrimination, and still others may embrace hostile stereotypes and actually favor punitive measures against those like themselves.

Even if low-income people’s interests could be defined in a politically meaningful way, and even if a party’s support for those interests could expand allegiance among swing voters or turnout from core voters, that support has a

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47. See, e.g., H.R. REP. NO. 96-788, at 12 (1980), *reprinted at* 1980 U.S.C.C.A.N. 843, 845 (describing food stamp cuts as sought by Administration); Super, *supra* note 39, at 1299 n.97 (describing steady increase in amounts Clinton Administration proposed to cut from food stamps during 1995-96 legislative debates); Press Release, Nat’l Org. of Social Sec. Claimants’ Representatives, Statement of the National Organization of Social Security Claimants’ Representatives Regarding Social Security Proposals in the Administration’s FY 2015 Budget (Mar. 4, 2014) <http://www.nosscr.org/news/2014/03/statement-national-organization-social-security-claimants%E2%80%99-representatives-regarding> (condemning new proposed cuts in SSI and applauding Administration for not reiterating prior proposals for cuts); Letter from Food Research and Action Center et al. to U.S. Senators (Sept. 17, 2010), [http://frac.org/wp-content/uploads/2010/08/snap\\_offset\\_signers.pdf](http://frac.org/wp-content/uploads/2010/08/snap_offset_signers.pdf) (urging the U.S. Senate to avoid benefit cuts to the Supplemental Nutrition Assistance Program).
  48. The twentieth century’s four major challenges to incumbent presidents from members of their own coalitions – including Edward Kennedy’s run at Jimmy Carter – all resulted in the election of a president from the opposite party.
  49. See David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2073-74 (2004) (describing the role of stigma in facilitating broad-based cuts to benefit programs); David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 829-30 (2004) (finding that the stigmatization of benefit receipt is an important aspect of program management).

good chance of driving an equal or greater number of swing voters into the other party's camp. This is particularly true because of the entanglements between race and poverty and between gender and poverty in U.S. politics. The strong forces favoring racial humiliation defeated in the Civil Rights Revolution did not fade away; to the contrary, they sought a new path back to political influence. With explicit references to race likely to impose an upper ceiling on their support, they sought alternatives with greater potential resonance. Attacks on affirmative action (first in school busing and then in employment and higher education admissions) served part of this purpose. So did demands for "law and order," implicitly but deniably painting people of color as criminals. But over time, criticism of low-income people became perhaps the most important means of exploiting white voters' racial antagonisms. Over the 1990s, for example, the tendency of Republican governors in the South to attack low-income people seemed to depend on their perceived need to racialize elections; where low-income people were predominately white, or where the Democratic candidate was African American, welfare seemed to be far less of an issue.<sup>50</sup>

Transfer programs' infrastructure is time-consuming to build and quick to dismantle, especially given the U.S. commitment to extensive, and administratively demanding, conditionality. Thus, even if solid majorities opposed to these programs take office only rarely, they can use those brief moments to undo the work of many years of efforts to aid low-income people. And because dismantling transfer programs poses existential challenges to group members, advocates for low-income people are ill-equipped to take the long view in political maneuvering.

Finally, low-income people's lack of coordination and identity has ensured that they are relatively low on the priority lists even of their avowed supporters. If Democratic politicians feel they cannot afford to cast too many difficult votes, they are likely to stay the course on abortion or issues important to organized labor while voting for a budget that pays for tax cuts with reductions in anti-poverty programs. In the game of interest-group chicken, low-income people are rarely even in a position to bluff.

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50. For over twenty years, the author has met regularly with a group of sophisticated anti-poverty advocates in the Southeast. Over that time, he has noted a far greater incidence of reports of vitriolic rhetoric about welfare in states with the largest African American populations, except when an African American was running for statewide office as a Democrat.

## 2. *Welfare Rights in the Partisan Arena*

The New Deal elevated poverty as a major national political concern for the first time in this country's history. Initially, much of the Republican Party opposed the New Deal categorically. This made low-income people a seemingly natural element of the Democratic Party's core.

From the perspective of the early 1960s, one could plausibly imagine low-income people and their allies becoming a swing constituency. The Eisenhower Administration had fully embraced the anti-poverty programs of the New Deal while President Kennedy had been quite skittish about expanding those programs. A welfare rights movement emerged on the fringes of the Civil Rights Movement. Although it did not initially have a clear partisan identification, its emphasis on rights and self-determination largely committed it to the realm of power politics within the partisan arena.

