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Measuring Political Power: Suspect Class Determinations and the Poor

Bertrall L. Ross II* & Su Li**

Which classes are considered suspect under equal protection doctrine? The answer determines whether courts will defer to legislatures and other government actors when they single out a group for special burdens or intervene to protect that group from such treatment. Laws burdening suspect classes receive the strictest scrutiny possible and, under current doctrine, whether a class is suspect turns largely on whether the court views the group as possessing political power.

But how do courts know when a class has political power? A plurality of the Supreme Court initially suggested that political power should be measured according to a group’s descriptive representation in politics. Under that measure, the largely white, male, wealthy, and straight makeup of most of the nation’s decision-making councils would indicate that other less well-represented groups lack political power. But that measure never received majority support from the Court. Instead, the Court consolidated around a different measure of political power—one that focused on

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democratic actions favorable to a group. If laws have been enacted protecting the group from discrimination or otherwise advancing the group’s interests, the Court assumes that the group can attract lawmakers’ attention and therefore does not need judicial protection.

In the forty years since the Court introduced this measure of political power, it has not found a single class suspect. In fact, it is hard to imagine the Court finding any class to be politically powerless under this measure. Even the most politically marginalized groups (such as the poor, noncitizens, and felons) have benefited from laws favoring their interests. This leads us to question whether favorable democratic action is a reliable measure of political power. Focusing on the poor, we advance the first empirical test of the Supreme Court’s measure of political power. Our findings suggest that legislators’ support for antipoverty legislation is not motivated by the political power of the poor—implying that favorable democratic action does not always reliably indicate a group’s political power. Given these findings, we argue that the Court should rely on a more holistic, and thus more reliable, measure of political power. The measure should include favorable legislative actions but also indicators of lobbying activity, political responsiveness, voter turnout, and descriptive representation in politics.

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INTRODUCTION

In the forty years since the Supreme Court announced a standard for determining which classes are suspect under the Equal Protection Clause, no new class has been found suspect.¹ Suspect class status is critical, because it determines whether a group will receive heightened judicial protection from discriminatory laws.² Whether, for example, a state employment law that discriminates against gays and lesbians, a local ordinance that criminalizes homelessness, or a state prohibition on felon voting will be invalidated under the Equal Protection Clause ordinarily depends on the judicial choice to extend suspect class status to gays and lesbians, the poor, and felons.

Some scholars attribute the Court’s failure to find new suspect classes to the Justices’ anxiety about extending this sort of protection to too many groups.³ Other scholars blame the growing conservatism of the Court.⁴ While both are certainly part of the story, many have overlooked the role of doctrine itself. According to doctrine, a class is considered suspect if members of the class share an immutable, obvious, or distinguishable trait that is irrelevant to their ability to contribute to or perform in society; have suffered a history of discrimination; and are politically powerless.⁵

Ever since the Court announced this standard, the Court has used it only to deny suspect class status to new groups. Women, children born out of

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1. Noncitizens represent the last class the Court declared suspect, and it did so by judicial fiat rather than through application of the suspect class standard. Graham v. Richardson, 403 U.S. 365, 372 (1971); see Suzanne B. Goldberg, Equality Without Tiers, 77 S. CAL. L. REV. 481, 485 (2004) (describing how the Court stopped the expansion of suspect class status almost immediately after developing the test).

2. This special judicial protection is in the form of strict scrutiny of discriminatory laws. In order for a law to survive strict scrutiny, the state must show that it is necessary to achieve a compelling purpose. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (Powell, J., plurality opinion). One scholar has suggested that “the choice between strict scrutiny and the rational relation standard often determines whether the court strikes down or upholds a law . . . .” Lynn A. Stout, Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications, 80 GEO. L.J. 1787, 1787–88 (1992).

3. See, e.g., Kenji Yoshino, The New Equal Protection, 124 HARV. L. REV. 747, 748, 755–63 (2011) (“The jurisprudence of the United States Supreme Court reflects . . . pluralism anxiety. Over the past decades, the Court has systematically denied constitutional protection to new groups, curtailed it for already covered groups, and limited Congress’s capacity to protect groups through civil rights legislation.” (footnotes omitted)).


5. See Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973) (Brennan, J., plurality opinion). Initially, the Court announced a requirement that a class share an immutable trait. In a later case, the Court broadly interpreted this requirement to include those classes that “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group.” Lyng v. Castillo, 477 U.S. 635, 638 (1986).
wedlock, and undocumented children have received quasi-suspect status, entitling them only to intermediate scrutiny. The aged and disabled have been denied any suspect status at all. Over the course of these decisions, a fault line has emerged over the proper measure of a group’s political power—a dispute that has become the key issue within suspect class doctrine. Originally, a set of liberal Justices favored descriptive representation—i.e., the extent to which the group’s members occupy political offices—as the measure of a group’s power. Over time, however, the Court moved to adopt a different indicator: whether a group has benefited from favorable legislation or executive action. Thus, the Court denied suspect class status to the aged and disabled because they had been the object of favorable democratic action in the past (and because the Justices thought their traits relevant to their ability to contribute to or perform in society).

What is the right measure of political power? The answer to this question is critical to the future of suspect class doctrine. If the Court continues to emphasize favorable democratic actions as the measure of political power, this limiting principle effectively shuts the door to any new suspect class. There are legislative and executive actions that protect or benefit virtually every class, including gays and lesbians, the poor, the disabled, and even felons. However, if political power is measured differently, then the door to extending suspect class status to groups in the future may remain open. For example, to the extent that the Court emphasizes the underrepresentation of groups in political bodies, we might expect extension of suspect class status to gays and lesbians, the poor, and perhaps other groups given that our political bodies remain predominantly white, male, straight, and wealthy.


9. Cleburne, 473 U.S. at 443–45 (determining that federal and state passage of laws protecting the disabled from discrimination and presidential orders doing the same demonstrated that the group had the power “to attract the attention of the lawmakers”); Vance v. Bradley, 440 U.S. 93, 97 n.12 (1979) (reaffirming the denial of suspect class status to the aged in part on the basis of “Congress’ recent [favorable] action with respect to mandatory retirement ages” as evidence that “the political system is working”).

10. See Goldberg, supra note 1, at 504–05 (going further and suggesting that “[i]f pursued to its logical end, [the political powerlessness] inquiry could actually support removal of traits such as race and sex from the list of suspect classifications . . . in light of the substantial legislation prohibiting differential treatment based on race and sex”).

11. While mere disproportionate representation might not be the right measure, the complete absence from politics of members of a group like the poor might indicate their lack of political power.
In this Article, we advance the first empirical test of the Supreme Court’s preferred measure of political power—favorable democratic actions. Specifically, we test whether the passage of antipoverty legislation is evidence of the political power of the poor. We choose to study the poor, in part, because of their unique constitutional status. The poor have not obtained suspect class status. Yet the Court has never actually applied the suspect class framework to the group. Rather, it has relied on a misreading of precedent to hold on the basis of judicial fiat that the poor are not a suspect class.

If the Court were to revisit the suspect class status of the poor, it would likely focus on the two limiting principles used to deny suspect class status to the aged and disabled: the relevance of the group’s defining trait to the group’s actual ability to contribute to or perform in society and the group’s political power. As to the first limiting principle, it seems clear that poverty “bears no relation to [the] ability to perform or contribute to society,” making the trait distinct from age and disability. There is nothing about the physical or mental capacity of the poor that distinguishes them from other members of society.

Therefore, the suspect class status of the poor would likely turn on the second limiting principle—the group’s political power. If political power is measured according to representation in decision-making councils, the poor clearly lack political power. Given the high salaries congressmembers earn for their service in office, none of them are poor. But even if we ignore congressmembers’ current income status and focus on their backgrounds, the poor appear to be a long way from achieving proportionate descriptive representation in Congress. While we lack direct measures of the poor’s descriptive representation in Congress, the closest proxy indicates that only 6 percent of congressmembers serving from 1999 to 2008 had spent some portion of their careers in a blue-collar job. In contrast, if we focus on past favorable

12. The Court initiated the suspect classification boom in the late 1960s with the declaration that laws that classified on the basis of wealth should be subject to the same exacting scrutiny as laws that classified on the basis of race. See Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966). For the next seven years, Justices listed wealth alongside race, national origin, and alienage as a suspect classification. However, following Richard Nixon’s appointment of four conservative Justices in the late 1960s and early 1970s, the Court reversed course determining that the poor were not a suspect class and that wealth was not a suspect classification. See infra Part II.A.


14. See infra Part II.A.

15. See Frontiero v. Richardson, 411 U.S. 677, 686 (1973); infra Part I.C.

16. See infra text accompanying note 123.

17. Nicholas Carnes, White-Collar Government: The Hidden Role of Class in Economic Policy Making 20 (2013) (finding further that of that 6 percent, only thirty-two of the forty-six congressmembers “spent more than 10 percent of their precongressional careers doing blue-collar work, and thirteen spent more than a quarter of their adult lives in working-class jobs”).

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democratic actions, the poor appear to have the power to protect their interests in democratic politics. The poor have benefited from initiatives like the “War on Poverty,” a nearly decade-long legislative push initiated fifty years ago. While the “war” ended in the 1970s, the federal government’s continued maintenance of a more limited safety net, through the continued funding of antipoverty programs, would likely suffice for the Court to justify denying suspect class status to the poor.

Given the discrepant results of these two measures of political power for the poor, choosing between them is critical. Recent social science studies of political inequality provide strong evidence that the poor lack political power, as defined by elected officials’ and legislatures’ responsiveness to the group’s preferences on an array of social, economic, and foreign policy issues, calling into question the Supreme Court’s emphasis on the passage of favorable legislation. But these prior studies do not directly test the Supreme Court’s assumption that the poor are able to influence legislators’ votes on laws directly favorable to the group.

We examine legislators’ roll call votes over a fifty-year period (1963–2012), and find no evidence that a powerful poor constituency motivates legislators’ support for antipoverty legislation. In fact, we find, surprisingly, that representatives of congressional districts where one would expect the poor to be more politically powerful (districts with a greater number of poor constituents) were in fact less likely to support antipoverty legislation than representatives of congressional districts where the poor should be less politically powerful (districts with fewer poor constituents). Instead of being responsive to the political power of the poor, ideology and partisanship appear to function as the dominant source of legislators’ support for antipoverty legislation.

To provide comparisons, we also tested the political power of union members and farmers using the Supreme Court’s measure of favorable democratic actions. In contrast to our findings regarding the poor, we find that representatives of congressional districts with larger union and farm constituencies are more likely to support pro-union and pro-agriculture legislation than representatives of congressional districts with smaller union and farm constituencies. This suggests that even though all three groups have

19. See infra App. 3.
20. See infra Part II.C.
22. See infra Part III.B.3.
23. See infra Part III.B.3.
benefited from favorable legislative actions, the poor differ from union members and farmers in the extent to which they influence their elected officials to adopt such actions.

Our findings thus suggest that, for at least some groups, legislative action favorable to a group is an unreliable indicator of political power. We therefore argue that the Court should not simply rely on favorable legislative actions as the exclusive indicator of political power but instead should take a more holistic approach to determining whether a group has such power. In addition to favorable legislative actions, the Court should look to evidence of organized political activity advancing the group’s interests, legislative responsiveness to the group, the group’s level of voter turnout compared to other groups, and the group’s descriptive representation in decision-making councils. This more holistic approach may require reconsideration of the suspect class status of groups like the poor, the disabled, and the aged. It would also provide needed guidance on the suspect class status of gays and lesbians and other groups that may make claims for suspect class status in the future.

This Article proceeds in four parts. In Part I, we explore the demise of suspect class doctrine. We argue that, over the last forty years, the Supreme Court’s measure of political power as favorable democratic actions has been a major doctrinal impediment to extending suspect class status to new classes. In Part II, we focus specifically on the poor. We argue that the Supreme Court’s measure of political power as favorable democratic actions is a de facto barrier to the suspect class status of the poor. We then show that recent social science studies suggest that the poor lack political power, casting doubt on this measure. In Part III, we develop a theoretical model for testing the Supreme Court’s measure of political power. We then test the measure and address a potential objection to our findings arising from public choice theory—a theory that suggests small groups should have an advantage over larger groups in securing favorable democratic actions. In Part IV, we make the case for an alternative, more holistic measure of political power.

I. SUSPECT CLASS DOCTRINE AND POLITICAL POWER

Just over forty years ago in Sugarman v. Dougall, Justice William Rehnquist lamented the Supreme Court’s seemingly standardless determination of suspect class status. Without any analysis, the Court in that case relied on its earlier declaration that aliens were a “discrete and insular minority” to apply strict scrutiny to a law discriminating against noncitizens. Before Sugarman, the Court had determined that laws classifying on the basis of

25. Graham v. Richardson, 403 U.S. 365, 372 (1971) (“Aliens as a class are a prime example of a ‘discrete and insular’ minority ... for whom such heightened judicial solicitude is appropriate.” (citation omitted)).
26. Sugarman, 413 U.S. at 641 (majority opinion) (citing Graham, 403 U.S. at 371).
wealth, illegitimacy, and gender were suspect or quasi-suspect.\textsuperscript{27} Justice Rehnquist was troubled by what he saw as these decisions’ failure to set out limiting principles that would avoid extending suspect class status to virtually every minority group. He complained, “The approach taken in . . . these cases appears to be that whenever the Court feels that a societal group is ‘discrete and insular,’ it has the constitutional mandate to prohibit legislation that somehow treats the group differently from some other group.”\textsuperscript{28} The Justice then expressed anxiety about where this approach might lead: “Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find ‘insular and discrete’ minorities at every turn of the road.”\textsuperscript{29}

Justice Rehnquist’s concern turned out to be misplaced. By the early 1970s, the Court had developed a standard for evaluating suspect class claims,\textsuperscript{30} and once it did so, it never again deemed a class suspect. In this Part, we describe the origins and development of the suspect class standard. We then show how the Court used this standard to deny group claims for suspect class status, driving the demise of the suspect class.

\textit{A. The Origins of Suspect Class Doctrine}

Beginning in the 1940s, the Supreme Court developed a new approach to equal protection law that imposed heightened scrutiny on laws burdening particular “suspect” (i.e., vulnerable) classes. However, the Court did not offer an explicit standard for identifying suspect classes. Instead, the Court simply applied stricter review to laws that classified individuals on the basis of race or national origin.\textsuperscript{31} Over time, the Court also closely scrutinized laws that burdened the poor or noncitizens, but it did so with little explanation.\textsuperscript{32} Only after several decades did the Court finally hint at a more explicit standard for when it would apply stricter scrutiny. That standard was rooted in the question

\textsuperscript{27} See Reed v. Reed, 404 U.S. 71, 76–77 (1971) (applying a rigorous form of review to a gender classification); Levy v. Louisiana, 391 U.S. 68, 70–72 (1968) (subjecting a law that discriminates against illegitimate children to review more rigorous than ordinary rational basis review); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966) (citing Korematsu v. United States, 323 U.S. 214 (1944), a case establishing the strict scrutiny standard for racial classifications, the Court held, “[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored” (citation omitted)); see also Wilkinson, supra note 13, at 953 (describing the Supreme Court’s sub silentio application of an intermediate level of scrutiny to certain classifications in the early 1970s).

\textsuperscript{28} Sugarman, 413 U.S. at 657 (Rehnquist, J., dissenting); see also Wilkinson, supra note 13, at 981 (“[T]he very designation of groups as ‘discrete and insular minorities’ has so far been more a matter of ‘feel’ on the part of the Court than of any rationally justifiable process.”).

\textsuperscript{29} Sugarman, 413 U.S. at 657 (Rehnquist, J., dissenting).

\textsuperscript{30} See Goldberg, supra note 1, at 485 (“The Court did not articulate detailed indicia for discerning which classifications should fill [the set of suspect or quasi-suspect classifications] until the early 1970s—decades after it first referred to race as a suspect classification.” (footnote omitted)).

\textsuperscript{31} See infra text accompanying notes 39–40.

\textsuperscript{32} See infra text accompanying notes 41–43.
of whether the state action targeted a group marginalized from democratic politics.  

The era of strict scrutiny for laws burdening certain suspect classes began with United States v. Carolene Products Co.  

In that case, the Court subjected a milk regulation to deferential rational basis review and indicated that most future state actions would be subject to the same lenient form of scrutiny. But in a famous footnote to the opinion, Justice Harlan Fiske Stone left open the possibility that a more rigorous form of scrutiny would be applicable to laws that harmed religious, racial, or other national minorities. The Justice explained, “[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”

For the next thirty years, the footnote lay dormant. Until the 1970s, the Court closely scrutinized only laws that classified on the basis of race or national origin, reasoning that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” This more exacting scrutiny resulted in the invalidation of nearly every racial and national origin classification beyond those based on race or national origin.

33. See infra text accompanying notes 44–45.

34. 304 U.S. 144 (1938); see Bruce A. Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713, 714–16 (1985) (describing the promise of Carolene Products footnote four in establishing a new foundation for judicial review); Robert M. Cover, The Origins of Judicial Activism in the Protection of Minorities, 91 YALE L.J. 1287, 1291–96 (1982) (identifying how “[f]ootnote four combined a textual and functional justification for the differing standards of review”).

35. Carolene Prods., 304 U.S. at 152; see Michael Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 219 (1991) (describing the emergence of the Carolene Products footnote from the constitutional crisis that arose from criticism of the Court’s “systematic second-guessing of legislative policy judgments (mostly economic) without clear constitutional warrant”).


37. Carolene Prods., 304 U.S. at 152 n.4.

38. See Klarman, supra note 35, at 220 (describing as “the most interesting feature of the first phase of modern equal protection . . . the somewhat mystifying failure of the Supreme Court to invoke the Carolene Products rationale in a single equal protection case”).

39. Hirabayashi v. United States, 320 U.S. 81, 100 (1943). In several other cases both before and after 1970, the Court has relied on this assertion as support for the application of a more exacting scrutiny of race and national origin classifications. See Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2418 (2013); Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 745–46 (2007); Rice v. Cayetano, 528 U.S. 495, 517 (2000); Shaw v. Reno, 509 U.S. 630, 643 (1993); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986) (Powell, J., plurality opinion); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290–91 (1978) (opinion of Powell, J.); Loving v. Virginia, 388 U.S. 1, 11 (1967); Oyama v. California, 332 U.S. 633, 646 (1948); see also Korematsu v. United States, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and must be subject to the most rigid scrutiny); Developments in the Law: Equal Protection, 82 HARV. L. REV. 1065, 1088 (1969) (“Certain classifications, such as those based on race, lineage, and alienage, are said to be ‘suspect,’ and a ‘very heavy burden of justification’ may be demanded of a state which draws such a distinction.”) (footnotes omitted).
classification that the Court addressed, but the Court provided little explanation for its chosen approach.40

The other classifications to receive heightened scrutiny from the Court before the 1970s were those that harmed noncitizens or the poor.41 But the Court did not develop a standard to guide its decisions about which discriminatory classifications would be subject to heightened scrutiny in any of these cases.42 Dissenting from a decision that applied heightened scrutiny to a poll tax, Justice John Marshall Harlan criticized the Court for deviating from its ordinarily deferential review on the basis of “captivating phrases” about fundamental rights and suspect classes.43

In the late 1960s, the Court suggested a potential standard for determining suspect class status, reviving the Carolene Products footnote as a source of guidance. The Court justified the different forms of review of state actions by explaining, “The presumption of constitutionality and the approval given ‘rational’ classifications . . . are based on an assumption that the institutions of state government are structured so as to represent fairly all the people.”44 When classifications were directed at those interests not fairly represented in the political process, the Court continued, “the assumption can no longer serve as the basis for presuming constitutionality.”45 The Court thus established a foundation for evaluating suspect class claims according to a group’s power to influence politics.

