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THE MEASUREMENT OF POWER: REVISITING SUSPECT  
CLASS ANALYSIS

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*A Note to the Readers*

*This is a very preliminary and incomplete rough draft of an article we are considering pursuing. The focus, as the title indicates, is on the Court's measurement of political power in its suspect class analysis. I am doing this first at the doctrinal level, identifying the Court's employment of a measure of political power focused on the existence of democratic action favorable to a group as a basis for denying suspect class status. I then seek to gauge empirically whether this measure of political power is suggestive of the political power of the group. The poor serve as the focus of this inquiry. The constitutional status of the poor, which was surprising to me, has never been directly addressed under the Court's suspect class analysis. The Court has instead declared that wealth is not a suspect classification by fiat. What I want to do is to engage the suspect class analysis with respect to the poor and assess whether the existence of democratic action favorable to the poor provides a measurement of political power.*

*This paper will ideally lead into a second paper thinking about how the Court should provide constitutional protections to the poor in light of its reluctance to closely scrutinize economic and social welfare legislation. The tentative argument there is that the Court should rely on its representative equality line of equal protection jurisprudence emanating from the one person, one vote to empower the poor to protect themselves in the political process. I argue that "poverty districts" are the tool that the Court should constitutionally mandate to provide the opportunity for the poor to protect themselves in politics.*

*I will be speaking about both papers and how they relate to each other in the presentation. My major need with respect to this paper is help with the empirical test of political power as favorable democratic action. My co-author is a statistician, but her training is as a sociologist rather than a*

## THE MEASUREMENT OF POWER

*political scientists. So suggestions on techniques and political science articles trying to get at similar questions would be very helpful. Thanks so much.*

### INTRODUCTION

Just over forty years ago, Justice Rehnquist in *Sugarman v. Dougall* lamented the Supreme Court's seemingly standard-less determination of suspect class status. Without any analysis, the Court declared aliens to be a "discrete and insular minority" and applied strict scrutiny to the law at issue, which classified individuals on the basis of citizenship status. *Sugarman* was part of an active period in the late 1960s and early 1970s in which the Court determined that laws classifying on the basis of wealth, illegitimacy, and gender were suspect or quasi-suspect. When state actors classified on these bases, the Court intervened into democratic politics by closely scrutinizing the state's justifications for the distinctions. What troubled Justice Rehnquist about this proliferation of special judicial protections for new discrete and insular classes was the absence of limiting principles. 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." The justice then directed anxiety toward 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."

That same term, a liberal plurality of justices in *Frontiero v. Richardson* heeded the call for a standard to determine suspect class status. They argued that women should be considered a discrete and insular class because they suffered a history of discrimination and lacked political power as indicated in their vast underrepresentation in "this Nation's decision-making councils." The Justices also explained that because sex, like race and national origin is "an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens would bear some relationship to individual responsibility.' And finally, the plurality pointed out that unlike intelligence or physical disability, "the sex characteristic bears no relation to ability to perform or contribute to society."

Paradoxically, the very standard that the liberal justices constructed to extend discrete and insular status to women would be the source of suspect classification doctrine's demise. Rather than applying the standard to extend suspect class status to new discrete and insular groups, the Court would use the standard to

deny that status to every subsequent group seeking it. The liberal justices abandoned their effort to fit women within the discrete and insular class, accepting a quasi-suspect status for gender classification premised on the broader societal prevalence of sex role stereotypes. For illegitimate children and undocumented children, the Court established a similar quasi-suspect status based on the absence of individual fault or wrongdoing for their status.

For other groups, an increasingly conservative Court developed from the *Frontiero* standard two important limiting principles that it used to avoid extending suspect class status. First, conservative majorities of the Court in *Massachusetts Board of Retirement v. Murgia* and *City of Cleburne v. Cleburne Living Center* justified the denial of suspect status for the aged and disabled in part because these characteristics were considered relevant to the “ability to perform or contribute to society.” State actors therefore needed leeway to develop classifications responsive to the different needs of these groups—and suspect class status would get in their way. Second, a conservative majority of the Court in *Cleburne* also justified the rejection of suspect status claims for the disabled because of their purported political power. In doing so, the Court shifted its measure of political power from disabled persons’ descriptive representation in the political process, where vast underrepresentation remained, to past favorable democratic action. The justices pointed to the fact that Congress and the state of Texas, the forum of the litigation, had passed a host of laws favorable to the group. This indicated to the Court that although the disabled might not win every democratic battle, they could secure protection and benefits from the democratic process without judicial intervention.