By the end of the decade, however, President Johnson's War on Poverty had claimed the issue for the Democrats. Even President Nixon's impressive achievements—establishing the Supplemental Security Income program in place of decrepit categorical programs for the elderly and people with disabilities, starting the Section 8 housing voucher program, and expanding food stamps nationwide—were not enough to break the association of low-income people with the Democrats. This, too, may be the result of low-income people's weak hold on the loyalties of their supporters, who were so alienated by President Nixon's actions in other arenas they refused to credit his leadership against poverty. Subsequent Republican presidents recognized the futility and stopped trying; some instead saw political gain in attacking these programs.

The result was power politics without the power. The welfare rights movement and the influence that lingered after it fell apart were sufficient, when joined with the efforts of right-wing opponents, to sink significantly progressive welfare reform proposals made by Presidents Nixon and Carter, but not to put anything else seriously in play. By the 1980s, the concept of welfare rights was so thoroughly reviled that President Reagan was able to expand the sphere of partisan welfare politics (and correspondingly shrink that of non-partisan anti-poverty policy) so that he could enact large cuts not just in AFDC but also in in-kind programs for food, housing, and health care. By the time "welfare reform" was back on the table in the late 1980s, House Democrats were making only the vaguest gestures toward the welfare rights community while Republicans and Senate Democrats made none at all. Welfare rights advocates were so dismayed by their diminished influence that they were unable to unite behind any position, with some trying unsuccessfully

to improve the legislation and others fruitlessly trying to revive their alliance with the right wing to kill it.

The difficulties low-income people face in leveraging partisan politics soon became apparent. As a few prominent Democrats turned against low-income people and suffered no consequences, low-income people's inability to discipline betrayals became clearer and others followed. Michael Dukakis was the first modern governor to eliminate welfare for childless adults, a move he touted as evidence of his centrism. That proved no barrier at all to winning the Democratic presidential nomination, and his ultimate loss to George H.W. Bush was widely attributed to his having moved too little, not too much, toward the center. New Jersey Governor Jim Florio lost his re-election bid after signing a harsh welfare bill amidst reduced turn-out in low-income areas, but popular accounts of the race did not attribute his loss to his welfare policies. Most strikingly, President Clinton signed the 1996 welfare law that dismantled decades-old welfare programs and then immediately ran for re-election as the best person to undo the damage of the law he had just approved. His vote in low-income areas showed little if any decline from his first race.

As a bitter reward for the welfare rights community's dedication to partisan politics, the 1996 welfare law turned out to be a petit popular constitutional moment for the other side. With the support of virtually all Republicans and countless prominent Democrats—including President Clinton but also about half of congressional Democrats and all but one Democratic governor—the legislation's core elements became effectively immune from mainstream criticism. The primacy of states in administering welfare, the legitimacy of time limits on aid, and the appropriateness of no-holds-barred efforts to empty out the cash assistance rolls became incontrovertible. Even when Democrats took full control of Congress and the White House in 2008, they made absolutely no effort to undermine any of those principles. Henceforth, as in the aftermath of other exercises in higher lawmaking, the debate centered on clarifying and interpreting what had been accomplished, not questioning it. In particular, advocates for low-income people sought to characterize the law's provisions addressing programs other than cash assistance as being peripheral and not included in the constitutional determination—in essence, trying to push back the line dividing welfare and anti-poverty policy.<sup>51</sup>

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51. See, e.g., Super, *supra* note 39, at 1289–96 (arguing that food stamps are not “welfare”).

*B. Constitutionalizing the Duty to Prevent Severe Hardship*

Although Franklin Roosevelt, the founder of the modern Democratic Party, gave prominent support to a new Freedom from Want, many leading Republicans at the time voiced similar sentiments. Senator Robert Taft, the leading conservative Republican in the years immediately after World War II, stated as clearly as any the principle anti-poverty advocates have tried to constitutionalize:

I believe that the American people feel that with the high production of which we are now capable, there is enough left over to prevent extreme hardship and maintain a minimum standard floor under subsistence, education, medical care and housing, to give to all a minimum standard of decent living and to all children a fair opportunity to get a start in life.<sup>52</sup>