40. The three racial classifications that have been upheld involved classifications made during wartime or classifications intended to benefit a subordinated racial minority. See Grutter v. Bollinger, 539 U.S. 306, 312–16 (2003) (describing the University of Michigan’s affirmative action program and its intent to benefit racially subordinated minorities that the Court upheld under strict scrutiny); Fullilove v. Klutznick, 448 U.S. 448, 464–67 (1980) (describing the objectives of a statutory provision designed to provide minorities with greater opportunities to secure contracts with the federal government that the Court upheld under heightened scrutiny); Korematsu, 323 U.S. at 216–17 (describing the military exclusion orders that resulted in the internment of Japanese Americans upheld under the Court’s more exacting scrutiny).

41. See Douglas v. California, 372 U.S. 353, 355 (1963) (invalidating as invidiously discriminatory the denial of counsel to indigents on appeal explaining that there “can be no equal justice where the kind of an appeal a man enjoys ‘depends on the amount of money he has’”); Griffin v. Illinois, 351 U.S. 12, 17–18 (1956) (invalidating a fee requirement for a criminal trial transcript because it discriminated against the poor); Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 420–21 (1948) (applying a heightened form of review to an alienage classification).

42. See Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341, 373 (1949) (describing the early era in which the Court felt “less constrained by consideration[s] of judicial deference in the field of human and civil rights than in that of economic regulation” but finding “no consistency of craftsmanship in manipulating the elements of the doctrine”).


45. Id.; see also Developments in the Law: Equal Protection, supra note 39, at 1125 (identifying the relationship between political impotence of certain minority groups and heightened judicial scrutiny for laws that classify those groups); David A. Strauss, Is Carolene Products Obsolete?, 2010 U. ILL. L. REV. 1251, 1257–58 (describing as a reasonable definition of discrete and insular under the Carolene Products footnote as encompassing “groups that are not able to play their proper role in democratic politics” and situations where “only the courts can make the democratic process work as it should”).
B. An Emerging Standard: Political Power as Descriptive Representation

In two important cases in the 1970s, the Court finally articulated a suspect class standard, one that explicitly asked whether the group had political power. In *San Antonio Independent School District v. Rodriguez*, the Court declared that “the traditional indicia of suspectness [are whether] the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”

Later that same term, a liberal plurality of the Court in *Frontiero v. Richardson* offered a more detailed version of the standard. The *Frontiero* plurality’s standard included four factors: (1) whether the class suffered from a history of discrimination, (2) whether members of the class shared an immutable and visible classifying trait, (3) whether the classifying trait was relevant to the individual’s ability to contribute to society, and (4) whether the class was politically powerless. A class that met all four criteria would be considered suspect.

The *Frontiero* plurality also suggested a way of measuring the fourth factor, political powerlessness. In arguing that women lacked political power despite comprising half the population, the plurality focused on women’s vast underrepresentation “in this Nation’s decisionmaking councils.” At the time of the decision, “[t]here ha[d] never been a female President, nor a female member of th[e] Court. Not a single woman [sat] in the United States Senate, and only 14 women [held] seats in the House of Representatives.” Women were vastly underrepresented not only in the highest echelons of the federal government, but also in the other levels of federal, state, and local governments.

The Justices implied that women’s lack of descriptive representation in politics meant that women’s substantive interests went overlooked. The plurality cited a book by Kirsten Amundsen called *The Silenced Majority: Women and American Democracy*. In the book, Amundsen argues that because women are underrepresented in government, their interests are poorly represented in the formulation and adoption of public policy. This link

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46. 411 U.S. 1, 28 (1973).
48. Id.
49. Id. at 686 n.17.
50. Id.
53. Amundsen, *supra* note 52, at 66 (relying on the assumption that “there is a politically significant relationship between the proportion of representative positions a group can claim for itself...
between the descriptive underrepresentation of women in politics and their lack of substantive representation seemed to demonstrate to the liberal Justices that women did not have the capacity to influence democratic politics. Women instead required special judicial protection from gender classifications harmful to them that were adopted through the majoritarian process.  

C. Political Power as Favorable Democratic Actions

Paradoxically, the very point at which the Court established a suspect class standard also marked the demise of the suspect class.  

Since articulating the standard in Frontiero, the Court has not declared a single class suspect.  

Rather than employing the standard to systematically assess which classes should be considered suspect, the Court developed limiting principles from the standard that would be nearly impossible for future classes to surmount. It has been the Court’s redefinition of one of the four factors—political powerlessness—that has played a crucial role in the demise of the suspect class.

Three years after Frontiero, Justice Thurgood Marshall first suggested that political power might be measured, not according to a group’s descriptive representation among policy makers, but rather by the passage of laws and other democratic actions benefiting the group. In Massachusetts Board of Retirement v. Murgia, a case involving a challenge to a state mandatory retirement age law, the Court ruled that the aged should not be considered suspect.  

Conceding that the aged faced a history of discrimination, the Court emphasized that it had not arisen from purposeful unequal treatment. The aged, the majority explained, had not “been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.”  

Justice Marshall dissented but agreed that the aged are distinguishable from traditionally suspect classes. For support, he pointed to the existence of antidiscrimination laws and other forms of legislation “that provide[] the aged with positive benefits not enjoyed by the public at large.”

and the degree to which the needs and interests of that group are articulated and acted upon in political institutions.

54. Id. at 75 (“The virtual absence of women in top [elected and appointed] positions . . . that carry with them the responsibilities, the access, and the prestige that guarantee influence and/or authority, provides overwhelming evidence of women’s lack of representation in the nation’s political power structure.”).

55. See Goldberg, supra note 1, at 503 (arguing that because of both misapplication and theoretical inconsistencies, “the set of classifications that might be considered suspect or quasi-suspect has remained largely unchanged for more than a quarter century”).

56. Although in later cases the Court explicitly declared that classifications on the basis of gender and illegitimacy—and more implicitly classifications on the basis of undocumented status—were entitled to quasi-suspect status, these determinations were made according to a different standard and rationale. See supra text accompanying note 27.


58. Id.

59. Id. at 325 (Marshall, J., dissenting).

60. Id.
In subsequent cases, the Court would treat evidence of favorable legislation as indicative of a group’s political power. In a second case denying suspect class status to the aged, the Court referenced Congress’s recent actions favoring the elderly “with respect to mandatory retirement ages” as evidence that “the political system is working.”\(^61\) Even if the democratic process sometimes burdened the aged, the Court reasoned, they did not need the special protection provided through suspect class status because they were capable of winning in democratic politics.\(^62\)

A dozen years after *Frontiero*, the Court, for the first time, explicitly relied on favorable democratic actions as evidence of a group’s political power. In *City of Cleburne v. Cleburne Living Center, Inc.*, the Court denied suspect class status to the mentally disabled while reaffirming the importance of political powerlessness.\(^63\) The Court first determined that mental disability is a status relevant to a person’s ability to contribute to society.\(^64\) Those that are mentally disabled, the Court explained, “have a reduced ability to cope with and function in the everyday world.”\(^65\) States should therefore be given wide latitude to classify on the basis of disability status so that they can be responsive to individuals’ different capacities.\(^66\) The Court also emphasized democratic actions favoring the disabled as a reason for denying suspect class status to this group. The mentally disabled had benefited from the protection of federal and state antidiscrimination laws, as well as from executive actions facilitating the hiring of the mentally disabled into the federal civil service. Those acts “negate[d] any claim that [members of the class] are politically powerless in the sense that they have no ability to attract the attention of the lawmakers.”\(^67\)

*Cleburne* marked the Supreme Court’s definitive shift away from measuring political power according to a group’s descriptive representation in politics. Instead, favorable democratic actions emerged as the Justices’ preferred measure. That shift has had important implications. Whereas many groups are descriptively underrepresented in politics, almost every group has


\(^{62}\) Id. at 97 (explaining, “[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted” (footnote omitted)).


\(^{64}\) Id. at 442.

\(^{65}\) Id.

\(^{66}\) Id. at 442–43 ("How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.”).

benefited from favorable laws. The federal government, states, and localities pass laws all the time that aid disfavored groups. It is therefore no accident that neither the Supreme Court nor lower federal courts have extended suspect class status when using favorable democratic actions as the measure of political power. 68

However, descriptive representation has not been definitively discarded as a measure of political power in the lower courts. These lower courts have continued to draw on both Cleburne and Frontiero in assessing suspect class claims. 69 During the current controversy over the suspect class status of gays and lesbians, the federal appellate courts have split over whether descriptive representation or favorable democratic action should be the measure of political power. That controversy, which we discuss in the next Section, illustrates how the measure of political power that courts choose tends to dictate whether a class will be deemed suspect.

D. Continuing Controversy over the Measure of Political Power

In the nearly thirty years since Cleburne, gays and lesbians have been the group most actively seeking suspect class status. Since Cleburne, most circuit courts of appeal have addressed claims from gays and lesbians for suspect class status. One circuit court determined that gays and lesbians were not a suspect class simply by judicial fiat. 70 Other circuits have held that sexual orientation classifications were based on conduct, not an immutable status, and, as such, would not be subject to heightened scrutiny. 71 A third set of courts has treated sexual orientation as a status but concluded that classifications on that basis would not be subject to heightened scrutiny. As support, these courts cited Bowers v. Hardwick, 72 in which the Supreme Court refused to subject a law criminalizing sexual conduct involving gay men to heightened scrutiny. 73 As

68. See infra Part I.D.
69. See infra Part I.D.
70. See Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 292 n.1 (6th Cir. 1997) (asserting that an ordinance banning statutes that provide gays, lesbians, and bisexuals with preferential treatment “does not impair the interests of members of any suspect or quasi-suspect class”).
71. See Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996) (“A class comprised of service members who engage in or have a propensity or intent to engage in [homosexual] acts is not inherently suspect.”); Rich v. Sec’y of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984) (“A classification based on one’s choice of sexual partners is not suspect.”); see also Richenberg v. Perry, 97 F.3d 256, 260 (8th Cir. 1996) (rejecting the contention that “homosexuality is a suspect classification . . . for the reasons stated by the Fourth Circuit in Thomasson”).
72. See Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (“After Hardwick it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm.”); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (“We . . . think the [Court’s] reasoning in Hardwick . . . forecloses appellant’s efforts to gain suspect class status for practicing homosexuals.”); see also Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (“Because we have held [in Hardwick v. Bowers] that engaging in homosexual conduct is not a constitutionally protected liberty interest . . . [w]e refused to hold, that homosexuals constitute a suspect or quasi-suspect classification.”).
the D.C. Circuit explained, “If the [Supreme] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.”

The Second, Seventh, and Ninth Circuit Courts of Appeals have been the only courts to actually apply the *Frontiero* suspect class standard to gays and lesbians. In all three decisions, the court’s determination turned, at least in part, on an assessment of the political power of the group.75 Those courts, however, applied different measures of political power, with the choice of measure appearing to dictate the suspect class determination. While the Seventh Circuit appeared to rely on an amalgamation of the *Cleburne* and *Frontiero* measures of political power, the Second and Ninth Circuits clearly chose one measure over the other and came to opposite conclusions about the suspect class status of gays and lesbians.

In denying a suspect class claim of gays and lesbians, the Seventh Circuit surmised, “homosexuals are proving that they are not without growing political power.”76 As support, the court cited a *Time* magazine article reporting, “one congressman is an avowed homosexual, and that there is a charge that five other top officials are known to be homosexual.”77 The court also pointed to a *Chicago Tribune* article reporting that the “Mayor of Chicago participated in a gay rights parade.”78 From this evidence, combining descriptive representation with a favorable action by an elected official, the court rejected any contention that gays and lesbians “have no ability to attract the attention of the lawmakers.”79

Relying on more than newspaper anecdotes, the Ninth Circuit followed *Cleburne* and pointed to legislation favorable to gays and lesbians as evidence of the group’s political power. As the court explained, “legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation.”80 In a footnote, the court cited laws passed in Wisconsin, California, and Michigan; an executive order issued in New York;

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74. *Padula*, 822 F.2d at 103.
75. The Second and Seventh Circuits agreed or did not contest whether: (1) gays and lesbians shared an immutable, obvious, or distinguishable characteristic; (2) gay and lesbian status was relevant to the ability to perform or contribute to society; or (3) members of the group suffered a history of discrimination. See Windsor v. United States, 699 F.3d 169, 181–85 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013); Ben-Shalom v. Marsh, 881 F.2d 454, 465–66 (7th Cir. 1989). The Ninth Circuit also determined that “[h]omosexuality is not an immutable characteristic [because] it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage.” *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990), abrogated by *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014).
76. *Ben-Shalom*, 881 F.2d at 466.
77. *Id.* at 466 n.9.
78. *Id.*
79. *Id.* at 466 (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 445 (1985)).
80. *High Tech Gays*, 895 F.2d at 574.
and regulations in the cities of New York, Los Angeles, Washington, D.C., Atlanta, Boston, Philadelphia, Seattle, and San Francisco.\textsuperscript{81} The court concluded that such legislation demonstrated that gays and lesbians “are not without political power; they have the ability to and do ‘attract the attention of the lawmakers.’”\textsuperscript{82} Accordingly, the court determined that suspect status was not appropriate for the class.\textsuperscript{83} 

The Second Circuit in \textit{Windsor v. United States} disagreed with the Seventh and Ninth Circuits’ determinations, finding that gays and lesbians lacked political power and should therefore be entitled to suspect class status. For the Second Circuit, the question was “not whether homosexuals have achieved political successes over the years”—the court conceded that they clearly had—but instead, “whether they ha[d] the strength to politically protect themselves from wrongful discrimination.”\textsuperscript{84} To assess whether gays and lesbians had this political strength, the court returned to the measure of political power advanced in \textit{Frontiero}, which looked to descriptive representation. The court explained that, like women in the early 1970s, gays and lesbians were underrepresented “in positions of power and authority.”\textsuperscript{85} The fact that there might be more gays and lesbians in politics who have not come out of the closet was “attributable . . . to a hostility that exclude[d] them,” suppressed their political activity, and prevented them from building coalitions in politics that advance their political interests.\textsuperscript{86} Gays and lesbians’ lack of descriptive representation in politics thus demonstrated to the court that “homosexuals are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public.”\textsuperscript{87} 

The Supreme Court twice had the opportunity to address the suspect class status of gays and lesbians, but both times it avoided the question. In \textit{Romer v. Evans}, the Court did not need to decide the question of suspect status: the challenged sexual orientation classification failed under rational basis review as a law motivated by animus.\textsuperscript{88} Justice Scalia, writing in dissent, disagreed vehemently with the majority’s characterization of the law.\textsuperscript{89} Further, he suggested that gays and lesbians were a politically powerful group that used their power “to achieve[e] not merely a grudging social toleration, but full social acceptance, of homosexuality.”\textsuperscript{90} As evidence of this political power, Justice

\begin{itemize}
  \item \textsuperscript{81} \textit{Id.} at 574 n.10.
  \item \textsuperscript{82} \textit{Id.} at 574.
  \item \textsuperscript{83} \textit{Id.} at 571.
  \item \textsuperscript{84} \textit{Windsor v. United States}, 699 F.3d 169, 184 (2d Cir. 2012), \textit{aff’d}, 133 S. Ct. 2675 (2013).
  \item \textsuperscript{85} \textit{Id.}
  \item \textsuperscript{86} \textit{Id.} at 184–85.
  \item \textsuperscript{87} \textit{Id.} at 185.
  \item \textsuperscript{88} 517 U.S. 620, 632–35 (1996).
  \item \textsuperscript{89} \textit{See id.} at 636 (Scalia, J., dissenting) (“The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a ‘bare . . . desire to harm’ homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.” (citation omitted)).
  \item \textsuperscript{90} \textit{Id.} at 646.
\end{itemize}
Scalia pointed to nondiscrimination ordinances passed in three Colorado cities and an executive order issued by the governor directing agencies to not discriminate on the basis of sexual orientation in hiring and promotion.91 Given that gays and lesbians have been able to achieve legislative success in the democratic process, Justice Scalia explained, they must also be subject “to being countered by lawful, democratic countermeasures as well.”92

Seventeen years later, when the Supreme Court granted certiorari to review the Second Circuit’s ruling in Windsor, both measures of political power emerged in the briefs. However, the parties in Windsor relied primarily on Cleburne’s favorable democratic action measure93—only the amici

91. Id.
92. Id.
93. The respondent, Edith Windsor, who challenged the Defense of Marriage Act (DOMA), and her opponents debated whether gays and lesbians had political power according to the Cleburne measure of favorable democratic actions. Brief on the Merits for Respondent Edith Schlain Windsor at 28–29, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307). To support her claim that gays and lesbians lacked political power, Windsor described the unsuccessful efforts of gays and lesbians to secure such protections from discrimination at both federal and state levels. Id. at 29–30. At the federal level, she focused on the absence of a federal ban on sexual orientation discrimination “in employment, housing, or public accommodations” and the absence of such protections in twenty-nine other states. Id. at 29. She then pointed to the number of state popular initiatives that had been introduced depriving gays and lesbians of civil rights. Id. Windsor argued on the basis of this evidence that gays and lesbians do not “have the strength to politically protect themselves from wrongful discrimination.” Id. at 30 (quoting Windsor v. United States, 699 F.3d 169, 184 (2d Cir. 2012), aff’d, 133 S. Ct. 2675 (2013)); see also Brief for the United States on the Merits Question at 32–35, Windsor, 133 S. Ct. 2675 (No. 12-307) (joining on the side of Windsor supporting her arguments about the lack of political power of gays and lesbians); Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amici Curiae in Support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits at 6–10, Windsor, 133 S. Ct. 2675 (No. 12-307) (joining on the side of Windsor supporting her arguments about the lack of political power of gays and lesbians).

The principal defender of DOMA, the Bipartisan Legal Advisory Group (BLAG) of the U.S. House of Representatives and friends of the court supporting BLAG, also relied on the Cleburne measure of political power of favorable democratic actions. See Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 51–54, Windsor, 133 S. Ct. 2675 (No. 12-307); Amicus Curiae Brief of Concerned Women for America, Addressing the Merits and Supporting Respondent Bipartisan Legal Advisory Group of the United States House of Representatives and Reversal at 14–23, Windsor, 133 S. Ct. 2675 (No. 12-307); Brief Amicus Curiae of the Family Research Council in Support of Respondent Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at 27–31, Windsor, 133 S. Ct. 2675 (No. 12-307); Brief of Amicus Curiae Liberty Counsel in Support of Respondent Bipartisan Legal Advisory Group of the United States House of Representatives (Merits Brief) at 32–34, Windsor, 133 S. Ct. 2675 (No. 12-307); Brief Amicus Curiae of United States Conference of Catholic Bishops in Support of Respondent Bipartisan Legal Advisory Group, Addressing the Merits, and Supporting Reversal at 14–15, Windsor, 133 S. Ct. 2675 (No. 12-307). But BLAG and other defenders of DOMA focused on the democratic successes of gays and lesbians. First, BLAG cited the support for same-sex marriage from President Barack Obama, Vice President Joseph Biden, the Senate Majority Leader Harry Reid, and the House Minority Leader Nancy Pelosi. Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, supra, at 51. Next, the group pointed to the passage of same-sex marriage initiatives in three states and the rejection of a prohibition on same-sex marriage in another. Id. at 53. BLAG also cited the decision of President Obama and his Attorney General to stop defending DOMA in court. Id. at 52.