Two prominent groups who have made claims on suspect status remain on the outside looking in—LGBTQ individuals and the poor. Members of the LGBTQ community, on the one hand, have been quite active in seeking suspect classification status. They have focused most of their energies on the two limiting principles. First, proponents of extending suspect class status to this group argue (mostly without controversy) that being LGBTQ is not relevant to their “ability to perform or contribute to society.” But their effort to overcome the second limiting principle about political power has thus far met significant resistance. In the recent case of *United States v. Windsor*, LGBTQ couples challenged a law that denied gay and lesbian married couples federal benefits. In *Windsor*, the proponents to extending suspect class status to this group focused on the *Frontiero* indicator of political power that measures representation in democratic councils. They argued that gays and lesbians’ underrepresentation showed that they could not adequately defend themselves in the democratic process. The opponents did not dispute this account, but they turned to the measure of political power identified in *Cleburne* that emphasizes favorable democratic action. The

opponents pointed to President Obama's decision to not enforce DOMA and the existence of favorable gay rights legislation in some states as evidence of the capacity of gays and lesbians to influence the political process. The Court in *Windsor* ultimately avoided the question of the discrete and insular status of the LGBTQ group. But the more conservative justices in prior dissenting opinions have registered their view that this group has political power principally on the basis of the existence of favorable democratic actions.

This controversy raises the question: What is the right measure of political power? The answer to this question is critical to the future of suspect classification doctrine. To the extent that the Court emphasizes favorable democratic action as the measure of political power, the limiting principle essentially shuts the door to any new suspect classification determinations. Democratic actions can be found that protect or benefit virtually every class. However, if the right measure of political power is something else, then the door will remain open to extending suspect class status to groups in the future. For example, to the extent the Court emphasizes the underrepresentation of members of classes in political bodies, there should be continued expansion of suspect class entitlement to gays and lesbians, the poor, and perhaps other groups. Our political bodies remain dominantly white, wealthy, straight, and male. And while mere disproportionate representation might not be the right measure, the complete absence of members of a group like the poor tends to indicate their lack of political power.

The status of the other group that has been sidelined in the suspect classification conversation, the poor, may provide guidance for addressing the question of the right measure of political power. The evolution of the constitutional status of the poor has been overlooked and, when discussed, very much misunderstood. The Court initiated the suspect classification boom in the late 1960s with the declaration that wealth was a suspect classification and that laws that classified on the basis of the ability to pay would be subject to the most exacting judicial scrutiny. For the next seven years, justices in different cases, some addressing laws that harmed the poor, listed wealth alongside race, national origin, and eventually alienage as a suspect classification.

The Court in the early 1970s, however, shifted in a more conservative direction due to President Richard Nixon's appointment of four justices in three years. This more conservative Court reversed course and refused to recognize wealth as a suspect classification. Many scholars, commentators, and courts, including the Supreme Court, point to the early 1970s case of *San Antonio Independent School District v. Rodriguez*, as the decision that denied suspect class status to the poor. But interestingly, the Court never actually decided the question of the suspect status of the poor in *Rodriguez* because the majority found that the

law being challenged did not classify on that basis. As further evidence that the question was never decided, the liberal justices in dissent, who had previously been rather consistent in listing wealth as a suspect classification, never engaged the question of the suspect status of the poor. As further evidence, the Court in a case decided two years later cited *Rodriguez* not for the proposition that the poor are not a suspect class, but rather to support the passive assertion that the “Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.” Nevertheless, courts, scholars and commentators have simply presumed that the poor are not a suspect class.

The Court’s failure to apply the suspect classification framework to the poor provokes two important questions. First, should the poor be considered a suspect class according to the framework? The instinctual move is to focus on the immutability factor and point to the fact that the poor can change their income status. But as many commentators have suggested and the Court itself has acknowledged in its decision to continue considering alienage to be a suspect class, the immutability factor has not been strictly applied. Instead, the Court would likely focus on the two limiting principles that the Court has applied to the aged and disabled and that some of the conservative justices have applied to gays and lesbians. As to the first limiting principle, it would seem uncontroversial to argue that poverty is distinct from age and disability in that it “bears no relation to ability to perform or contribute to society.” As with gays and lesbians, there is nothing about the physical or mental capacity of the poor that distinguishes them from other members of society. The suspect status of the poor would therefore turn on the second limiting principle focused on the group’s political power.