Similarly, *King v. Smith*,<sup>53</sup> the landmark case limiting states' ability to manipulate public benefit program rules to humiliate low-income people, relied heavily on findings by Eisenhower Administration officials. As noted, the creation of SSI and Section 8 were attributable at least as much to President Nixon as they were to any Democrats. The Food Stamp Act of 1977 was the project of former Democratic presidential candidate George McGovern and future Republican presidential candidate Bob Dole; Dole later called it the most important domestic policy achievement since Social Security. Conservative Republicans Henry Hyde and Orrin Hatch combined with liberal Democrats Henry Waxman and Bill Bradley on a series of Medicaid expansions in the late 1980s that transformed the program from an adjunct to AFDC into a major down payment on health insurance for all low-income people. When President George W. Bush called for budget cuts in 2005, Georgia Republican Saxby Chambliss, rated the fourth-most conservative member of the Senate, flatly announced there would be no cuts to food stamps.<sup>54</sup>

More generally, the anti-poverty cause has made many of its greatest advances when it has eschewed partisan politics and engaged established leaders in each party to appeal to the principle of preventing severe harm.

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52. U.S. RIOT COMM'N, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 268 (1968).

53. 392 U.S. 309 (1968).

54. *Senate Plan to Cut Food Stamps Dies*, WASH. POST, Oct. 19, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/18/AR2005101801459.html>.

When the well-being of low-income people has become a partisan issue, they have been attacked by one party and taken for granted or actively shunned by the other. Although sweeping redistribution of income remained anathema to the Republican Party, relieving extreme distress had neither the same cost nor the same ideological implications.

Even the setbacks anti-poverty advocates have suffered are illustrative of an important principle of popular petit constitutionalism: the impossibility of mixing partisan power politics with the ethical appeals of constitutionalism. Welfare's identification with the Democratic Party, and welfare rights advocates' exclusive residence there, gave President Reagan and Speaker Gingrich free rein to attempt to recruit lower-middle-class white voters with attacks on welfare. When the Democratic Party showed no interest in that losing battle, Republicans pressed their advantage by expanding the range of programs they were attacking. This largely marginalized Republican supporters of food stamps, Medicaid, SSI disability benefits, and other anti-poverty programs. Republican food stamp supporters on the agriculture committees were conservative enough to have some room to maneuver and thwarted their leadership's efforts to convert the program to a block grant. The moderate Republican supporters of Medicaid and SSI, by contrast, were largely silenced.

The impact of petit constitutionalism in anti-poverty policy is evident at the state level, too. The most important determinant of the liberality of a state's AFDC grant levels and Medicaid coverage has been the historic moderation of the state's Republicans, not the strength or the attitude of its Democrats. States such as Connecticut, Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio, and Pennsylvania all had relatively liberal policies even though several had lengthy Republican domination of the governor's mansion, legislature, or both. Because welfare rights rhetoric was less prominent at the state level, the line between partisan welfare politics and the non-partisan, petit constitutional principle of preventing severe hardship could shift so far as to even treat AFDC as an anti-poverty program (which, of course, it was).

## **CONCLUSION**

Too many accounts of our public life hold that all issues not governed by a narrow set of constitutional norms are controlled by partisan competition. These accounts are both descriptively inaccurate and normatively unappealing.

Descriptively, these accounts leave too many important aspects of public policy-making essentially unexplained. Legislators and executive officials of both parties take numerous actions that are impossible to explain as self-seeking, vote- or donation-maximizing behavior without some analytical

sleight-of-hand that effectively assumes the conclusion. Officials spend real political capital, and risk real consequences, from clashing with their parties or behaving in ways that opponents could characterize as inconsistent with constituents' interests. And even if some of this behavior is seeking to avoid alienating moderate voters, some theory is still needed about what sorts of demands those voters impose on issues far from their core concerns.

Normatively, two-party elections cannot effectively determine the popular will on more than a small handful of issues. The nature of campaigns and finite voter attention restrict how many issues meaningfully may be addressed. Turning resolution of the remainder of the issues over to the winner is typically the best option available. This will be likely to achieve the electorate's desired result on issues for which preferences are well-correlated with those on which the election was fought. Sometimes issues that lacked prominence in campaigns have such correlation: if the voters elected a candidate vowing to build up the army we can presume they want an adequate navy, too. On the other hand, blithely assuming that positions on all issues correlate tightly is to concede a degree of ideological polarization deeply antithetical to the American political self-image. On most issues, bringing decision-making closer to those the People elected does little to advance real democratic control.