Finally, the amicus briefs focused on specific congressional and regulatory actions favorable to gays and lesbians, including amendments to the Immigration and Nationality Act to
opposing the Defense of Marriage Act drew on *Frontiero*’s descriptive representation measure.\(^{94}\) In the end, the Supreme Court in *Windsor* chose to punt again on the issue of the suspect class status of gays and lesbians. As in *Romer*, the Court determined that it did not need to decide the question because the Defense of Marriage Act failed under rational basis review as a law motivated by animus.\(^{95}\)

Despite the Court’s avoidance of the question in past gay rights cases, the controversy over the proper measure of political power is not likely to go away anytime soon. The competing measures will likely be the focal point in challenges to future laws discriminating against gays and lesbians in which members of the group will likely seek suspect class status.\(^{96}\) One can also imagine a revival of claims by the disabled, the aged, and the poor to suspect class status on the basis of the measure of political power that most favors their claim.

The question will therefore persist: Is there any basis for choosing between the two ways of measuring political power? In the rest of this Article, we address this question empirically by testing whether favorable democratic actions are an accurate indicator of group political power. We chose to examine the political power of the poor because there is readily available data that remove sexual deviation as a mental ground for health exclusion, a ground that had been understood as homosexuality; the Hate Crimes Prevention Act of 2010 defining hate crimes as including those crimes of violence “based on . . . the victim’s ‘actual or perceived . . . sexual orientation’”; the repeal of the Don’t Ask, Don’t Tell policy barring openly gay and lesbian persons from serving in the military; and President Obama’s decision to extend benefits to the same-sex domestic partners of federal employees. See Brief Amici Curiae of the Family Research Council in Support of Respondent Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal, *supra*, at 27–29 (second alteration in original) (citing the Immigration and Nationality Act, Pub. L. 100-649, § 601(a), 104 Stat. 4978, 5067; codified at 8 U.S.C. § 1182(a), the Hate Crimes Prevention Act of 2010, Pub. L. 111-321, § 2, 124 Stat. 3515, 3516). According to BLAG, “gays and lesbians are one of the most influential, best-connected, best-funded, and best-organized interest groups in modern politics, and have attained more legislative victories, political power, and popular favor in less time than virtually any other group in American history.” Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, *supra*, at 53.

\(^{94}\) The amici pointed to the vast underrepresentation of gays and lesbians in federal and state government and argued that this evidenced the group’s lack of political power. See Brief of Constitutional Law Scholars Bruce Ackerman et al. as Amici Curiae Addressing the Merits and Supporting Affirmance at 20–21, *Windsor*, 133 S. Ct. 2675 (No. 12-307); Brief for Amici Curiae Leadership Conference on Civil and Human Rights et al. in Support of Respondent Edith Windsor at 24–26, *Windsor*, 133 S. Ct. 2675 (No. 12-307); Brief for Political Science Professors as Amici Curiae in Support of Respondent Windsor and Affirmance Addressing Political Power of Gay Men and Lesbians at 11–16, *Windsor*, 133 S. Ct. 2675 (No. 12-307).

\(^{95}\) *Windsor*, 133 S. Ct. at 2695 (finding that “the principal purpose and necessary effect [of DOMA] are to demean those persons who are in a lawful same-sex marriage”).

\(^{96}\) After the Court’s determination that the Constitution protected the fundamental right for same-sex couples to marry, LGBTQ groups vowed that the next step would be to seek suspect class status for protection against other laws that discriminate on the basis of sexual orientation. See Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (invalidating state same-sex marriage bans because they infringed on the fundamental right to marry); Erik Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, N.Y. TIMES (June 27, 2015), http://www.nytimes.com/2015/06/28/us/gay-rights-leaders-push-for-federal-civil-rights-protections.html.
allows us to assess the relationship between favorable democratic action toward the poor and the group’s political voting strength. Moreover, the poor’s status as a suspect class is very much undetermined in doctrine. Arguably, whether the poor should be a suspect class for equal protection purposes remains an open question.

II.

THE CASE OF THE POOR

Though it is generally understood that the Supreme Court does not consider the poor to be a suspect class, the Court has never squarely addressed the issue under the *Frontiero* or *Cleburne* standards. In this Part, we examine how the Court has treated the poor in its past equal protection doctrine and consider how the suspect class standard might be applied to them. We argue that if the Court ever chose to revisit the poor’s suspect class status, the outcome would rest on the measure of political power the Justices applied. We then look to political science studies for empirical determinations of the political power of the poor. While we find compelling evidence from these studies that the poor lack political power, we argue that they fail to squarely engage the Supreme Court’s current measure of political power. These empirical studies leave an opening for a more direct test of the Supreme Court’s measure of political power.

A. The Curious Case of the Suspect De-Classification of the Poor

For a brief seven-year period in the late 1960s and early 1970s, classifications on the basis of wealth stood on the same level as classifications on the basis on the basis of race—traditionally disfavored and subject to heightened judicial scrutiny. But after the addition of four conservative Justices in the early 1970s, the Court reversed course and ultimately determined that wealth was not a suspect classification and that the poor were not a suspect class.

In the mid-1960s, the Court appeared to extend suspect class status to the poor. In *Harper v. Virginia State Board of Elections*, a case involving a challenge to a state poll tax, the Court explained that “[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.”

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97. See, e.g., Loffredo, supra note 13, at 1278–79 (“Although the poor are generally recognized as a politically powerless minority, the Court’s poverty discourse nevertheless treats society’s most marginalized members as though they were the fully empowered equals of the more affluent.” (footnote omitted)).

98. 383 U.S. 663, 668 (1966) (citation omitted). Scholars have offered different perspectives on whether the Court actually declared wealth a suspect classification in *Harper* and the cases that followed. See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 10 (1972) (describing as dicta the Court’s suggestion that wealth classifications were suspect and pointing to the absence of cases that “actually invalidated a law solely because of differential impact on the poor”); Loffredo, *supra* note 13, at 1282–83 (describing the shifting scholarly understandings of the suspect class status of the poor in the 1960s and 1970s); Wilkinson, *supra* note 13, at 979 (“Indigency is ‘at least in some settings’ called suspect,
According to the Harper majority, “[w]ealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.” 99 Three years later, the Court reaffirmed this suspect classification determination for wealth in a case addressing a challenge to the denial of absentee ballots to inmates awaiting trial. Citing Harper, the Court concluded that wealth and race are “two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.” 100 In concurrences and dissents in subsequent cases, the more liberal Justices reasserted that wealth was a suspect classification. 101 No other Justice contradicted these assertions.

In the early 1970s, the Court decided the case of San Antonio Independent School District v. Rodriguez, which would serve as the foundation for the Court’s eventual denial of suspect class status to the poor. 102 The irony is that while the Court would later cite Rodriguez to support its denial of suspect class status to the poor, 103 the Court never actually decided the question in the case.

Rodriguez involved a challenge to Texas’s system of financing public education. 104 The financing system apportioned money to school districts on the basis of property taxes, which led to an unequal distribution of money between property-tax-rich and property-tax-poor districts. 105 Parents of poor children residing in property-tax-poor districts challenged the financing system as a violation of the Equal Protection Clause. 106 The parents claimed that the school financing system discriminated on the basis of a suspect status—wealth—and failed to satisfy strict scrutiny. 107

The Court disagreed, holding that the financing system did not discriminate on the basis of wealth. The Court explained that the challengers “made no effort to demonstrate that [the public financing system] operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty

though neither the setting nor the nature of the indigency classification has been systematically defined.” (footnote omitted)).

101. See, e.g., Boddie v. Connecticut, 401 U.S. 371, 385 (1971) (Douglas, J., concurring) (identifying the reach of rigorous equal protection scrutiny to classifications on the basis of race, alienage, religion, poverty, and class or caste); Shapiro v. Thompson, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting) (describing the origins of judicial application of strict scrutiny to racial classifications and explaining “[t]he criterion of ‘wealth’ apparently was added to the list of ‘suspects’ as an alternative justification for the rationale in Harper”).
103. See infra text accompanying note 113.
104. Rodriguez, 411 U.S. at 4–6 (describing the nature of the constitutional challenge).
105. Id. at 7–11 (describing the Texas system of financing public education).
106. Id. at 12–13 (noting that the educational financing scheme resulted in a disparity in which the school district with the lowest property values spent $248 per pupil while the school districts with the highest property values spent $558 per pupil).
107. Id. at 19–20 (describing the appellees’ claim that identifies three ways that the Texas financing system classifies on the basis of a suspect wealth criteria).
level.” 108 The Court held that the challengers’ claim that the law discriminated “against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts,” involved a class that was too “large, diverse, and amorphous” to be considered suspect. 109 It was this class, which included school children of poor, middle-class, and wealthy households, that the Court held did not meet any of “the traditional indicia of suspectness.” 110

Thus, the Rodriguez Court never addressed whether the poor were a suspect class. 111 Yet in subsequent cases, the Court used Rodriguez as a jumping-off point for denying suspect class status to the poor. In Maher v. Roe, a case involving a challenge to a state welfare regulation that provided funds for childbirth but not abortions, the Court asserted that it “had never held that financial need alone identifies a suspect class for purposes of equal protection analysis.” 112 For this true but inconclusive proposition, the Court cited Rodriguez. 113 In a subsequent case, Harris v. McRae, involving a challenge to a prohibition on Medicaid reimbursements for abortions, the Court then relied on its analysis in Maher to directly deny suspect class status to the poor. 114 Citing Maher, the Court in Harris concluded, “poverty, standing alone, is not a suspect classification.” 115

Thus, by sleight of hand and without substantive analysis, the Court denied suspect class status to the poor. The Court, however, has never squarely addressed the status of the poor under the suspect class standard. The next Section turns to how that standard might be applied to the poor.

B. Applying the Suspect Class Standard to the Poor

To apply the suspect class standard, a court would need to assess whether the poor, as a class, meet the four criteria set out in Frontiero: (1) whether the poor “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group”; 116 (2) whether they have suffered a history of discrimination; (3) whether their wealth is irrelevant to their ability to

108.  Id. at 22–23.
109.  Id. at 20, 28.
110.  Id. at 28.
111.  As further evidence that the Rodriguez Court did not deny suspect class status to the poor, the dissenters, who included Justices William Douglas and Thurgood Marshall, staunch advocates of the poor in their equal protection jurisprudence, never engaged the question.  Id. at 70–133 (Douglas and Marshall, JJ., dissenting).
113.  Id. In a footnote, the Court also distinguished past cases like Griffin v. Illinois and Douglas v. California, explaining that they never found wealth alone to be a suspect class.  Id. at 471 n.6. The Court explained, “These cases are grounded in the criminal justice system, a governmental monopoly in which participation is compelled.”  Id. Notably, the Court never mentions Harper v. Virginia State Board of Elections, the case in which the Court most clearly categorized wealth as a suspect classification.  See supra text accompanying notes 98–99.
115.  Id. at 323.
contribute to society; and (4) whether they lack the political power to command the attention of lawmakers.\textsuperscript{117}

The poor should meet the first three criteria rather easily. First, being poor is an obvious and distinguishable characteristic. We can generally determine that people are poor on the basis of where they live, what they possess, and their demonstrated levels of education.\textsuperscript{118} Second, they have suffered a well-chronicled history of discrimination. This history includes prejudicial and exclusionary laws, societal stigmatization of the poor, and broader societal indifference about the needs of the poor.\textsuperscript{119} Third, wealth has no relevance to an individual’s ability to contribute to or perform in society. As the Court has interpreted this factor, the money that an individual possesses is not a characteristic relevant to his or her inherent ability to contribute to or perform in society.\textsuperscript{120}

That leaves the question of whether the poor lack the political power necessary to protect their interests in the democratic process. The answer would turn on the measure of political power that the Court uses. If the Court relies on the \textit{Frontiero} measure of descriptive representation, it seems clear that the poor lack political power because the poor are vastly underrepresented in decision-making councils. To start, members of Congress and most state legislators do not meet the criteria of being poor simply because of the salaries they receive as elected officials.\textsuperscript{121} Moreover, looking beyond the current salaries of elected officials, very few legislators hail from working class or poor backgrounds—according to a recent study by Nicholas Carnes, only 6 percent of congressmembers that held office between 1999 and 2008 entered Congress from a working class background.\textsuperscript{122} In this study, Carnes also found suggestive evidence that the poor’s lack of descriptive representation contributes to the poor’s lack of substantive representation.\textsuperscript{123} In short, under the \textit{Frontiero} measure of political power, the Court should deem the poor a suspect class.

\textsuperscript{117} See \textit{Frontiero} v. Richardson, 411 U.S. 677, 684–87 (1973) (Brennan, J., plurality opinion).

\textsuperscript{118} See, e.g., \textsc{Sean F. Reardon \& Kendra Bischoff, Growth in the Residential Segregation of Families by Income, 1970–2009, at 10–16 (2011) (describing the trend toward the increased residential segregation of the poor from other income groups); \textsc{Sean F. Reardon, The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations, in Whither Opportunity? Rising Inequality, Schools, and Children’s Life Chances 91 (Greg J. Duncan \& Richard J. Murnane eds., 2011).}

\textsuperscript{119} See, e.g., \textsc{Martin Gilens, Why Americans Hate Welfare: Race, Media, and the Politics of Antipoverty Policy 102–73 (1999) (describing the historic racialization and stigmatization of poverty and other sources of indifference to the needs of the poor).}

\textsuperscript{120} See \textit{ supra} notes 98–101. The Court in the age and disability cases focused on factors inherent to an individual, such as mental and physical capacity. \textit{See supra} text accompanying notes 64–66.

\textsuperscript{121} See, e.g., \textsc{Ida A. Brudnick, Cong. Research Serv., RL30064, Congressional Salaries and Allowances: In Brief 9–11 (2014) (collecting data on the salaries of members of the House and the Senate).}

\textsuperscript{122} Carnes, \textit{ supra} note 17.

\textsuperscript{123} See \textit{id.} at 32–41 (finding that legislators who worked in blue-collar occupations prior to serving in Congress voted more liberally on economic issues than other legislators).
But if the Court relies on the Cleburne measure that emphasizes favorable
democratic action, a strong case can be made that the poor do have political
power. Federal and state governments have passed numerous laws protecting or
benefiting the poor, particularly during the ten-year period between the mid-
1960s and the mid-1970s in which the government conducted its “War on
Poverty.” There are even recent examples of high-profile legislation that, at
least arguably, provide benefits to the poor, such as the expansion of Medicaid
and increases in minimum wages in several states and local jurisdictions. These
favorable democratic actions might suggest to the Court that the poor can
protect their interests in democratic politics. Thus, if the Court applied the
Cleburne measure of political power, it would likely not consider the poor a
suspect class.

C. Prior Measures of the Political Power of the Poor

Can social science tell us which of the two measures, Frontiero or
Cleburne, is the better one? Past empirical studies have found little evidence
that the poor possess the power to influence lawmakers. Unfortunately, though,
their methods do not speak squarely to the question of whether the Court’s
preferred measure—favorable democratic actions—is a reliable one.

Over the past fifty years, political scientists interested in political power
and accountability have focused on testing the degree of responsiveness of
legislatures and legislators to their constituents. One approach has examined
the influence of constituents on legislative policy and the roll call voting
behavior of representatives. A second set of studies, more relevant here, has

124. See, e.g., PATTERSON, supra note 18, at 153–92 (detailing the War on Poverty).
125. See CHRIS L. PETERSON & THOMAS GABE, CONG. RESEARCH SERV., R41137, HEALTH
INSURANCE PREMIUM CREDITS IN THE PATIENT PROTECTION AND AFFORDABLE CARE ACT
(PPPACA) (2010) (describing as eligible for premium credits under the Affordable Care Act those
persons with incomes less than 400 percent of the federal poverty level); Rachel Abrams, States’
Minimum Wages Rise, Helping Millions of Workers, N.Y. TIMES (Dec. 31, 2014),
hhttp://www.nytimes.com/2015/01/01/business/hourly-minimum-wage-is-going-up-for-millions.html
(describing minimum wage increases in twenty states and the District of Columbia that either went
into effect on January 1, 2015, or later that year).
126. Early studies found that constituents had little influence on the roll call voting behavior of
representatives. See, e.g., Warren E. Miller & Donald E. Stokes, Constituency Influence in Congress,
57 AM. POL. SCI. REV. 45, 51–56 (1963) (finding a very modest relationship between constituent
opinion and representative roll call behavior on issues of social welfare and foreign affairs and a
relatively strong relationship for civil rights); Christopher H. Achen, Measuring Representation, 22
AM. J. POL. SCI. 475, 494–97 (1978) (relying on the data and finding less of a relationship between
constituent preferences and legislators’ roll call behavior); James H. Kuklinski, Representatives and
Elections: A Policy Analysis, 72 AM. POL. SCI. REV. 165, 172 (1978) (finding a modest relationship
between constituent opinion as expressed in votes on state-related referenda and legislators’ roll call
voting behavior in California). But see Robert S. Erikson, Constituency Opinion and Congressional
Behavior: A Reexamination of the Miller-Stokes Representation Data, 22 AM. J. POL. SCI. 511, 513–
14 (1978) (finding biases in the sample procedure used to collect the data that supported the Miller
and Stokes data, which resulted in nonrandom, very small samples for the relevant congressional district
units).

Later studies relying on broader, more representative samples of constituency opinion and
other measures of responsiveness consistently found that constituents influence lawmakers’ votes and
examined the influence of different subconstituencies on legislatures and legislators. These latter studies have focused on the comparative influence of different income and racial groups on legislators’ roll call behavior and public policy more generally.