This leads to the second important question: what is the proper measure for the political power? And specifically, is the passage of legislation favorable to a group the right indicator of the political power of the group? Focusing on the poor provides an opportunity to address this question that is not provided by a focus on other groups. Similar to the disabled, and gays and lesbians, the poor have been the beneficiaries of favorable legislation. President Lyndon Baines Johnson declared a War on Poverty fifty years ago that initiated a nearly decade-long period of intense legislative activity addressing issues surrounding poverty. While that legislative activity has petered off in recent decades, that past favorable legislation provides a basis for engaging this measure of political power.

Unlike for the disabled, and gays and lesbians, there is a measure available to empirically assess whether favorable legislation responds to the influence of the poor. The prediction under two of the leading theories of political behavior, rational choice and pluralism, is that the greater the numerical strength of a minority in a legislative district, the more likely it will be that a re-election

minded legislator will support legislation favorable to the group. To state concretely with a hypothetical, it should be easier for a group that comprises forty percent of a legislative district to develop the coalitions necessary to influence politicians concerned about re-election to act in its favor than it will be for a group that comprises twenty percent of a legislative district. Unlike the disabled, and gays and lesbians, there is available demographic data about the wealth composition of districts that when combined with legislative roll call data will provide us with an opportunity to assess the influence of the poor. If the prediction proves correct in that legislators with more poor constituents tend to vote favorably for legislation benefitting the group, then it would suggest that favorable democratic action might in fact reflect a group's political power, at least in some contexts. However, if the prediction proves false in that legislators representing districts with a higher proportion of poor constituents are no more likely or even less likely to vote for legislation favorable to the poor, then it would suggest that favorable democratic action is not necessarily a good measure of political power. We find [to be determined]

The article proceeds in three parts. In Part I, we examine the demise of suspect classification doctrine. We argue that a major doctrinal impediment to extending suspect class status is the Court's measurement of political power according to the prior passage of legislation favorable to the group seeking such status. In Part II, we empirically gauge whether this measure is informative of the political power of groups. In Part III, we engage alternative measures of political power and suggest a doctrinal path forward that protects those classes that truly lack political power.

## I. SUSPECT CLASSIFICATION DOCTRINE AND THE EMERGENCE OF LIMITING PRINCIPLES

[Intro and Roadmap to Part]

### A. *The Origins of Suspect Classification Doctrine*

For many legal scholars and lawyers, *United States v. Carolene Products Co.* serves as the fundamental organizing principle for the Supreme Court's Equal Protection jurisprudence. In the case, the Court continued the process of putting to rest the *Lochner* era activist jurisprudence in which the Court closely scrutinized and invalidated a host of economic and welfare legislation. The Court announced that as a general matter for those laws, including the one being reviewed in the case, rational basis review would apply resulting in most of them being upheld. But in a famous footnote to the opinion, Justice Harlan Fiske Stone

## THE MEASUREMENT OF POWER

writing for a plurality of the Court left open whether the deferential form of review should apply to religious, racial, or other national minorities. He implied that “prejudice against discrete and insular minorities [might] 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 [might] call for a correspondingly more searching judicial inquiry.”

For the first thirty years after its promulgation, the footnote lay dormant with its theory of when courts should engage in more searching judicial inquiry of a law operating more in the background than the forefront of cases. In this thirty period leading up to the 1970s, the Court applied more exacting scrutiny to laws that classified on the basis of race and national origin reasoning, “distinctions 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.” The Court derived this principle from what it determined was the original purpose of the Fourteenth Amendment, which was “to eliminate racial discrimination from official sources in the States.” The more exacting scrutiny the Court applied to racial and national origin classifications resulted in the Court striking down every one that it addressed except one.

The other classifications to receive the heightened attention of the Court during this period were those based on alienage status and wealth. The Court applied forms of review much less deferential than rational basis to laws that harmed non-citizens and the poor. In a decision to invalidate a California state law that discriminated against non-citizens in their eligibility for commercial fishing license, the Court declared “[T]he Fourteenth Amendment and the laws adopted under its authority ... embody a general policy that all persons lawfully in this country shall abide ‘in any state’ on an equality of legal privileges with all citizens under non-discriminatory laws.” The Court proceeded to reject the asserted state interests for the discriminatory classification.