Moreover, recognizing petit constitutional principles limits wild policy swings as voters alternate parties for managerial rather than substantive reasons.<sup>55</sup> When voters perceive one party as corrupt, or find its particular candidates untrustworthy, they may wish to turn that party out of office temporarily. They may be reluctant to do so, however, if the consequence is upending policies the voters long have accepted. Understanding which principles petit constitutionalism has removed from partisan debate helps these voters determine whether the consequences of alternating parties are acceptable.

Groups have come to seek redress outside of partisan politics for a variety of reasons. Some groups seeking civil rights protection have recognized that they lacked the numbers and cohesiveness to function effectively as swing constituencies or parts of the base of one of the major parties. Others, such as children's advocates and people with disabilities, have felt they lacked the cohesion to play power politics effectively. Still other vulnerable groups, such as immigrants, prisoners, and reviled religious minorities, have such strong

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55. For example, the House banking scandal that fueled the 1994 Republican wave election and the occasional election of Democratic governors in red states to replace indicted Republicans have not been triggered by substantive policy concerns.

opponents that the parties may not compete aggressively for their support for fear of driving more voters and contributors into the opposing party.

Occasionally, groups pursue their agendas through popular petit constitutionalism when they are ejected from, or betrayed by, one of the partisan coalitions. When California voters denied retention to Chief Justice Rose Bird and two associate justices over their opposition to capital punishment, the Democratic Party largely abandoned death penalty abolitionists. When votes for relatively tepid gun legislation cost House Judiciary Chairman Jack Brooks and some colleagues their seats in the 1994 wave election, the party walked away from gun control. After a backlash against attempts to intervene in the Terry Schiavo case, the Republican Party similarly dumped the hospice rights movement. Large elements of the environmental movement are now having to decide whether to remain part of the Democratic coalition or to seek to remove some of their key priorities from partisan debate with the help of evangelicals and other conservatives who espouse careful stewardship of the Earth.<sup>56</sup>

Although petit constitutional principles—like grand constitutional ones—cannot directly bind the Supreme Court, they can mark particular subsequent decisions by the Court (or by other officials) as particularly radical and hence problematic. *Plessy v. Ferguson*,<sup>57</sup> for example, did not just validate Jim Crow—it also abrogated longstanding principles that held common carriers and innkeepers to a more inclusive standard than other businesses,<sup>58</sup> which signaled unambiguously the abandonment of Reconstruction’s constitutional legacy.

Finally, a more inclusive constitutional order can arise from recognizing some constitutional principles, even ones of a lesser order, that are protective of those with neither the capacity to trigger grand constitutional politics nor the leverage to protect their interests through ordinary politics. Some groups may not need the kind of legal sea change that requires grand constitutionalism; others might desire such changes but still benefit from a lesser order of protection. And without petit constitutional enforcement, too, the achievements of grand constitutional moments are all too easy to erode after

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56. See Larry Stammer, *Evangelicals Advocate Earth Issues – Church Leaders Say Faith Dictates Environment Care*, HOUS. CHRON., July 11, 2004, at A4 (describing initiative of some of “the nation’s most conservative Christians”).

57. 163 U.S. 537 (1896).

58. See David S. Bogen, *Why the Supreme Court Lied in Plessy*, 52 VILL. L. REV. 411, 414 (2007).

the protagonists of those struggles have receded into the shadows of public awareness.

Reasonable people could question whether, even if a non-partisan sphere exists outside of ordinary politics, that sphere should be described as constitutionalism. These principles describe what We the People regard as core values of the nation. They are set through the participation of both political parties. They restrain the impulses of majoritarian politics. In all of these ways, they seem to fit the label quite well. Expanding the petit constitutional canon respects the political decisions We the People have reached in much the same way that expanding grand constitutionalism does. Just as the American people did not stop thinking big political thoughts in the twentieth century, they did not walk away from second-order concerns when they restricted quartering of soldiers in private homes in the Bill of Rights. How curious it would be if We the People were speaking less on these matters now that the technology for probing our views on myriad issues has reached levels the Framers could not have imagined.

Ultimately, perhaps not a great deal turns on the label of constitutionalism. The writings of Augustine and Aquinas, the Talmud, and the Hadiths retain enormous influence even if they are technically part of a lesser canon. A purported religious scholar who ignored the wisdom there would be just as foolish as a constitutional scholar disregarding the guiding principles described in this essay.