Recent studies of the comparative political influence of the poor have found evidence that the poor have significantly less influence on public policy and legislators’ roll call votes than members of other income classes. Political scientist Martin Gilens examined the relationship between the policy preferences of different income groups and policy outcomes across a range of broader public policy. See Robert S. Erikson et al., Statehouse Democracy: Public Opinion and Policy in the American States 78 (1993) (finding a strong correlation of 0.82 between states’ mean constituent ideological identification and a composite policy index); Stephen Ansolabehere & Philip Edward Jones, Constituents’ Responses to Congressional Roll-Call Voting, 54 AM. J. POL. SCI. 583, 584, 596 (2010) (finding that “constituents have the capacity to and do in fact hold their members of Congress accountable for roll-call votes”); Larry M. Bartels, Constituency Opinion and Congressional Policy Making: The Reagan Defense Build Up, 85 AM. POL. SCI. REV. 457, 467–68 (1991) (finding that “the impact of constituency opinion appears to have been remarkably broad-based, influencing all sorts of representatives across a wide spectrum of specific defense spending issues”); Amihai Glazer & Marc Robbins, Congressional Responsiveness to Constituency Change, 29 AM. J. POL. SCI. 259, 270–71 (1985) (finding evidence that the roll call voting behavior of representatives changes in response to redistricting-induced shifts in the partisanship and ideology of their constituents); Jeffrey J. Harden & Thomas M. Carsey, Balancing Constituency Representation and Party Responsiveness in the US Senate: The Conditioning Effect of State Ideological Heterogeneity, 150 PUB. CHOICE 137, 139 (2012) (“Though some debate remains, numerous studies find that constituencies’ average ideological positions play an important role in shaping legislator decision making.”); Christine Leveaux-Sharpe, Congressional Responsiveness to Redistricting Induced Constituency Change: An Extension to the 1990s, 26 LEGIS. STUD. Q. 275, 283 (2001) (reaffirming the Glazer and Robbins findings for representatives after the 1990s redistricting cycle); Benjamin I. Page et al., Constituency, Party, and Representation in Congress, 48 PUB. OPINION Q. 741, 748–52 (1984) (finding a strong relationship between constituency opinion and demography on representatives’ roll call votes); see also John W. Kingdon, Congressmen’s Voting Decisions 30–67 (3d ed. 1989) (finding on the basis of extensive interviews with congressmembers that their perception of constituency opinion has a strong influence on their decisions).

These studies have been inspired by a growing concern about political inequality. See Task Force on Inequality & Am. Democracy, Am. Pol. Sci. Ass’n, American Democracy in an Age of Rising Inequality (2004), http://www.apsanet.org/ports/54/Files/Task Force Reports/taskforcereport.pdf [https://perma.cc/355Q-PX2A] (calling for a greater focus in political science on the effects of political and economic inequality on democracy). As Sidney Verba argues, “One of the bedrock principles of democracy is the equal consideration of the preferences and interests of all citizens.” Sidney Verba, Would the Dream of Political Equality Turn Out to be a Nightmare?, 1 PERSP. ON POL. 663, 663 (2003).

See John D. Griffin & Brian Newman, Minority Report: Evaluating Political Equality in America 77–137 (2008) (finding on issues not particularly salient to African Americans and Latinos that senators and representatives were much less responsive to these minority groups’ interests than to the interests of whites in their roll call voting but finding no statistically significant difference on legislators’ responsiveness to the different groups on issues salient to African Americans and Latinos); Joshua D. Clinton, Representation in Congress: Constituents and Roll Calls in the 106th House, 68 J. POL. 397, 398 (2006) (finding that majority-party Republicans are more responsive to constituents who self-identify as members of the party and “minority party Democrats are most responsive to the preferences of non-Democratic constituents”); Lawrence R. Jacobs & Benjamin I. Page, Who Influences U.S. Foreign Policy?, 99 AM. POL. SCI. REV. 107, 120–21 (2005) (examining the comparative influence of different groups on foreign policy and finding that “internationally oriented business leaders,” policy experts, and labor have varying degrees of influence on government officials while public opinion had “little or no significant effect on government officials”).
government policies including the minimum wage, abortion, and sending troops to Bosnia. Gilens found that “government policy bears absolutely no relationship to the degree of support or opposition among the poor.” Only when the poor shared the views of the wealthy and middle classes did government policy accord with their preferences. In contrast, the views of the wealthy had a strong relationship with government policy. These findings held across issues of foreign policy, social welfare, economic policy, and issues having a moral or religious component.

Political scientist Larry Bartels came to similar conclusions about the poor’s lack of influence. Testing the relationship between the ideological views of different income groups and senators’ roll call votes in the late 1980s and early 1990s, Bartels found that while “senators seem to have been quite responsive to the ideological views of their middle- and high-income constituents . . . , the views of low-income constituents had no discernible impact on the voting behavior of their senators.” Bartels specifically examined four roll call votes—a vote on the federal minimum wage, a cloture vote on an amendment to the Civil Rights Act, a budget vote shifting money from the Defense Department to domestic programs, and a cloture vote on “removing the ‘firewall’ between defense and domestic appropriations.” The views of the poor were negatively correlated with senators’ roll call votes on three of the issues (civil rights, the budget vote, and the cloture vote) and there was no relationship between the views of the poor and senators’ roll call votes on the fourth issue (raising the minimum wage).

Other studies have arrived

130. Id. at 81.
131. Id. at 79. Gilens found that when the income classes agree on a particular issue, the link between preferences and public policy “is necessarily the same irrespective of income.” Id. But the more that the preferences of the low- and high-income groups diverge, the greater the gap in policy responsiveness to the policy preferences between the groups. Id. For example, “on those proposed policy changes where the preferences of low- and high-income respondents coincide . . . the logistic coefficients for the preference/policy link are 0.54 for both the 10th and 90th income percentiles.” Id. But when there is over a 10 percent point gap in the preferences between low- and high-income respondents, there continues to be “a strong association [of policy] with the preferences of the affluent (b = 0.46, p < 0.001) but no association with the preferences of the poor at all (b = 0.02, p = 0.85).” Id.
132. See id. at 81.
133. The association between the preferences of the poor and policy outcomes on all four issues dramatically declines when their preferences diverge from other income groups. It is only in the realm of social welfare that there is not a significant decline in the association between middle-income preferences and policy outcomes when income class preferences diverge. It is only the wealthy who do not see a significant decline in the association between their preferences and policy outcomes in the four areas when the group’s preferences diverge from other income groups. See id. at 97–120.
134. LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 259–60 (2008). Bartels estimated the impact of constituency preferences on a senator’s ideological position (measured on a -1 to +1 roll call scale) to be 0.39 for high-income constituents, 0.34 for middle-income constituents, and indiscernible from 0 for low-income constituents. Id.
135. Id. at 262.
136. Id. at 262–65.
at similar findings about the comparative lack of influence of the poor on roll call votes and political party behavior.\textsuperscript{137}

Prior political science research thus reveals considerable political inequality between income groups. None of these studies, however, directly test the Supreme Court’s measure of group political power. Political inequality is not necessarily proof of group political powerlessness. In the next Section, we explain why.

**D. The Limits of Prior Measures**

The poor appear to have considerably less influence over legislators’ roll call votes and public policy than the middle class and the wealthy. But would this fact convince the Supreme Court that the poor are politically powerless? The Court might respond that these studies do not explain the passage of antipoverty legislation during the War on Poverty in the 1960s and early 1970s and the government’s ongoing support for food stamps, welfare funding, and subsidized housing.\textsuperscript{138} Further, the Court could point to the fact that both during and after the War on Poverty, Congress rejected many pieces of legislation unfavorable to the poor.\textsuperscript{139} Finally, the Court could emphasize some legislators’ support for laws favorable to the poor that did not pass and opposition to unfavorable laws that did.\textsuperscript{140} Such outcomes, the Court might argue, represent the ordinary operation of politics in which there are winners


\textsuperscript{138} For a comprehensive examination of the antipoverty legislation passed and programs adopted during the War on Poverty, see *A Decade of Federal Antipoverty Programs: Achievements, Failures, and Lessons* (Robert H. Haveman ed., 1977). For a study of more recent initiatives directed at the poor, see *Changing Poverty, Changing Policies* 203–363 (Marcia Cancian & Sheldon Danziger eds., 2009).


\textsuperscript{140} Every legislative action that we coded as favorable to the poor received at least 120 yea votes in the House and every legislative action that we coded as unfavorable to the poor received at least 150 nay votes in the House.
and losers. Even if the poor are politically empowered, they cannot expect to win all of the time.

Those claims themselves are open to challenge, though. The obvious response is that the War on Poverty represented a special ideological moment and that any remaining legislative support for the poor in the present is simply a legacy of that moment. John F. Kennedy, the President responsible for initiating a new federal response to poverty, was inspired by his trip to West Virginia during the 1960 presidential campaign as well as Michael Harrington’s *The Other America*, a powerful book about poverty in the United States. President Lyndon Baines Johnson, who assumed office next, had been influenced by the poverty he witnessed during his youth in West Texas and wanted to carry forward President Kennedy’s legacy. Thus, Johnson decided to pursue an all-out “War on Poverty.” President Johnson’s 1964 Message to Congress provides evidence of the role of ideas, as well as the sense of morality and justice that underpinned this legislative onslaught. In the message, President Johnson set forth a national goal of ending poverty, envisioning:

> [an] America in which every citizen shares all the opportunities of his society, in which every man has a chance to advance his welfare to the limit of his capacities. We have come a long way toward this goal. We still have a long way to go. The distance which remains is the measure of the great unfinished work of our society. To finish that work I have called for a national war on poverty. Our objective: total victory.

In explaining why the nation should pursue a war on poverty, President Johnson explained, “[w]e do this, first of all, because it is right that we should. . . . We do it also because helping some will increase the prosperity of all.”

According to this alternative account, ideological or moral concerns about poverty influenced future generations of politicians, particularly Democrats, to support antipoverty laws and oppose laws that harmed the poor. From this perspective, the poor do not constitute an influential subconstituency able to secure legislative victories for themselves through politics. Rather, they are bystanders benefiting from an ideological moment and what remains of its legacy. Unfortunately, the available empirical studies on political inequality cannot tell us which account is the right one—whether the political power of the poor, ideology, or both drive legislative actions favorable to the poor.

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141. MICHAEL HARRINGTON, THE OTHER AMERICA: POVERTY IN THE UNITED STATES (1962); see also PATTERSON, supra note 18, at 97, 122 (describing how President Kennedy was influenced by “the misery he witnessed first hand in West Virginia” during his presidential campaign and Harrington’s “powerful, passionate book” that “catalyzed a rediscovery of poverty in America”).


144. Id.
Survey data on subconstituency preferences, of the type that recent political scientists utilize, simply did not exist until the late 1980s, and it did not exist in large enough samples at the state level until the 1990s. Thus, it is impossible to use survey-based methods to measure whether it was the poor’s political power that drove the primary burst of favorable legislation for the poor—the War on Poverty. Even today, survey data on subconstituency preferences at the congressional district level do not exist in large enough samples. Thus, studies like Bartels’s have been limited to Senate votes and state-level data, which are less fine-grained and hence less illuminating than district-level data. Moreover, in emphasizing the lack of correlation between the poor’s attitudes and legislators’ voting, these studies do not ask what drives the instances of action actually favoring the poor.

In sum, while political scientists’ findings of political inequality between income groups are quite troubling, they do not squarely engage the Supreme Court’s measure of political power. What we need is a direct test of the Supreme Court’s preferred measure of political power; specifically, an empirical test to ascertain what might drive democratic actions favorable to a group. In the next Part, we develop a model for and a test of the Supreme Court’s measure of political power as favorable democratic actions. We ultimately find the Court’s measure to be an inaccurate gauge of the poor’s political power.

III. TESTING THE SUPREME COURT’S MEASURE OF POLITICAL POWER

In some respects, the Supreme Court’s measure of political power as favorable democratic actions comports with social science theories about political power. Political scientist Robert Dahl theorized, “A has power over B to the extent that he can get B to do something that B would not otherwise do.” Similarly, political philosopher Jack Nagel explained, “power [is] the causation of outcomes by preferences.” These definitions of power suggest

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145. See Ansolabehere & Jones, supra note 126, at 596 (“With the exception of isolated cases, surveys have not asked directly about the roll-call votes of Representatives.”); Benjamin G. Bishin, Constituency Influence in Congress: Does Subconstituency Matter?, 25 LEGIS. STUD. Q. 389, 393 (2000) (“For many issues, constituent preference data is nonexistent. Even when data on the issue at hand is available, it is rarely compiled on a level that allows for the discrete analysis of small subgroup preferences.”).

146. See Phillip J. Ardon & James C. Garand, Measuring Constituency Ideology in U.S. House Districts: A Top-Down Simulation Approach, 65 J. POL. 1165, 1166 (2003) (“While reliable data on constituency policy preferences at the state level are available, data on constituency policy preferences in legislative districts below the state level are almost impossible to obtain.” (citations omitted)); Chris Tausanovitch & Christopher Warshaw, Measuring Constituent Policy Preferences in Congress, State Legislatures, and Cities, 75 J. POL. 330, 330 (2013) (“Even the largest national surveys have only about one hundred people in each congressional district.”).


148. JACK H. NAGEL, THE DESCRIPTIVE ANALYSIS OF POWER 24 (1975); see also R. Douglas Arnold, Can Inattentive Citizens Control Their Elected Representatives?, in CONGRESS
that democratic actions favorable to a group can be an appropriate measure of political power. These democratic actions are outcomes of processes that are presumably influenced by those who benefit from them. There is, however, a critical problem with only measuring political power according to favorable democratic outcomes. As discussed above, such outcomes can also result from other factors, such as ideology. If we simply assume that the enactment of laws favorable to a group is a reflection of a group’s political power, we might miss those instances in which ideology—not responsiveness to constituency preferences—leads democratic actors to pursue actions that benefit a marginalized group. These democratic actions are laudable, to be sure, but they should not be mistaken as an indicator of the marginalized group’s political power.

Differentiating between the forces that drive democratic actions is critical. A major premise underlying the Supreme Court’s prevailing measure of political power is that groups who benefit from favorable democratic actions are able to defend their interests through the political process. But we should not view groups dependent on the whims of partisanship and ideology to secure the passage of favorable laws as capable of defending themselves in democratic politics. Rather, these classes become vulnerable once ideological moments

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149. There are two ways that “constituents exert influence over the voting behavior of their [member of Congress].” Vincent L. Hutchings et al., Congressional Representation of Black Interests: Recognizing the Importance of Stability, 66 J. POL. 450, 453 (2004) (citing Miller & Stokes, supra note 126, at 50–51). First, constituents select “like-minded representatives” who “typically vote in a manner consistent with their constituents because they generally share the same views and values.” Id. Second, members of Congress who do not necessarily share the views of their constituents try to “represent faithfully what [they] perceive[] to be their constituents’ positions on the issues . . . in order to win reelection.” Id.

150. Political scientists and economists measuring the source of influence on different policies have found ideology to be a particularly influential factor in certain decisions by lawmakers. See, e.g., ROBERT A. BERNSTEIN, ELECTIONS, REPRESENTATION, AND CONGRESSIONAL VOTING BEHAVIOR: THE MYTH OF CONSTITUENCY CONTROL 104–05 (1989) (finding after an extensive analysis that “[t]he desire for reelection has only marginal impact in shifting members from ideological preferences should those preferences differ from the preferences of their constituencies”); Richard Fleisher, Economic Benefit, Ideology, and Senate Voting on the B-1 Bomber, 13 AM. POL. Q. 200, 205–07 (1985) (finding that ideology had a strong effect on Senate roll call procurement votes); John E. Jackson & John W. Kingdon, Ideology, Interest Group Scores, and Legislative Votes, 36 AM. J. POL. SCI. 805, 816 (1992) (“[A]ctual legislative voting is driven by a complex mix of factors—ideology, the motivation to select ‘good’ public policies, a desire for reelection, party loyalty, career advancement, the pursuit of power within the legislature, and probably several others.”); Steven D. Levitt, How Do Senators Vote? Disentangling the Role of Voter Preferences, Party Affiliation, and Senator Ideology, 86 AM. ECON. REV. 425, 434 (1996) (finding that for the period 1970–1990, “Senator ideology appears to be the most important determinant of senator voting by a wide margin”). But see Sam Peltzman, Constituent Interest and Congressional Voting, 27 J.L. & ECON. 181, 197–203 (1984) (examining 331 Senate votes and finding the effects of senators’ ideology to be more apparent than real).

151. See supra text accompanying note 67.
pass or partisan winds shift away from protecting their interests—and hence, probably still should be considered suspect.

In this Part, we use empirical evidence to disentangle the reasons why representatives might support legislative actions favorable to the poor. To the extent we find that legislators support laws benefiting the poor in response to the poor’s political strength, such a result would weigh in favor of the Court’s measure of political power as favorable democratic action. On the other hand, if the evidence shows that other factors, such as representatives’ ideology, are the impetus for these laws, then the Court’s measure itself becomes suspect.

A. The Theoretical Model

In an ideal world, we would test the Supreme Court’s measure of political power with survey data showing, for example, that the poor favor certain pieces of legislation and disfavor others. But as discussed in the prior Section, such data is not available for the most recent period of heightened legislative activity favorable to the poor, the 1960s-era War on Poverty. Instead, to test the Cleburne measure of political power, we can follow the Supreme Court’s example and assume that groups support actions favorable to them. For example, in cases that applied suspect class determination to the aged and disabled, the Supreme Court assumed, without the benefit of survey data, that these groups supported legislative actions that protected them from discrimination or otherwise benefited them. Lower courts have made the same assumptions with respect to gays and lesbians.

These judicial assumptions about which legislative actions favor a group are certainly questionable. Legislative actions are complex. They are often adopted against numerous alternatives that are both more and less favorable to the relevant group. In addition, members of groups often have different perspectives on what makes them better or worse off. As a result, there is no uncontested objective basis for determining which legislative actions are favorable or unfavorable. Yet, the Court has nonetheless made these determinations. It appears to do so by comparing the legislative actions to the baseline of the laws in place before the legislative actions. While this approach differs from that of social scientists, we follow it in order to test the Supreme Court’s measure of political power.

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152. See supra text accompanying notes 145–46.
153. See supra text accompanying note 67.
154. See supra text accompanying notes 81–82.
Court’s measure of political power. We discuss this test in further detail in Part III.B.

Next, we need a theory of group political power that can be used to construct an empirical test of the political power of the poor. We rely on a leading theory in political science that focuses on the potential power of inattentive groups. This theory, which we label the *anticipatory preference theory* of legislative behavior, arose from critiques of the standard *constituent control theory of legislative behavior* that was once dominant in political science.

Under the standard control theory, legislators act according to the instructions of their constituents.\(^{156}\) Legislators who wish to be reelected simply do whatever their constituents want them to do.\(^{157}\) This theory relies on three assumptions. The first is that legislators are principally focused on getting reelected.\(^{158}\) This assumption, which also serves as the basis for the anticipatory preference theory, recognizes that reelection is not legislators’ sole concern.\(^{159}\) Nevertheless, legislators realize that to pursue other goals, such as advancing policies consistent with their ideology, their view of the public good, or partisan preferences, they need to be in office.\(^{160}\) Qualitative studies of legislators have provided support for this assumption.\(^{161}\)

Scholars have found the other two related assumptions under the standard control theory to be less tenable. The second assumption is that citizens have preferences about policy outcomes and the processes used to reach those outcomes.\(^{162}\) The third assumption is that citizens are attentive to roll call votes and punish or reward legislators according to whether these votes are consistent with citizens’ preferences.\(^{163}\) Surveys have shown that while Americans have general preferences on the hot-button issues, most lack knowledge and clear

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156. See Arnold, supra note 148, at 403 ("Legislators act as instructed delegates, working to discern their constituents’ policy preferences and doing their best to follow the majority’s preferences.").

157. See HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 140 (1967) (describing as a leading conception of representation one in which the representative “is seen as receiving explicit instructions from [her constituents] and carrying out those instructions”).

158. Arnold, supra note 148, at 403. This assumption has served as the foundation for a rational choice model of politics. See, e.g., DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5 (1974) (articulating "a vision of United States congressmen as single-minded seekers of reelection").

159. See GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 100 (2d ed. 2007) (describing the many possible goals of rational legislators “including reelection, internal advancement, ‘good’ policy, social prestige, and advancement in the hierarchy of political offices").

160. GRIFFIN & NEWMAN, supra note 128, at 26 ("[E]lected officials may have several goals, including serving the public, enacting certain public policies, and increasing their influence or prestige within their particular institution. However, meeting these goals requires maintaining elected office.” (citation omitted)).

161. See KINGDON, supra note 126, at 60 (describing as “[t]he classic enforcement of constituency control over the representative . . . retribution at the polls”).

162. Arnold, supra note 148, at 402.

163. See id. at 402–03.
preferences when it comes to less salient issues. Surveys have also shown that Americans are largely ignorant of legislators’ policy positions and roll call votes on most issues. These findings cast doubt on the assumption that Americans reward and punish legislators on the basis of their roll call votes. More broadly, the findings suggest that legislators do not act as instructed delegates tracking specific constituent preferences on most issues.

Yet, despite these findings that the American public is mostly inattentive to politics, interviews reveal that legislators focus intensely on trying to act consonant with the preferences of their constituents. The anticipated preference theory arose out of this seeming mismatch between an inattentive public and legislators’ constituent-focused behavior. According to the anticipated preference theory of legislative behavior, citizens act more like “tax auditors, who notice when things are seriously out of line, than like drill sergeants, who direct troops to march left and right in precise formations.” In addition to assuming that legislators are strongly motivated by the desire to be reelected, the anticipated preference theory also assumes three things: (1) citizens can “easily acquire policy preferences after the legislature acts, even though they may not have had policy preferences in advance of legislative action.” (2) “citizens are capable of evaluating incumbent legislators by focusing on their policy positions and their actions in office,” and (3) challengers to incumbents and activists can mobilize citizens to punish legislators for their past actions.

Legislators who are concerned about reelection and who are operating with limited information about constituency preferences thus try to anticipate what their constituents would want if their constituents were better informed, and they act accordingly. Incumbents fear that failing to anticipate constituent preferences will make them vulnerable to challengers who might

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165. See Brandice Canes-Wrone et al., *Out of Step, Out of Office: Electoral Accountability and House Members’ Voting*, 96 AM. POL. SCI. REV. 127, 127 (2002) (identifying “the plethora of studies that suggest that individual voters are fairly ignorant about members’ policy actions”).

166. See AAGE R. CLAUSEN, *HOW CONGRESSMEN DECIDE: A POLICY FOCUS* 119 (1973). Clausen finds that “[d]espite the latitude of decision accorded the representative, the sense of constituency responsibility certainly remains in most cases.” Id. He points to “extensive research [that] indicates . . . the constituency looms larger in the congressman’s calculations than need be, leading to a greater attention to constituency views than would be necessary to avoid serious political repercussions.” Id.


168. Id.

169. See R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 10 (rev. ed. 1992) (“Legislators’ anticipation of future opinion can be a powerful constraint on their voting decisions.”); KINGDON, *supra* note 126, at 31 (“Even if constituents are rarely interested in the congressman’s actions, . . . he may anticipate their possible reactions to his votes and take those potential reactions into account.”).
reveal the incumbent’s unpopular past positions to the previously inattentive public.\textsuperscript{170}

As a general matter, we should expect legislators to be more concerned with the anticipated preferences of larger groups than smaller groups. Larger groups have more potential voters and therefore have a greater potential impact on incumbents’ electoral prospects.\textsuperscript{171} However, legislators might view some groups, even some large groups, as so politically marginalized that they need not worry about defying the group’s preference.\textsuperscript{172} So long as a group is not marginalized from politics, the anticipated preference theory predicts that the greater the representation of the group in an electoral unit, such as a state or legislative district, the more likely the legislator will support legislation favorable to the group.\textsuperscript{173} However, if the group is marginalized from politics, then the size of the group in an electoral unit should not matter to the legislator’s roll call vote.

Thus, the model we use to test the Supreme Court’s measure of political power relies on two assumptions. First, consistent with the Supreme Court’s measure of political power, our model assumes that groups support democratic actions that provide benefits or protections to them. Second, consistent with the anticipated preference theory, our model assumes that when a group is not politically marginalized, the larger the group’s presence in an electoral unit, the more likely the legislator representing that electoral unit will seek to anticipate the group’s preferences by supporting legislative actions favorable to the group. Based on these assumptions, if the poor are not politically marginalized, then it should be the case that the greater the number of poor people in an electoral unit, the more likely it will be that the representative of the electoral unit will support legislative actions favorable to the poor. If there is no positive relationship between the number of poor people and favorable legislative roll call votes, then this suggests that it is not the political power of the poor that motivates the legislators’ actions. In the next Section, we describe the data and methods we use to test what we label the Supreme Court’s model of political power.

\textsuperscript{170} Arnold, supra note 148, at 410; see also Canes-Wrone et al., supra note 165, at 138 (acknowledging that voters lack knowledge about representatives’ actions, but suggesting “‘uninformed’ voters may take cues from informed elites or, alternatively, may become informed by challengers when an incumbent votes out of step with her district”).

\textsuperscript{171} See ARNOLD, supra note 169, at 84 (“[L]egislators care about the size of the various groups that have preferences on an issue. All else equal, they prefer satisfying large groups to satisfying small ones, for the net gain in votes is greater.”).

\textsuperscript{172} African Americans living in the South prior to the 1970s represented one such example of a politically marginalized group. See infra text accompanying notes 198–199.

\textsuperscript{173} We respond to a potential public choice objection to this claim in Part III.C.
B. Testing the Supreme Court’s Model of Political Power

1. Hypothesis and Data

We test the Supreme Court’s model of political power with a comprehensive empirical examination of the roll call voting behavior of members of the U.S. House of Representatives from 1963 to 2012. We hypothesize that the greater the proportion of a group in a congressional district, the more likely the representative for that district will support legislative actions favorable to the group. We label this the Supreme Court hypothesis; it implies that a group’s political strength tends to drive favorable legislative actions. Further, this variable—the group’s political power—should be the most important factor in influencing legislative actions, such that we cannot plausibly argue that other factors, like ideology, are the primary drivers of favorable legislative actions.

We test the Supreme Court hypothesis on the behavior of members of the House of Representatives rather than the Senate for several reasons. First, the House was intended to be the congressional branch most responsive to the interests of the people. James Madison made this point in The Federalist No. 52: “As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration [the House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people.”

This greater responsiveness was secured, in part, through elections every two years, the most frequent of any of the political branches. Madison surmised, “[f]requent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.” Social scientists have empirically confirmed Madison’s prediction that more frequent elections lead to more responsive behavior. Focusing on the legislative behavior of members of the House of Representatives therefore allows us to test the Supreme Court’s model of political power on the most responsive federal legislators.

Second, we focus on the House because there is slightly greater variation in the demographic composition of congressional districts than there is of states. This allows us to see more clearly how differences in demographic

174. THE FEDERALIST NO. 52, at 268 (James Madison) (Ian Shapiro ed., Yale Univ. Press 2009); see also Clinton, supra note 128, at 397 (“Examining the relationship in the House is substantively consequential because it is in the House that constituency preferences were intended to be especially represented.”).

175. THE FEDERALIST NO. 52, supra note 174, at 268.

176. See Kuklinski, supra note 126, at 173–74 (finding a relationship between the frequency of elections of California assembly persons and their greater responsiveness to constituent preferences).

compositions affect legislators’ voting behavior. Finally, we focus on the House because it has more members (and thus more roll call votes) than the Senate, which increases our sample size.

We test the Supreme Court’s hypothesis as to three different groups: the poor, labor unions, and farmers. The Court does not consider the poor a suspect class; yet, recent studies suggest that they have significantly less ability to influence politics than other income groups.\(^\text{178}\) The goal of our empirical test is to provide evidence that might help resolve this discrepancy and help us discern whether past legislation benefiting the poor flowed from their political clout or some other factor. We also test the hypothesis on two comparison cases, labor unions and farmers, because these classes are not considered suspect and there is broad agreement that these groups have the political power needed to influence democratic politics.\(^\text{179}\) If the model of political power that we assign to the Supreme Court is viable, then our empirical test should provide evidence that the political power of unions and farmers helps drive laws favoring those groups.

To test the Supreme Court’s model of political power on these three groups, we constructed an original dataset. It combines demographic data on members of the House, data on the demographic composition of congressional districts, and legislative actions that we coded as favorable or unfavorable to the three groups. We collected this data for the period from the 88th Congress (1963–64) to the 112th Congress (2011–12).\(^\text{180}\)

\(^\text{178}\) See supra Part II.A.


\(^\text{180}\) For data on representatives’ party affiliation, race, and gender, we relied on (1) the Biographical Directory of the United States Congress, which collects information about the representatives’ party affiliation and districts, and (2) a database from the U.S. House of Representatives History, Art, and Archives, which collects racial, ethnic, and gender information about members of Congress. See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS: 1774–PRESENT, http://bioguide.congress.gov/biosearch/biosearch.asp [https://perma.cc/2EJ7-SXXM]; U.S. House of Representatives, People Search, HISTORY, ART & ARCHIVES, http://history.house.gov/People/Search [https://perma.cc/U6XP-J7YZ].
For congressional districts, we collected data on the percentage of the population with incomes below the poverty line, the percentage of employed persons that were members of labor unions, and the percentage of the total population of each district living in rural farm areas. We also collected data on other variables, used as controls, including the percentage of the district population that was African American, the percentage of the population that lived in urban areas, and the geographic region of the congressional district.  

Finally, we coded legislative actions as favorable or unfavorable to the three groups using the Congressional Quarterly Almanac Online Edition Policy Tracker. The policy tracker provides extensive summaries of legislative actions from the past sixty years. These summaries include details about the bill, the bill’s path through the legislative process, descriptions of committee and floor debates about the bill, and accounts of interest group support and opposition to particular legislative actions. From this source, we coded legislative actions as favorable or unfavorable to the groups in a way that mirrored how the courts appear to make determinations about which democratic actions are favorable to a group. We assessed final legislative actions against the baseline of the preexisting legislative framework. If the final legislative action provided the group with greater benefits, protections, or support than existed before Congress voted on the law, we coded the action as favorable. If the final legislative action reduced benefits, protections, or support to the group, then we coded the action as unfavorable. Legislative actions


There were no data sources measuring the percentage poor in congressional districts prior to the 93rd Congress, so we imputed congressional district poverty levels from county-level poverty data collected in the 1960 U.S. Census. We describe this process of imputing district poverty levels in Appendix 1. In addition, no source collects data on the percentage of employed persons that are members of labor unions at the congressional district level. We therefore had to impute percent union in congressional districts from a combination of percent union in the state, the number of persons employed in industry and government sectors in each congressional district, and percent union in industry and government sectors in each state. We describe this process of imputing district union levels in Appendix 2.


183 We took a very conservative approach to coding legislative actions. We only coded those actions that were clearly favorable or unfavorable to the particular groups. For example, we coded all legislation that subsidized housing or food stamps or that funded schools in poverty-stricken areas as
coded as favorable or unfavorable did not necessarily represent the best or worst of the available legislative alternatives for the group. In most cases, the final legislative action represented a compromise between legislators who wanted a more favorable bill and legislators who wanted a less favorable bill or no bill at all. But given that the Court does not account for legislative alternatives in its assessment of the favorability of legislative actions, we do not do so either.

We also coded intermediate legislative actions, such as votes on amendments and votes to recommit bills to committees. We included these votes to increase the sample size of legislative actions and because they were often easier to code as favorable or unfavorable to a group. For amendments, we assessed favorability on the basis of whether they reduced or increased the protections, benefits, or support for the group provided in the bill. For recommittal motions, which are usually designed to kill the bill, we assessed favorability on the basis of whether the bill subject to the recommittal motion advantaged or disadvantaged a group.

Finally, we derived representatives’ roll call votes for each of these legislative actions from Govtrack.us, a database that tracks bills in Congress and legislators’ voting records. We coded “yea” votes on legislative actions favorable to the group and “nay” votes on legislative actions unfavorable to the group as reflecting representatives’ support for the group.

2. Methods

We ran multivariate logistic regressions to examine whether there was a statistically significant correlation between the size of a particular group (proportion population living in a rural farm area, percent union members, or percent poor) in congressional districts and the district representatives’ likelihood of supporting legislative actions favorable to the group. We left out of the dataset legislative actions that did not fall into either category. This included minimum wage bills that some argue favor the poor because it would increase their incomes but others argue harm the poor because it would decrease the number of jobs. See John T. Addison & McKinley L. Blackburn, Minimum Wages and Poverty, 52 Indus. & Lab. Rel. Rev. 393, 393–94 (1999) (describing the conflicting findings on the effects of minimum wage on poverty).

As a check to our coding of poverty legislation, we compared it against a legislative coding regime commonly used by social scientists—the LCCR House Vote Scores. See Previous Voting Records, supra note 155. Assuming favorable LCCR vote scores align with the interests of the poor, our coding of legislative actions matched LCCR’s in the sample of overlapping legislative actions included in both datasets. We engaged in a similarly conservative coding strategy for legislative actions related to labor unions and farmers.

We excluded from the dataset any combined or omnibus bills that included legislative actions related to multiple subjects. This required that we exclude most appropriations bills providing funding for different agencies in the government and several legislative actions that combined farm subsidies and food stamps.

constructed separate models for labor-related, farm-related, and poverty-related legislative actions.

The dependent variables in the regression models are whether a representative voted favorably or unfavorably on particular legislative actions. The main independent variables are percent union population within that representative’s district (for the labor legislation model), percent rural farming population within the district (for the farmer legislation model), and percent poor population within the district (for the poverty legislation model).

A representative’s vote might be affected by factors other than the main independent variables we examine. Therefore, all models included control variables. Control variables in regression models help to accurately parse out the main effect. For instance, if congressional districts with high poverty levels tended to have Democratic representatives, and Democratic representatives were more likely to support poverty legislation, we would not be able to accurately measure the correlation between district poverty level and representatives’ votes without controlling for the party membership of congressional representatives. The main control variables we used were representatives’ own demographic variables, including the representatives’ gender, race, and party, and the demographics of the representatives’ districts, such as the percent black population within the district, the percent urban population within the district, and the region (Deep South or not).

For each model, we included dichotomous variables indicating the Congress in which the legislation was voted on. Using these dummy variables for each Congress allowed us to isolate any variable that might affect voting outcome, but which did not change across time. We included the cluster option in each model to control for the interrelationship between votes cast by the same representative on different legislative actions.

Using logistic regressions, we can estimate how strongly each independent variable is correlated with the likelihood of a representative’s favorable vote on particular types of legislation. We tested our model with the full dataset. We then split the data into final and nonfinal legislative actions and tested the models against final legislative actions only. Final legislative

185. Model 1: farmer legislation:

\[
\log \left( \frac{P_{\text{Poste}}}{1 - P_{\text{Poste}}} \right) = \beta_1 * \text{percent rural farm population} + \beta_2 * \text{Representative demographics} + \beta_3 * \text{other district demographics} [\text{south, percent black, percent urban}] + \beta_4 * \text{Congress dummies}
\]

Model 2: labor legislation:

\[
\log \left( \frac{P_{\text{Poste}}}{1 - P_{\text{Poste}}} \right) = \beta_1 * \text{percent union} + \beta_2 * \text{Percent Poverty} + \beta_3 * \text{Representative demographics} + \beta_4 * \text{other district demographics} [\text{south, percent black, percent urban}] + \beta_5 * \text{Congress dummies}
\]

Model 3: poverty legislation:

\[
\log \left( \frac{P_{\text{Poste}}}{1 - P_{\text{Poste}}} \right) = \beta_1 * \text{district poverty} + \beta_2 * \text{Representative demographics} [\text{gender, race, party}] + \beta_3 * \text{other district demographics} [\text{south, percent black, percent urban}] + \beta_4 * \text{Congress dummies}
\]
actions included votes on the entire bill. Nonfinal legislative actions included votes on amendments or votes to recommit the bill to a committee. We separated out final legislative actions from nonfinal legislative actions because representatives might have different electoral concerns for the two types of actions. It is likely easier for activists and future challengers to mobilize an inattentive public based on final legislative actions, which tend to be more politically salient and easier to explain, than nonfinal legislative actions. We therefore expect that it is more likely that there will be a statistically significant positive relationship between the proportion of a group in a district and representatives’ roll call votes supporting the group in final legislative actions.

For the poverty model, we split the data further into two separate periods, the 88th to 92nd Congresses (1963–72) and the 93rd to 112th Congresses (1973–2012). We did this out of concern that the denial of voting rights to African Americans and other minority groups, particularly in the South, might have influenced the results during the War on Poverty. A significant proportion of African Americans were poor throughout this period and, while the 1965 Voting Rights Act formally remedied the denial of voting rights to racial minorities, it took some time for racial minorities to reach parity with whites in voting registration in the South. From this racial gap in voting registration and the disproportionate representation of African Americans and other minority groups among the poor, we surmised that between 1963 and 1972, elected officials might be less responsive to the poor regardless of their size in the district. We therefore tested our model separately for the two periods.

3. Findings

Descriptive Statistics: We coded members’ votes on twenty-four farm-related legislative actions, thirty-eight labor-related legislative actions, and fifty-nine poverty-related legislative actions. Tables 1 to 3 present summary statistics of the dependent and independent variables in the models used for our

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186. This included final votes prior to passage in the House, votes on bills as agreed to by the House-Senate Conference Committee responsible for addressing differences between the House and Senate bills after they passed the two houses, or votes to override a presidential veto of legislation. For each bill, we chose the last vote on the entire bill.

187. See GILENS, supra note 129, at 45 (“Roll-call votes, and especially final-passage votes on high-profile legislation, are most likely to be noticed by voters (and most easily brought to voters’ attention by electoral opponents, interest groups, and legislators themselves). Therefore it is these votes on which members of Congress have the greatest incentives to conform to their constituents’ desires.”).

188. See JOSEPH DALAKER, U.S. CENSUS BUREAU, PUB. NO. P60-214, POVERTY IN THE UNITED STATES: 2000, at 4 (2001) (showing that the poverty rate for African Americans and Latinos has been between twice and four times the poverty rate of whites); James E. Alt, The Impact of the Voting Rights Act on Black and White Voter Registration in the South, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 351, 374–76 (Chandler Davidson & Bernard Grofman eds., 1994) (showing the increase in black voter registration and the reduction of voter registration disparities between blacks and whites in selected southern states).

189. These legislative actions were voted on in different Congresses between 1963 and 2012 (88th–112th Congresses).
empirical tests. For farm-related legislative actions, the number of observations (N) was 4,959 representative roll call votes. For labor legislation, the N was 15,968, and for poverty legislation, the N was 24,085.

For all three samples, 50 percent or more of representatives’ roll call votes favored the legislative actions. Approximately 94 percent of the representatives that voted on the legislative actions over the fifty-year period were male, and around 90 percent of the representatives were white. On average, at the congressional district level, the black population was 11 percent of the total population, and 69 percent of the population lived in urban areas.¹⁹⁰

¹⁹⁰ Note that these were averages across all 435 congressional districts from the 88th to the 112th Congress.
Table 1. Summary Statistics for Votes on Poverty-Related Legislative Actions

<table>
<thead>
<tr>
<th>Variables</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Min</th>
<th>Max.</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vote (Yes)</td>
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<td>0.50</td>
<td>0</td>
<td>1</td>
<td>24085</td>
</tr>
<tr>
<td>Final Legislative Actions</td>
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<td>0</td>
<td>1</td>
<td>24085</td>
</tr>
<tr>
<td>Proportion Female (Rep.)</td>
<td>0.06</td>
<td>0.24</td>
<td>0</td>
<td>1</td>
<td>24085</td>
</tr>
<tr>
<td>Proportion White (Rep.)</td>
<td>0.94</td>
<td>0.49</td>
<td>0</td>
<td>1</td>
<td>24085</td>
</tr>
<tr>
<td>Proportion Democrat (Rep.)</td>
<td>0.58</td>
<td>0.49</td>
<td>0</td>
<td>1</td>
<td>24085</td>
</tr>
<tr>
<td>Proportion Deep South (Rep.)</td>
<td>0.07</td>
<td>0.25</td>
<td>0</td>
<td>1</td>
<td>24085</td>
</tr>
<tr>
<td>Proportion Poor (District)</td>
<td>0.22</td>
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<td>0.02</td>
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<td>24085</td>
</tr>
<tr>
<td>Proportion Black (District)</td>
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<td>0</td>
<td>0.92</td>
<td>24085</td>
</tr>
<tr>
<td>Proportion Urban (District)</td>
<td>0.69</td>
<td>0.26</td>
<td>0</td>
<td>1.00</td>
<td>24085</td>
</tr>
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Table 2. Summary Statistics for Votes on Farm-Related Legislative Actions

<table>
<thead>
<tr>
<th>Variables</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Min</th>
<th>Max.</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vote (Yes)</td>
<td>0.56</td>
<td>0.50</td>
<td>0</td>
<td>1</td>
<td>24085</td>
</tr>
<tr>
<td>Final Legislative Actions</td>
<td>0.61</td>
<td>0.49</td>
<td>0</td>
<td>1</td>
<td>24085</td>
</tr>
<tr>
<td>Proportion Female (Rep.)</td>
<td>0.06</td>
<td>0.24</td>
<td>0</td>
<td>1</td>
<td>24085</td>
</tr>
<tr>
<td>Proportion White (Rep.)</td>
<td>0.94</td>
<td>0.49</td>
<td>0</td>
<td>1</td>
<td>24085</td>
</tr>
<tr>
<td>Proportion Democrat (Rep.)</td>
<td>0.58</td>
<td>0.49</td>
<td>0</td>
<td>1</td>
<td>24085</td>
</tr>
<tr>
<td>Proportion Deep South (Rep.)</td>
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<td>1</td>
<td>24085</td>
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<tr>
<td>Proportion Rural Farm Pop. (District)</td>
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</tr>
<tr>
<td>Proportion Black (District)</td>
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<td>0.92</td>
<td>24085</td>
</tr>
<tr>
<td>Proportion Urban (District)</td>
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<td>0.26</td>
<td>0</td>
<td>1.00</td>
<td>24085</td>
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Table 3. Summary Statistics for Votes on Labor-Related Legislative Actions

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<th>Variables</th>
<th>Mean</th>
<th>Std. Dev.</th>
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<th>Max.</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vote (Yes)</td>
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<td>0.50</td>
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<tr>
<td>Final Legislative Actions</td>
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<td>15968</td>
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<tr>
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<td>Proportion White (Rep.)</td>
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<tr>
<td>Proportion Democrat (Rep.)</td>
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<td>1</td>
<td>15968</td>
</tr>
<tr>
<td>Proportion Deep South (Rep.)</td>
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<td>0</td>
<td>1</td>
<td>15968</td>
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<tr>
<td>Proportion Union (District)</td>
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<td>15968</td>
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<tr>
<td>Proportion Black (District)</td>
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<tr>
<td>Proportion Urban (District)</td>
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<td>0.25</td>
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<td>15968</td>
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</table>
Regression Results: We first ran regressions predicting the likelihood of a representative supporting legislative actions favorable to farmers and union members. We focused on these groups first to determine whether our results matched the findings of other studies showing that these two groups have political power.

Table 4 presents the logistic regressions predicting the likelihood of a representative supporting legislative actions favorable to farmers. Model 1 is the full model including all farm-related legislative actions. Model 2 used only data for final legislative actions. In both models, we find a statistically significant positive relationship between percent rural farming population and the likelihood that the representative supported legislative actions favorable to farmers—suggesting that farmers’ political strength does predict favorable legislative actions.\textsuperscript{191}

\textsuperscript{191} The two other factors that had a statistically significant correlation to favorable democratic actions were the representatives’ party and the percentage of urban population in the districts. Democrats were much more likely to vote for legislative actions favorable to farmers than Republicans in both the full and final model. In somewhat of a surprise, districts with a higher percentage of urban population were slightly more likely to vote for legislative actions favorable to farmers in the full model. However, in the models for votes on final legislative actions, the relationship was reversed; that is, the percentage of urban population was negatively correlated with representatives’ roll call votes supporting legislative actions favorable to farmers.
Table 5 provides an interpretation of the logistic coefficients for the relationship between percent rural farm population and likelihood of farmer-favorable votes on all farm-related legislative actions and final farm-related legislative actions. For all farm-related legislative actions, which included final votes, amendments, and recommittal votes, the mean percentage farmer across all congressional districts was 5.57 percent in the Congresses that voted on these legislative actions. Based on our models, a 10 percent increase in the percentage farmer beyond this mean was associated with a 5 percent increase in the likelihood that the district’s representative would vote favorably to farmers on all farm-related legislative actions. For final farm-related legislative actions, the mean percentage farmer in congressional districts was 5.38 percent in the Congresses that voted on these legislative actions. A 10 percent increase above this mean in the percentage farmer in a congressional district was associated
with a 14 percent increase in the likelihood that the representative would vote favorably to farmers on final farm-related legislative actions.

Table 5. Increased Likelihood of Favorable Farm Vote
When Percent Farmer Increases by 10 Points Above the Mean

<table>
<thead>
<tr>
<th>Legislative Actions</th>
<th>Percent Farmer</th>
<th>Predicted Probability Favorable Vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Legislative Actions (Full Model)</td>
<td>5.57%</td>
<td>51%</td>
</tr>
<tr>
<td>All Legislative Actions (Full Model)</td>
<td>15.57%</td>
<td>56%</td>
</tr>
<tr>
<td>Final Legislative Actions</td>
<td>5.38%</td>
<td>60%</td>
</tr>
<tr>
<td>Final Legislative Actions</td>
<td>15.38%</td>
<td>74%</td>
</tr>
</tbody>
</table>

Tables 6 and 7 present similar models to the models presented in Tables 4 and 5, but they focus on roll call voting for labor-related legislative actions. As shown in Table 6, we found that percent union membership in a district was positively correlated with representatives’ roll call votes supporting legislative actions favorable to labor—again suggesting that this group’s political power is directly reflected in favorable laws. Not surprisingly, Democratic representatives were more likely to support legislative actions favorable to labor.192

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192. The interaction effect of region (if a Deep South state) and party (if Democrat) showed statistically significant negative effects in both models, which meant that Democrats from Deep South states were less likely to support legislative actions favorable to the poor than Democrats from other regions of the country.
As shown in Table 7, for all labor union–related legislative actions, including final votes, amendments, and recommittal votes, a 10 percent increase above the mean percentage of labor union members in congressional districts was associated with a 4 percent increase in the likelihood that the representatives would vote favorably to labor unions on union-related legislative actions. For final union-related legislative actions, a 10 percent increase in the percentage of labor union members in a congressional district was associated with a 10 percent increase in the likelihood that the representative would vote favorably to labor unions on union-related legislative actions.
These results are consistent with other studies finding that farmers and labor unions have political power. These findings suggest that favorable democratic action may be a good measure of the political power of at least some groups.

Next, we examine the poor. If the poor have political power, then there should be a similarly positive correlation between percent poor in a district and the likelihood that representatives support legislative actions favorable to the poor, as we found for union members and farmers. However, we find no such correlation. Table 8 presents the two different models for poverty-related legislative actions: the full model, including votes on all poverty-related legislative actions and a model that only includes final votes on poverty-related legislative actions (Model 2). In Model 1 we found no statistically significant correlation between district poverty level and representatives’ roll call support for legislative actions favorable to the poor. These findings suggest that the size of the poor population in the district is not related to representatives’ roll call votes on all poverty-related legislative actions.

193. *See supra* note 179.
These results change for the final model of final legislative actions, which tend to be more salient to inattentive publics, but not in the direction one would suspect. For final legislative actions, we found a statistically significant negative relationship between the percent poor in a district and representatives’ support for legislation favorable to the poor. In other words, the higher the poverty level in a district, the less likely that representatives voted to advance the interests of the poor.

Table 8. Logistic Regressions Predicting the Likelihood of Yes Votes on Poverty-Related Legislative Actions

<table>
<thead>
<tr>
<th></th>
<th>(1) Full Model</th>
<th>(2) Final</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent Poor</td>
<td>-0.004</td>
<td>-0.051***</td>
</tr>
<tr>
<td></td>
<td>(0.002)</td>
<td>(0.007)</td>
</tr>
<tr>
<td>Democrat</td>
<td>0.142***</td>
<td>1.705***</td>
</tr>
<tr>
<td></td>
<td>(0.031)</td>
<td>(0.110)</td>
</tr>
<tr>
<td>Female</td>
<td>0.101</td>
<td>-0.202</td>
</tr>
<tr>
<td></td>
<td>(0.060)</td>
<td>(0.182)</td>
</tr>
<tr>
<td>White</td>
<td>-0.164*</td>
<td>-0.142</td>
</tr>
<tr>
<td></td>
<td>(0.065)</td>
<td>(0.204)</td>
</tr>
<tr>
<td>Deep South States</td>
<td>-0.078</td>
<td>0.536*</td>
</tr>
<tr>
<td></td>
<td>(0.098)</td>
<td>(0.220)</td>
</tr>
<tr>
<td>Deep South*Democrat</td>
<td>-0.042</td>
<td>-1.443***</td>
</tr>
<tr>
<td></td>
<td>(0.116)</td>
<td>(0.291)</td>
</tr>
<tr>
<td>Percent Black</td>
<td>-0.003*</td>
<td>-0.015***</td>
</tr>
<tr>
<td></td>
<td>(0.001)</td>
<td>(0.005)</td>
</tr>
<tr>
<td>Percent Urban</td>
<td>0.000</td>
<td>-0.003</td>
</tr>
<tr>
<td></td>
<td>(0.001)</td>
<td>(0.002)</td>
</tr>
<tr>
<td>Constant</td>
<td>0.419**</td>
<td>1.516***</td>
</tr>
<tr>
<td></td>
<td>(0.147)</td>
<td>(0.415)</td>
</tr>
<tr>
<td>Observations</td>
<td>24085</td>
<td>11709</td>
</tr>
<tr>
<td>Pseudo R-squared</td>
<td>0.058</td>
<td>0.162</td>
</tr>
</tbody>
</table>

Standard errors in parentheses
* p<0.05, ** p<0.01, *** p<0.001

Note: Representative cluster effects are controlled in the models. The table excludes control variables for each Congress. The squared term of percent poverty does not have a significant effect on the dependent variable.
Table 9 shows the effect of a 10 percent increase in proportion poor in a district on a representatives’ likelihood of voting favorably to the poor on poverty-related legislative actions. For all poverty-related legislative actions, including final votes, amendments, and recommittal votes, a 10 percent increase above the mean percentage of the poor in congressional districts was associated with virtually no change in the likelihood that the representative would vote favorably to the poor on poverty-related legislative actions. For final poverty-related legislative actions, a 10 percent increase in the percentage of poor in a congressional district was associated with an 11 percent decrease in the likelihood that the representative would vote favorably to the poor on poverty-related legislative actions.

These findings suggest that the poor are not merely a politically marginalized group but might even be a part of a political underclass that representatives actively avoid supporting because of antipathy towards the group that increases with their proportion of the population. In both models, the variable “Democrat” was positively correlated with representatives’ support for legislative actions favorable to the poor, meaning that Democrats were more likely to support legislative actions favorable to the poor.

The other statistically significant variables in the final model are percent black in a district and the interaction of the variables Deep South and Democrat. Percent black in a congressional district was negatively correlated with representatives’ support for legislative actions favorable to the poor. In other words, the more African Americans there were in a district, the less likely that a representative supported pro-poor legislative actions. Similarly, if the representative was a Democrat from the Deep South, the legislator was less likely than other Democrats to support legislative actions favorable to the poor.

These findings motivated us to investigate whether there were period effects on the relationship between percent poverty in a district and roll call votes for final poverty-related legislative actions. Earlier empirical studies (before 1970) found a negative relationship between percent African American in a district and representatives’ support for African American interests in the
South (where most African Americans lived). There were two related explanations for this negative relationship: V.O. Key’s racial threat hypothesis and African Americans’ lack of a right to vote during much of this period. According to the racial threat hypothesis, the more African Americans in a geographic area, the greater the threat that whites perceived African Americans posed to their political hegemony. The greater the white population’s perception of racial threat, the more likely it was that whites would support the most racist white candidate opposed to the interests of African Americans. Given the high proportion of African Americans among the poor during the War on Poverty and their relatively limited exercise of the right to vote during this period, the threat hypothesis could have also applied to the poor. In other words, whites in Southern districts with a high proportion of African Americans could have perceived support for the poor as support for African Americans, which threatened their political hegemony.

Once the voting power of African Americans increased as a result of the enforcement of the Voting Rights Act, there was a shift in the relationship between percent African American in a congressional district and representatives’ roll call votes favorable to African American interests. Studies of the period between 1970 and 1980 found a curvilinear relationship. Legislators representing districts with the lowest percentage of African Americans were more supportive of African American interests than legislators representing districts with a moderate percentage of African Americans; but, when percent African American in a district surpassed a tipping point, support for African American interests exceeded support in districts with a lower percentage of African Americans. In other words, at some percent of the population, African American voters became powerful enough to demand representation.

194. See Merle Black, Racial Composition of Congressional Districts and Support for Federal Voting Rights in the American South, 59 SOC. SCI. Q. 435, 443 (1978) (examining support for federal voting rights amongst representatives in the South and finding strong approval from representatives of districts with less than 20 percent blacks, substantially less support for districts with 20–29 percent blacks, and only marginal support in districts with greater than 30 percent blacks); Mary Alice Nye, The U.S. Senate and Civil Rights Roll-Call Votes, 44 W. POL. Q. 971, 979 (1991) (finding a statistically significant negative relationship between proportion black in a district and favorable Senate roll call votes on civil rights legislation in the 89th (1965–67) and 91st (1969–71) Congresses).

195. V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 5–10 (1949).

196. Id.; see also Michael W. Combs et al., Black Constituents and Congressional Roll Call Votes, 37 W. POL. Q. 424, 425 (1984) (describing a “widely accepted explanation” for the inverse relationship between proportion black in a district and degree of representatives’ liberal voting in the early period as “the threat of black domination in the eyes of whites: the more blacks in an area, the more the white constituents and representatives feared losing control to blacks and the more these whites felt compelled to support the status quo”).


This pattern shifted again as African Americans’ voter registration and voting moved closer to parity with whites. Studies of more recent periods (post-1980) have mostly found positive linear relationships between percent African American in a district and representatives’ roll call support for legislative actions favorable to African Americans. This suggests that African Americans equipped with the right to vote are exercising political power and that if whites feel threatened in districts with a high proportion of African Americans, they are unable to do much about it.

To the extent that support for the poor is based on the pattern of support for African Americans, we might expect a similar temporal shift in the relationship between percent poor in congressional districts and representatives’ roll call votes on legislative actions favorable to the poor. But this is not what we find. In Table 10, we split the poverty-related legislative data into two groups, legislative actions between the 88th and 92nd Congresses (1963–72) and legislative actions after the 92nd Congress (1973–2012). Models 2 and 3 test the two periods separately.

Model 2 shows that for final legislative actions in the first period (1963–72), percent poverty in a district was negatively correlated with representatives’ roll call votes supporting final legislative actions favorable to the poor. These findings are consistent with the racial threat hypothesis that scholars recognized for this period. Unlike Model 2, however, Model 3 shows that this negative correlation persisted for votes on final legislative actions during the second period (1973–2012). And in this second period, the statistically significant relationship between percent black in a district and representatives’ support for legislation favorable to the poor disappears. Both of these findings suggest that the political power of the poor does not simply track African American political power. Even after African Americans emerged as a politically relevant class, the poor continued to be a political underclass, apparently exercising call votes favorable to African Americans from a negative linear relationship to a curvilinear relationship); Charles S. Bullock III & Susan A. MacManus, Policy Responsiveness to the Black Electorate: Programmatic Versus Symbolic Representation, 9 AM. POL. Q. 357, 361 (1981) (finding a curvilinear relationship between black population of voting age and support for legislation favorable to African Americans); Combs et al., supra note 196, at 428–29 (examining the period from 1973 to 1980 and finding a curvilinear relationship between the size of the black constituency in a district and representatives’ support for civil rights legislation).

199. See Marry Herring, Legislative Responsiveness to Black Constituents in Three Deep South States, 52 J. POL. 740, 744, 752 (1990) (examining 1980 Senate roll call votes in Louisiana, Georgia, and Alabama on issues involving the “redistribution of wealth, civil rights and liberties, and issues with an overt racial component” and finding that “[a]lmost across the board, black constituency size has a significant, positive impact on legislative support for issues of interest to blacks”); Hutchings et al., supra note 149, at 455–58 (examining roll call votes from the 101st to the 103rd Congresses (1989–94) and finding a positive relationship between representatives’ support for civil rights and the size of the black constituency in the district); Kenny J. Whitby, Measuring Congressional Responsiveness to the Policy Interests of Black Constituents, 68 SOC. SCI. Q. 367, 369, 374 (1987) (examining a two-year period of southern congressmen’s support for social welfare legislation beginning in 1983 and finding that “support for policies of interest to blacks increases as percent urban and black proportion in the district increase”).
little to no influence on representatives’ roll call votes on poverty-related legislative actions.\footnote{Examining all legislative actions, we find no statistically significant relationship between percent poor in a congressional district and representative roll call votes favorable to the poor in either period.}
Table 10. Logistic Regressions Predicting the Likelihood of Yes Votes on Poverty-Related Legislative Actions in Two Periods

<table>
<thead>
<tr>
<th></th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>88-112</td>
<td>88-92</td>
<td>93-112</td>
</tr>
<tr>
<td>Percent Poor</td>
<td>-0.051***</td>
<td>-0.149***</td>
<td>-0.019**</td>
</tr>
<tr>
<td></td>
<td>(0.007)</td>
<td>(0.042)</td>
<td>(0.007)</td>
</tr>
<tr>
<td>Percent Poverty Squared</td>
<td>0.002**</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.001)</td>
<td></td>
</tr>
<tr>
<td>Democrat</td>
<td>1.705***</td>
<td>3.325***</td>
<td>0.096</td>
</tr>
<tr>
<td></td>
<td>(0.110)</td>
<td>(0.208)</td>
<td>(0.089)</td>
</tr>
<tr>
<td>Female</td>
<td>-0.202</td>
<td>0.521</td>
<td>-0.124</td>
</tr>
<tr>
<td></td>
<td>(0.182)</td>
<td>(0.544)</td>
<td>(0.118)</td>
</tr>
<tr>
<td>White</td>
<td>-0.142</td>
<td>-5.125***</td>
<td>0.437***</td>
</tr>
<tr>
<td></td>
<td>(0.204)</td>
<td>(1.094)</td>
<td>(0.138)</td>
</tr>
<tr>
<td>Deep South States</td>
<td>0.536*</td>
<td>0.161</td>
<td>0.265</td>
</tr>
<tr>
<td></td>
<td>(0.220)</td>
<td>(0.596)</td>
<td>(0.219)</td>
</tr>
<tr>
<td>Deep South*Democrat</td>
<td>-1.443***</td>
<td>-1.254</td>
<td>-0.335</td>
</tr>
<tr>
<td></td>
<td>(0.291)</td>
<td>(0.662)</td>
<td>(0.280)</td>
</tr>
<tr>
<td>Percent Black</td>
<td>-0.015***</td>
<td>-0.069***</td>
<td>0.003</td>
</tr>
<tr>
<td></td>
<td>(0.005)</td>
<td>(0.010)</td>
<td>(0.003)</td>
</tr>
<tr>
<td>Percent Urban</td>
<td>-0.004</td>
<td>0.009</td>
<td>-0.005***</td>
</tr>
<tr>
<td></td>
<td>(0.002)</td>
<td>(0.005)</td>
<td>(0.001)</td>
</tr>
<tr>
<td>Constant</td>
<td>1.516***</td>
<td>6.709***</td>
<td>3.108***</td>
</tr>
<tr>
<td></td>
<td>(0.199)</td>
<td>(0.467)</td>
<td>(0.349)</td>
</tr>
<tr>
<td>Observations</td>
<td>11709</td>
<td>6326</td>
<td>5383</td>
</tr>
<tr>
<td>Pseudo R-squared</td>
<td>0.162</td>
<td>0.336</td>
<td>0.105</td>
</tr>
</tbody>
</table>

Standard errors in parentheses

* p<0.05, ** p<0.01, *** p<0.001

Note: Representative cluster effects are controlled in the models. The table excludes control variables for each Congress. The squared term of percent poverty does not have a significant effect on the dependent variable in models 1 and 3.
Another potential source of bias in our findings is the inclusion of congressmembers’ characteristics in our data, particularly the inclusion of representatives’ party membership as a control variable. The inclusion of these variables could bias the estimates of the total effect of percent poverty on representatives’ likelihood to support the poor on poverty-related legislative actions. The poor may exert power by selecting a representative—a Democrat or an African American—and by controlling these variables in our model, we are removing from our estimates some of the influence of the poor on roll call voting. We therefore ran the regression again, controlling only for demographic characteristics of the district and region. As shown in Table 11, the relationship between percent poor and the likelihood of a representative’s favorable roll call vote for final legislative actions is less negative once the congressmember’s characteristics are excluded—indicating that the poor exercise some political power through the selection of representatives with certain partisan affiliations and demographic characteristics—but the negative relationship still remains and is highly statistically significant.

<table>
<thead>
<tr>
<th></th>
<th>(1) Full Model</th>
<th>(2) Final</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent Poor</td>
<td>-0.001</td>
<td>-0.025***</td>
</tr>
<tr>
<td></td>
<td>(0.002)</td>
<td>(0.007)</td>
</tr>
<tr>
<td>Deep South States</td>
<td>-0.152</td>
<td>-0.578*</td>
</tr>
<tr>
<td></td>
<td>(0.061)</td>
<td>(0.179)</td>
</tr>
<tr>
<td>Percent Black</td>
<td>-0.001</td>
<td>-0.002</td>
</tr>
<tr>
<td></td>
<td>(0.001)</td>
<td>(0.004)</td>
</tr>
<tr>
<td>Percent Urban</td>
<td>0.001</td>
<td>0.004</td>
</tr>
<tr>
<td></td>
<td>(0.001)</td>
<td>(0.002)</td>
</tr>
<tr>
<td>Constant</td>
<td>0.143</td>
<td>0.800*</td>
</tr>
<tr>
<td></td>
<td>(0.116)</td>
<td>(0.325)</td>
</tr>
<tr>
<td>Observations</td>
<td>24085</td>
<td>11709</td>
</tr>
<tr>
<td>Pseudo R-squared</td>
<td>0.057</td>
<td>0.083</td>
</tr>
</tbody>
</table>

Standard errors in parentheses
* p<0.05, ** p<0.01, *** p<0.001

Note: The table excludes control variables for each Congress. The squared term of percent poverty does not have a significant effect on the dependent variable.

In sum, these findings suggest that the Supreme Court’s measure of power as favorable democratic action is unreliable for the poor. Whereas persons living in rural farm areas and union members appeared to exercise political power in our models, we found no evidence that the poor influenced their Congressional representatives’ support for legislative actions favorable to the group. Instead, our findings suggest that something other than political power, perhaps ideology or partisanship, motivates legislative actions favorable to the
poor. Before turning to the implications of these findings in Part IV, we address in the next Section an important potential objection to our model.

**C. The Public Choice Objection**

Public choice theory offers an important objection to the model we use to test the Supreme Court's hypothesis about political power. Group size is a key element in public choice theory's assessment of why some groups work to influence politics and others do not, but according to the theory it is the small groups, not the large groups, that tend to be more powerful.

In *The Logic of Collective Action*, Mancur Olson explains that “unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, rational, self-interested individuals will not act to achieve their common or group interests.”201 The free rider problem explains this phenomenon. Collective goods such as clean waterways and safe highways benefit all of society, but it is very difficult to exclude anyone from enjoying them. A rational person will not expend the effort to secure the good, preferring instead to free ride on the efforts of others. Assuming everyone follows this rational course, a large group will not organize to secure collective goods that broadly benefit the group, because no single individual will be motivated enough to invest their time in organizing the group.202 Thus, “the larger the group, the less it will further its common interests.”203

Only when “the total gain would . . . be [very] large in relation to the total cost” will individuals have the incentives to organize and expend effort to secure a collective good.204 This relationship between benefit and cost depends on the size of the group. In smaller groups, “where each member gets a substantial proportion of the total gain simply because there are few others in the group, a collective good can often be provided by the voluntary, self-interested action of the members of the group.”205 In these smaller groups, each member has a large enough stake in the desired benefit to justify his or her participation in the group effort to secure the collective good.206

Working from Olson’s logic of collective action, economists James Buchanan, Gordon Tullock, and other academics developed a rather cynical

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202. *Id.* at 44 (“[I]n a large group in which no single individual’s contribution makes a perceptible difference to the group as a whole, or the burden or benefit of any single member of the group, it is certain that a collective good will not be provided unless there is coercion or some outside inducements that will lead the members of the large group to act in their common interest.”) (emphasis omitted).

203. *Id.* at 36.

204. *Id.* at 22.

205. *Id.* at 22, 34.

206. *Id.* at 36 (“The most important single point about small groups . . . is that they may very well be able to provide themselves with a collective good simply because of the attraction of the collective good to the individual members.”).
theory of the legislative process. These public choice scholars focus on legislation as a collective good. Using the economics framework of supply and demand, they explain that politically organized groups are on the demand side in the legislative marketplace. These public choice scholars focus on legislation as a collective good. Using the economics framework of supply and demand, they explain that politically organized groups are on the demand side in the legislative marketplace. The unorganized public ultimately pays for these legislative enactments. Members of the unorganized public are unlikely to organize in response to the rent-seeking activity of the smaller groups because they do not have the capacity to police free riding. The result is that small groups obtain targeted benefits at the expense of the larger unorganized public. As Olson puts it, “[t]here is a surprising tendency for the ‘exploitation’ of the great by the small.”

Public choice theory thus suggests that small groups have an advantage over larger groups in securing legislative goods. In the model we use to test the Supreme Court’s measure of political power, public choice theorists would suggest that a group’s sheer numbers are an unreliable indicator of political power. Despite their size, large groups may lack political power because they do not have the capacity to organize to influence politics. Smaller groups, however, can organize and obtain power because they have greater incentives to police the behavior of their members. The lack of a positive relationship between percent poor in a congressional district and the representatives’ roll call votes favorable to the poor should therefore not be surprising.

While public choice theory might explain the lack of positive relationship between percent poor and representatives’ roll call votes favorable to the poor, it does not explain the positive relationship we see between the proportion union members and farmers in a congressional district and representatives’ roll call votes favorable to these two groups. Under a public choice account, the

209. See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 405 (2d ed. 1977) (“[T]he electoral process creates a market for legislation in which legislators ‘sell’ legislative protection to those who can help their electoral prospects with money and/or votes.”).
210. See, e.g., Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223, 229 (1986) (describing as an assumption in the public choice theory the view that smaller groups who “enjoy lower information and transaction costs than others . . . succeed in obtaining wealth transfers to themselves at the expense of other groups”).
211. See, e.g., Frank H. Easterbrook, The State of Madison’s Vision of the State: A Public Choice Perspective, 107 HARV. L. REV. 1328, 1336 (1994) (“Overcoming free riding is easier when the group is small, cohesive . . . , able to target large benefits on each member and to exclude non-members from sharing in these benefits.”).
212. OLSON, supra note 201, at 35 (emphasis omitted).
size of the group in congressional districts should not predict representatives’ roll call votes. These positive relationships suggest that the public choice account does not tell the full story about group political power—size appears to be an advantage for some groups.

Organized lobbying activity, one of the preferred indicators of political power under public choice theory, might explain why size appears to be an advantage in some instances and not in others. This indicator suggests that the poor do not have power because they have not been able to organize to influence legislative action in any context. Although there has been a dramatic increase in the number of national and state lobbying groups advancing the interests of other marginalized groups, like racial minorities, women, the disabled, and the aged, studies show that these groups tend not to be particularly active in advancing the interests of the poor in the political arena. When they do seek to advance the interests of the poor, they are not particularly effective in doing so.

One can contrast the status of lobbying groups advancing the interests of the poor with groups advancing the interests of union members and farmers. While national and state union and farm lobbies have suffered a decline in influence over the past fifty years, they still represent a powerful force in politics. The difference in lobbying strength between the poor, on the one hand, and labor unions and farmers, on the other, suggests that this is a factor, perhaps even a critical factor, in determining which inattentive publics influence the roll call behavior of representatives. These national and state lobbies contain the activists and entrepreneurs that can turn inattentive publics into attentive ones if representatives act against the group’s interests. Thus, it is perhaps because union members and farmers have a national and state lobbying presence that the elected officials representing districts with a high proportion of members of these groups focus on representing the groups’ interests. In contrast, the poor, lacking a similar national or state lobbying presence, are

213. See JEFFREY M. BERRY, THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS 55–57 (1999) (finding that among liberal advocacy organizations, quality of life issues such as the environment are crowding out economic equality and poverty issues as a focal point); DARA Z. STROLOVITCH, AFFIRMATIVE ADVOCACY: RACE, CLASS, AND GENDER IN INTEREST GROUP POLITICS 113–20 (2007) (finding a lack of representation of economic issues affecting low interest groups among advocacy organizations, particularly organizations focusing on identity-based issues).

214. See, e.g., FRANK R. BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 255 (2009) (“Although some marginalized constituencies . . . have organized with beneficial results, the same cannot be said of those who are simply poor.”).

215. See id. at 256 (“Despite its decline, organized labor still possesses substantial resources and maintains influence in Washington.”); WILLIAM P. BROWNE, PRIVATE INTERESTS, PUBLIC POLICY, AND AMERICAN AGRICULTURE 39 (1988) (“Lobbyists for both active and relatively uninvolved agricultural interests believe overwhelmingly that policymakers perceive most issues as the domain of farm organizations and accord them special legitimacy when farm conditions are affected.”).

216. See GARY C. JACOBSON & JAMIE L. CARSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 249 (9th ed. 2015). (“The [electoral] system naturally favors any politically attentive group that is present in significant numbers in a large number of states or districts.”)
unable to draw the attention of representatives no matter what proportion of the
district they comprise.

Thus, rather than contradicting our findings, the public choice account may in fact reinforce and provide an explanation for our findings regarding the political powerlessness of the poor. A group that lacks a well-organized lobbying presence is unlikely to influence representatives to support legislative actions favorable to the group by their sheer numbers alone.

IV. TOWARD A MORE HOLISTIC APPROACH TO MEASURING POLITICAL POWER

Our findings suggest that the Supreme Court should rethink how it measures the political power of groups in its suspect class determinations. Measuring a group’s political power according to favorable legislative actions certainly has its advantages—it is an intuitive measure that is easy for courts to apply. But our findings indicate that it is an unreliable measure of a group’s political power because some favorable legislative actions arise from factors other than a group’s political strength. Instead of focusing exclusively on favorable legislative actions, the Court should take a more holistic approach to determining whether a group has political power. This approach could include favorable legislative actions as one factor, since it appears to accurately measure the political power of some groups accurately, like unions and farmers. But this measure should be supplemented with others to provide a more reliable assessment of a group’s political power. This will avoid instances in which favorable legislative actions are “false positive” indicators of political power, such as with the poor.

Within a more holistic assessment of political power, the Court should also look at the degree to which organized lobbying groups seek to advance the group’s interests at the national and state level. As we discussed in the prior Section, a key factor that distinguishes labor unions and farmers from the poor is the existence of active lobbies for the former and not the latter at both the national and state level. These lobbies contain the activists and political entrepreneurs that elected officials seem to fear because of their capacity to mobilize inattentive publics. Our findings, combined with the studies of lobbies’ influence, suggest that politicians do not anticipate the preferences of all inattentive publics. However, they do seem to anticipate the preferences of those publics that have organized activists who seek to advance their interests at the national and state levels.

Additionally, the Court should look to empirical evidence of political inequality from social science research. The studies in Part III show that the poor have no influence on policy outcomes relative to their wealthy and middle class counterparts on issues for which the preferences of economic classes diverge. While scholars have not yet assessed the relative degree of influence

217. See supra Part III.
held by the different groups on issues for which their preferences converge, it seems likely that on these issues, elected officials are mostly, if not entirely, responsive to the wealthy and middle classes. Importantly, Martin Gilens’s, Larry Bartels’s, and other social scientists’ empirical findings of political inequality are consistent with ours regarding the political powerlessness of the poor.218Similarly studies on other groups’ influence might be useful for courts assessing suspect status claims.

In assessing a group’s political power, the Court should also examine the group’s relative turnout in elections. Over the time period of this study (1963–2012), there has been a huge disparity between the reported voting of the poor and other income groups. The poorest Americans are least likely to report voting. Less than half of those in the lowest income category reported voting in the 1964 election,219and in the 2012 election, less than half of those in the lowest two income categories reported voting.220Further, there is a large gap between the voting of the lowest income class and the highest income class. In 1964, there was a 35 percent gap in reported voting between the lowest income class and the highest income class,221and in 2012, there was more than a 30 percent gap.222

Political mobilization scholars have theorized that groups like the poor lose interest in politics and stop voting because elected officials do not respond to their interests.223These theories are consistent with a frequently reported attitude among the poor that their votes do not matter because voting will not lead officials to respond to their needs and preferences.224Once the poor decide

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218. See supra text accompanying notes 129–37.


220. Voting and Registration in the Election of November 2012—Detailed Tables, tbl.7, U.S. CENSUS BUREAU, https://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html [https://perma.cc/8L97-MG8K] (finding 46.9 percent of individuals with a family income of less than $10,000 and 45.8 percent of individuals with a family income of between $10,000 and $14,999 reported that they voted in the 2012 presidential election).

221. Voting and Registration in the Election of November 1964—Tables, supra note 219 (finding 84.9 percent of Americans in the highest income category ($10,000 and over) reported that they voted in the 1964 presidential election).

222. Voting and Registration in the Election of November 2012—Detailed Tables, supra note 220 (finding 76.9 percent of Americans with a family income from $100,000 to $149,999 and 80.2 percent of Americans with a family income of $150,000 and over reported that they voted in the 2012 presidential election).

223. Political mobilization scholars have theorized that “people who see more at stake in politics, whether because policies affect them more, identities beckon them more, options appeal to them more, or duty calls them more, are more attracted by the many benefits that politics offers.” STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 6 (1993). These scholars find that groups like the poor lose interest in politics because of the “changing patterns of mobilization by parties, campaigns, and social movements” that focus less on the needs of the politically marginalized. Id. at 213.

224. See, e.g., Frederick Solt, Economic Inequality and Democratic Political Engagement, 52 AM. J. POL. SCI. 48, 58 (2008) (“Declining political interest, discussion of politics, and participation in elections among poorer citizens with rising inequality attest to the increased ability of relatively
not to vote because of the perception that their votes do not matter, the prophecy becomes self-fulfilling as elected officials pay less attention to the poor’s needs and preferences.\textsuperscript{225} In a sense, the failure of the poor to vote is an admission of political powerlessness that elected officials accept and reinforce. The overall implication is that disparities in voter turnout between groups may result from and reflect each group’s relative capacity to influence politics.

Finally, a group’s descriptive representation in political office should influence the Court’s holistic assessment of that group’s political power. Scholars have demonstrated the statistical relationship between group political power and descriptive representation, as well as the relationship between descriptive and substantive representation for African Americans and women—indicating that descriptive representation tracks substantive political power for those groups.\textsuperscript{226} But it is not yet clear whether such descriptive representation is a relevant indicator of political power for other groups like the poor. The only political science study to engage this question suggested that elected officials from working class and poor backgrounds were more likely to act consistently with the interests of the poor, but the sample size of legislators from these backgrounds was small.\textsuperscript{227}

We offer these as factors that may provide additional guidance to courts in their suspect class determinations. At this preliminary stage, it is too early to prescribe any weights to the different factors; their viability as measures of political power may depend on the group and the context. Regardless, our study shows that an exclusive focus on favorable legislative actions, while intuitive and easy to apply, will mistakenly shut the door on groups in need of judicial protection from democratic politics.

wealthy individuals to make politics meaningless for those with lower incomes in such circumstances.”).

\textsuperscript{225} See, e.g., Kim Quaile Hill & Jan E. Leighley, \textit{The Policy Consequences of Class Bias in State Electorates}, 36 AM. J. POL. SCI. 351, 363 (1992) (finding a systematic relationship between the upper-class bias in a state electorate and social welfare policies favoring the rich and disadvantaging the poor).

\textsuperscript{226} See, e.g., CLAUDINE GAY, \textit{THE EFFECT OF MINORITY DISTRICTS AND MINORITY REPRESENTATION ON POLITICAL PARTICIPATION IN CALIFORNIA} (2001) (finding a relationship between minority representation in politics and majority-minority districts, on the one hand, and greater electoral Latino and black electoral involvement in politics, on the other); Lawrence Bobo & Franklin D. Gilliam, Jr., \textit{Race, Sociopolitical Participation, and Black Empowerment}, 84 AM. POL. SCI. REV. 377, 387 (1990) (finding a relationship between descriptive representation and higher levels of black political empowerment); see also supra text accompanying notes 53–54.

\textsuperscript{227} See CARNES, supra note 17, at 25–58 (finding a relationship between descriptive and substantive representation, but data was limited to a small sample of congressmembers with low-income and working-class backgrounds). We are in the process of conducting a more extensive study of the relationship between legislators’ backgrounds and support for groups like the poor. This study will provide further insight into the importance of this factor in a more holistic assessment of political power.
CONCLUSION

It has been more than forty years since the Court has declared a class to be suspect. In that time, political power has emerged as a central linchpin in the Court’s suspect class determinations. In denying suspect class status to the aged and the disabled, the Court focused on legislators’ adoptions of laws favorable to the groups, arguing that these groups are capable of attracting lawmakers’ attention. Lower courts have followed suit, making the same claim about the political power of gays and lesbians. And, although it has not yet been used in the courts, this argument is also available for denying suspect class status to the poor, should that issue be reopened.

In this Article, we have shown that favorable democratic actions are not always a good indicator of a group’s political power. In assessing the source of favorable legislative actions for the poor, we find that there is no positive correlation between this measure of political power and representatives’ support for legislative actions favorable to the poor. In relying on favorable legislative actions as the measure of political power, the Supreme Court overlooks other reasons why legislators support laws, including partisanship and ideology. Because a simple count of favorable legislative actions is not necessarily proof of a group’s political power, the Court should supplement this measure with others. A more holistic approach would consider interest group support, measures of political inequality, relative group voter turnout, and descriptive representation alongside favorable legislative actions to provide a more accurate assessment of a group’s political power. By shifting to a more holistic measure, the Court can better identify the groups in need of special judicial protection from democratic politics. That might in turn be the first step toward reviving suspect class doctrine, which has been moribund for too long.
Appendix 1: Imputation of Congressional District Poverty Data for the 88th–92nd Congress (1963–72)

There are no sources of congressional district level poverty data for the period from the 88th through the 92nd Congress (1963–72). We therefore had to estimate this measure using county-level income data and county-district map shape files.

With the help of county-district map shape files collected and published by Jeffrey Lewis et al., we reconstructed a dataset that linked county with congressional districts.\(^{228}\) Given that one congressional district might include pockets of land from multiple counties, or the district itself was only a part of one county, we created a weight variable reflecting the relative size of the districts and the different parts of the counties that include or share the district. For instance, the first voting district of the 88th Congress in Alabama included land from six counties: Choctaw, Clarke, Mobile, Monroe, Washington, and Wilcox. The shape files allowed us to calculate what portion of the land from each county belonged to District 1. The portion was the relative size of the part of each county that belonged to a certain district. We used the relative size as the weight for our later calculation of the district poverty rate.

We calculated a poverty rate for each county using the threshold of $3,000 per year family income. We chose this threshold for two reasons. First, the $3,000 income line at the county level yielded state level poverty rates that were closest to the published state level poverty rates in the 1960 census.\(^{229}\) Second, according to the 1960 weighted poverty threshold and the average family size of 1960, $3,000 best reflected the average family size and national poverty threshold.\(^{230}\)

Using the weight variable and the county-level poverty rate variable, we calculated a weighted average of percent below poverty population of each district and used this number as the poverty rate of that district.


\(^{229}\) The 1960s census has only the state-level poverty rate and the county-level income data, but not the district-level poverty rate or district-level income data. See Historical Poverty Tables—People, supra note 177; Census 1960 (U.S., County & State), SOCIAL EXPLORER, http://www.socialexplorer.com/data/C1960CountyDS/metadata/?ds=SE

APPENDIX 2: IMPUTATION OF CONGRESSIONAL DISTRICT UNION DATA

There were no sources of congressional district-level data on union membership that covered the entire period of our study. We therefore had to estimate this measure using state-level data on total persons employed, percent union, and percent union in different industries and the government sector, combined with congressional district-level data on total persons employed and the numbers of persons employed in different industries and the government sector.

For state-level data on percent union and percent union in different industries and the government sector, we relied on Barry Hirsch and David MacPherson’s Union Membership and Coverage Database, available at unionstats.com. This database includes state data on percent union from 1973 forward and percent union data in different industries and the government sector from 1983 forward. For state-level data and congressional district-level data on persons employed in different industries and the government sector, we relied on E. Scott Adler’s Congressional District Dataset for the period 1973–2002 and the United States Census American Community Survey for the period 2003–12.

Because we did not have sufficient data to calculate the percentage union in congressional districts for the period from 1963 to 1972, we excluded it from the dataset. For the period from 1973 to 2012, we imputed congressional district data using the following series of equations:

State union membership = total persons employed in state * percent union in state

Unadjusted congressional district union membership = percent union in state * total persons employed in congressional district

State industry & government union membership = (state industry employment * state union percent for industry) + (state union government employment * state union percent for government)

Congressional district industry & government union membership = (congressional district industry employment * state union percent for industry) + (congressional district government employment * state union percent for government)


232. Id.

233. Adler, supra note 181; American Community Survey, supra note 181.
Congressional district other union membership = (state union membership – state industry & government union membership) / number of congressional districts in state

Adjusted congressional district union membership = Congressional district industry & government union membership + congressional district other union membership

Congressional district union percentage = adjusted congressional district union membership / total persons employed in congressional district
### Farm-Related Legislative Actions

<table>
<thead>
<tr>
<th>Legislative Action</th>
<th>Congress (Year)</th>
</tr>
</thead>
<tbody>
<tr>
<td>To agree to conference report on H.R. 9811, the Food and Agriculture Act of 1965</td>
<td>89 (1965)</td>
</tr>
<tr>
<td>To recommit H.R. 17126, to amend the Food and Agriculture Act of 1965 with instructions regarding $20,000 limitation on payments on farm subsidies</td>
<td>90 (1968)</td>
</tr>
<tr>
<td>To adopt the conference report on H.R. 17126, the Food and Agriculture Act of 1965</td>
<td>90 (1968)</td>
</tr>
<tr>
<td>To adopt an amendment to bill H.R. 11612 that would limit subsidy payments to $20,000 to any recipient of farm payments</td>
<td>91 (1969)</td>
</tr>
<tr>
<td>To agree to a motion to table the motion regarding instructing House managers to insist on $20,000 subsidy payment limitation in H.R. 11612, appropriations for the department of agriculture and related agencies</td>
<td>91 (1969)</td>
</tr>
<tr>
<td>To order the previous question on motion to recede and concur to Senate amendments to H.R. 11612, making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1970</td>
<td>91 (1969)</td>
</tr>
<tr>
<td>To recommit H.R. 18546, Agricultural Act of 1970, with instructions to strike out titles relating to payment limitations, wheat, feed, grain, cotton, and miscellaneous provisions</td>
<td>91 (1970)</td>
</tr>
<tr>
<td>To agree to the conference report on H.R. 6782, the Emergency Agricultural Act of 1978</td>
<td>95 (1978)</td>
</tr>
<tr>
<td>On agreeing to the amendment: amendment 12 to H.R. 3950</td>
<td>101 (1990)</td>
</tr>
<tr>
<td>On agreeing to the amendment: amendment 28 to H.R. 3950</td>
<td>101 (1990)</td>
</tr>
<tr>
<td>On agreeing to the amendment: amendment 1 to H.R. 2419</td>
<td>110 (2007)</td>
</tr>
<tr>
<td>On agreeing to the amendment: amendment 9 to H.R. 2419</td>
<td>110 (2007)</td>
</tr>
<tr>
<td>On agreeing to the amendment: amendment 42 to H.R. 2112</td>
<td>112 (2011)</td>
</tr>
<tr>
<td>On agreeing to the amendment: amendment 60 to H.R. 2112</td>
<td>112 (2011)</td>
</tr>
</tbody>
</table>

### Labor-Related Legislative Actions

<table>
<thead>
<tr>
<th>Legislative Action</th>
<th>Congress (Year)</th>
</tr>
</thead>
<tbody>
<tr>
<td>To Pass H.R. 77, a bill to repeal right to work provisions (14(b)) of the Taft-Hartley Act</td>
<td>89 (1965)</td>
</tr>
<tr>
<td>Action</td>
<td>Year</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------------------------</td>
<td>-------</td>
</tr>
<tr>
<td>To agree to the Conference Report on H.R. 13712, the Fair Labor Standards Amendments</td>
<td>89 (1966)</td>
</tr>
<tr>
<td>To agree to the Steiger (Wisconsin) - Sikes substitute to H.R. 16785, the Occupational Safety and Health Act</td>
<td>91 (1970)</td>
</tr>
<tr>
<td>To agree to an amendment in the nature of a substitute to H.R. 7935</td>
<td>93 (1973)</td>
</tr>
<tr>
<td>To override the President’s veto of H.R. 7935, a bill to increase the minimum wage rate</td>
<td>93 (1973)</td>
</tr>
<tr>
<td>To pass H.R. 12435, a bill to increase the minimum wage and extend its coverage</td>
<td>93 (1974)</td>
</tr>
<tr>
<td>To agree to the conference report on S. 3203, amending the National Labor Relations Act to extend its coverage and protection to employees of nonprofit hospitals</td>
<td>93 (1974)</td>
</tr>
<tr>
<td>To amend H.R. 8069, fiscal 1976 appropriations for the Departments of Labor and HEW, by prohibiting the use of funds for the issuance of first-instance citations by the Occupational Safety and Health Administration to firms employing 25 or fewer employees</td>
<td>94 (1975)</td>
</tr>
<tr>
<td>To agree to the conference report on H.R. 5900, protecting the economic rights of labor in the building and construction industry by providing for treatment of craft and industrial workers (common situs picketing bill)</td>
<td>94 (1975)</td>
</tr>
<tr>
<td>To amend the Sarasin amendment offered as a substitute for the Quie amendment in the nature of a substitute to H.R. 4250.</td>
<td>95 (1977)</td>
</tr>
<tr>
<td>To pass H.R. 4250</td>
<td>95 (1977)</td>
</tr>
<tr>
<td>To amend H.R. 8410 by deleting the so-called equal access provision, . . .</td>
<td>95 (1977)</td>
</tr>
<tr>
<td>To amend H.R. 8410 by striking language that authorizes the National Labor Relations Board to compensate losses of wages and fringe benefits that occur when a first contract has been delayed due to the employer’s refusal to bargain</td>
<td>95 (1977)</td>
</tr>
<tr>
<td>To pass H.R. 8410</td>
<td>95 (1977)</td>
</tr>
<tr>
<td>To pass H.R. 162, High-Risk Occupational-Disease Notification, to establish a system for identifying, notifying, and preventing illness and death among workers who are at high risk of occupational disease</td>
<td>100 (1987)</td>
</tr>
<tr>
<td>To pass H.R. 2, minimum wage increase, over the President’s veto to raise the minimum wage to fair and equitable rate</td>
<td>101 (1989)</td>
</tr>
<tr>
<td>Legislative Action</td>
<td>Congress (Year)</td>
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<tr>
<td>-----------------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>H.R. 5, Strike Participation (Strike Replacement/Workplace Fairness) bill</td>
<td>102 (1991)</td>
</tr>
<tr>
<td>Passage, Objection of the President Notwithstanding: S. 5 Family and Medical Leave Act</td>
<td>102 (1992)</td>
</tr>
<tr>
<td>H.R. 1, Family and Medical Leave Act of 1993</td>
<td>103 (1993)</td>
</tr>
<tr>
<td>H.R. 5, Cesar Chavez Workplace Fairness Act</td>
<td>103 (1993)</td>
</tr>
<tr>
<td>H.R. 1227, Minimum Wage increase bill</td>
<td>104 (1996)</td>
</tr>
<tr>
<td>H.R. 3846, to amend the Fair Labor Standards Act of 1938 to increase the minimum wage, and for other ...</td>
<td>106 (2000)</td>
</tr>
<tr>
<td>S.J. Res. 6, Ergonomics Regulations resolution</td>
<td>107 (2001)</td>
</tr>
<tr>
<td>On agreeing to the amendment: amendment 18 to H.R. 5006</td>
<td>108 (2004)</td>
</tr>
<tr>
<td>On Motion to Recommit with Instructions: H.R. 2 Fair Minimum Wage Act</td>
<td>110 (2007)</td>
</tr>
<tr>
<td>On agreeing to the amendment: amendment 1 to H.R. 800</td>
<td>110 (2007)</td>
</tr>
<tr>
<td>On agreement to the amendment: amendment 2 to H.R. 800</td>
<td>110 (2007)</td>
</tr>
<tr>
<td>On agreement to the amendment: amendment 3 to H.R. 800</td>
<td>110 (2007)</td>
</tr>
</tbody>
</table>

**Poverty-Related Legislative Actions**

<table>
<thead>
<tr>
<th>Legislative Action</th>
<th>Congress (Year)</th>
</tr>
</thead>
<tbody>
<tr>
<td>H.R. 10222. Passage</td>
<td>88 (1964)</td>
</tr>
<tr>
<td>S. 2642. Passage of the Anti-Poverty Bill Which Incorporated the Text of H.R. 11377</td>
<td>88 (1964)</td>
</tr>
<tr>
<td>To pass H.R. 2362. The Elementary and Secondary Education Act of 1965</td>
<td>89 (1965)</td>
</tr>
<tr>
<td>To amend H.R. 7984, a bill to create a HUD cabinet department, by rewriting section 101, relating to rent</td>
<td>89 (1965)</td>
</tr>
</tbody>
</table>
To Recommit H.R. 7984, a bill to create a HUD cabinet department . . . 89 (1965)  
To Recommit H.R. 8283, The Economic Opportunity Amendments of 1965 89 (1965)  
To agree to the Conference Report on H.R. 7984, A Bill to Create a HUD Cabinet Department 89 (1965)  
To amend H.R. 11588, 1965 supplemental appropriations, by deleting the rent supplement program 89 (1965)  
To recommit the Qui Substitute for H.R. 15111, The Economic Opportunity Amendments of 1966 89 (1966)  
To recommit H.R. 13161, the Elementary and Secondary Education Amendments of 1966 89 (1966)  
Economic Opportunity Amendments of 1966. To Adopt the Conference Report on H.R. 15111, a bill providing for continued progress in the nation’s war on poverty 89 (1966)  
To adopt the Conference Report to H.R. 13161, the Elementary and Secondary Education Amendments of 1966 89 (1966)  
To Pass H.R. 7819, a bill extending federal authority for aiding Indian school children and children in overseas schools run by the Department of Defense . . . 90 (1967)  
To amend H.R. 1318, a bill to amend the Food Stamp Act of 1964, by requiring the states to pay 20% of the value of the bonus coupon issued to participants in the food stamp program 90 (1967)  
To recede and concur in the Senate amendments to S. 953, a bill amending the Food Stamp Act of 1964 90 (1967)  
To recommit S. 2388 authorizing funds for the continued operation of OEO programs, to the Committee on Education and Labor with instructions to make various reductions totaling $920 million in funds . . . 90 (1967)  
To agree to the Conference Report on S. 3497, The Housing and Urban Development Act of 1968 90 (1968)  
To amend H.R. 18249, amending and extending the Food Stamp Act, by removing the limitation on the authorization and providing for a 4-year authorization 90 (1968)  
To agree to the Conference Report on S. 3068, the Food Stamp Program 90 (1968)
<table>
<thead>
<tr>
<th>Description</th>
<th>Vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>To adopt the Conference Report on S. 3016, extending the Antipoverty Program through fiscal 1971</td>
<td>91 (1969)</td>
</tr>
<tr>
<td>To adopt the Conference Report on H.R. 514, which extends programs of assistance for elementary and secondary education</td>
<td>91 (1970)</td>
</tr>
<tr>
<td>To adopt Brandemas’s Amendment to H.R. 10351</td>
<td>92 (1971)</td>
</tr>
<tr>
<td>To recommit H.R. 10351 to the committee with instructions to report it back with an amendment relative to child care fees and to the lowering of the maximum family income level entitling disadvantaged children to certain free services</td>
<td>92 (1971)</td>
</tr>
<tr>
<td>To amend H.R. 12350, a bill to provide for the continuation of programs under the Economic Opportunity Act of 1964, by substituting for the committee amendment an amendment that seeks to provide a straight 2-year extension of OEO programs</td>
<td>92 (1972)</td>
</tr>
<tr>
<td>To adopt to the Conference Report on H.R. 12350, a bill to provide for the continuation of programs authorized under the Economic Opportunity Act of 1964</td>
<td>92 (1972)</td>
</tr>
<tr>
<td>To agree to the Conference Report on S. 3066, Housing and Community Development Act of 1974</td>
<td>93 (1974)</td>
</tr>
<tr>
<td>To suspend the rules and pass H.R. 1589, amending the Food Stamp Act of 1964</td>
<td>94 (1975)</td>
</tr>
<tr>
<td>To pass H.R. 8578, a bill to increase the federal share of financial assistance to community action agencies</td>
<td>94 (1975)</td>
</tr>
<tr>
<td>To pass H.R. 15</td>
<td>95 (1978)</td>
</tr>
<tr>
<td>To amend S. 1309 by reducing the food stamp benefits to those households with children receiving federally subsidized school lunches</td>
<td>96 (1980)</td>
</tr>
<tr>
<td>To amend S. 1309 by reinstating the purchase requirement except in households with a member who is over 60 years of age or is blind or disabled</td>
<td>96 (1980)</td>
</tr>
<tr>
<td>To amend S. 1309 by providing for repayment of certain excess food stamp benefits</td>
<td>96 (1980)</td>
</tr>
<tr>
<td>To amend H.R. 3603, by requiring most food stamp recipients to pay for a portion of their stamps</td>
<td>97 (1981)</td>
</tr>
<tr>
<td>To amend H.R. 6892. The Wampler amendment authorizes the Secretary to require that food stamp applicants seek work at the time of application</td>
<td>97 (1982)</td>
</tr>
<tr>
<td>An amendment to H.R. 2100, removing any changes to the food stamp program. These changes would increase the amount of benefits and expand the number of eligible</td>
<td>99 (1985)</td>
</tr>
<tr>
<td>Amendment</td>
<td>Description</td>
</tr>
<tr>
<td>-----------</td>
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</tr>
<tr>
<td>3 to H.R. 2519</td>
<td>To instruct the House Conferees on H.R. 1720, welfare reform, to allocate no more than $2.8 billion and allow no impediments to employment for welfare recipients</td>
</tr>
<tr>
<td>On Agreeing to the Amendment 13 to H.R. 2406</td>
<td></td>
</tr>
<tr>
<td>On Agreeing to the Amendment 18 to H.R. 2406</td>
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<tr>
<td>On Agreeing to the Amendment: Amendment 1 to H.R. 3734</td>
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</tr>
<tr>
<td>On Agreeing to the Amendment: Amendment 7 to H.R. 2</td>
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<tr>
<td>On Agreeing to the Amendment: Amendment 22 to H.R. 2</td>
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</tr>
<tr>
<td>On Agreeing to the Amendment: Amendment 23 to H.R. 2</td>
<td></td>
</tr>
<tr>
<td>On Agreeing to the Amendment: Amendment 1 to H.R. 4737</td>
<td></td>
</tr>
<tr>
<td>No further poverty-related legislative actions until the 113th Congress</td>
<td></td>
</tr>
</tbody>
</table>