In a series of cases beginning in the 1950s and extending through the early 1970s, the Court applied a virtually categorical rule against wealth classifications in the criminal process. The Court invalidated laws under the Equal Protection and Due Process Clauses that imposed fees on trial transcripts, fixed modest bail, imposed statutory filing fees to apply for a writ of habeas corpus, and continued the imprisonment of indigents beyond the statutory maximum because of their inability to pay court fines. The Court also required states to provide indigents with free access to counsel and a sufficiently complete trial record during early stages of the criminal appellate process and during a civil habeas corpus proceeding. The Court found the justification for overturning these laws in the requirements of the criminal process.

In the case starting this line of jurisprudence, *Griffin v. Illinois*, the Court explained, “[p]roviding equal justice for poor and rich, weak and powerful alike is an age-old problem.” The “constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discrimination between persons and different groups of persons.” Due process and equal protection therefore demands, “all people charged with a crime ... stand on an equality before the bar of justice in every American court.” While these cases focused mostly on the criminal process, justices in various opinions suggested that a categorical rule, or at least a rule requiring more exacting scrutiny, should apply to laws that discriminated between rich and poor. For example, the more conservative Justice Harlan and the moderate Justice Stewart dissented from the Court’s categorical application of equal protection to a law denying state paid appellate counsel to all criminal defendants. The justices conceded that it was obvious that the Equal Protection Clause prohibited states from “discriminating between ‘rich’ and ‘poor’ as such in the formulation and application of their laws. But they argued that generally applicable laws should not be invalidated merely because they have a more harmful effect on the poor than the rich.

In addition, a liberal majority of the Court in the mid-1960s case of *Harper v. Virginia State Board of Elections* relied in part on the indigent criminal process cases to rigidly scrutinize and invalidate a state poll tax that required the payment of money to vote. The Court explained that the right to vote is fundamental and that “wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.” Then, in its most explicit statement about the status of wealth classifications to date, the Court declared that “[I]ines drawn on the basis of wealth or property, like those of race ... are traditionally disfavored.” The liberal majority then proceeded to strike down the poll tax concluding that “[t]o introduce wealth or payment of a fee as a measure of a voter’s qualification is to introduce a capricious or irrelevant factor.”

The Court did not employ in any of the cases a clear standard to guide their decision about whether to extend the equivalent of suspect class status to non-citizens and the poor. Justice Harlan in dissent in *Harper* criticized the Court for deviating from its ordinary rational basis review of laws based on “captivating phrases” about fundamental rights and wealth as an improper classification. In extending suspect class status to non-citizens, the Court did draw an analogy between alienage and wealth classifications on the one hand, and race or national origin classifications, on the other.<sup>1</sup> But it never really fleshed out what the

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<sup>1</sup> In the indigent criminal process cases, the Court focused exclusively on the demands for equal justice rather than factors relevant to the classification in its categorical invalidation of the laws.

factors were that connected the new classifications with the prototype classifications that it was the original purpose of the Fourteenth Amendment to eliminate. The closest the Court came was in *Harper* when it focused on the irrelevance of wealth to “one’s ability to participate intelligently in the electoral process.”

Three years after *Harper*, the Court began to revive *Carolene Products* footnote four as an organizing principle for the suspect classification determination. It did so first by providing a rationale for when rational basis review should apply. Rational basis review had been the default form of equal protection review for laws both before and after the *Carolene Products* footnote. Courts without reflection simply applied the deferential form of scrutiny except in those cases when it held that a more exacting form of scrutiny applied. Standards of review were essentially imposed by judicial fiat without explanation or justification. This changed in *Kramer v. Union Free School District No. 15* when the Court drew a link between rational basis review and a presumption about the proper operation of the political process. The Court explained, “[t]he 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.” When classifications are directed at those interests not fairly represented in the political process, “the assumption can no longer serve as the basis for presuming constitutionality.”

This account of when rational basis review should apply and when it should not provides a basis for understanding the un-reasoned declaration two years later in *Graham v. Richardson* that aliens were a discrete and insular class. *Graham* marked the first time that the Court used the language of *Carolene Products* footnote four to justify applying a heightened form of scrutiny to a classification. While the Court said nothing more than that “aliens as a class are a prime example of a ‘discrete and insular’ minority, *Kramer* provides a clear basis for understanding the determination. In the early 1970s when the Court decided *Graham*, aliens could not vote anywhere in the United States. Without the vote, there was nothing to ensure that the interests of non-citizens were fairly represented in the political process.<sup>2</sup> The presumption of constitutionality therefore could not hold. Instead, the role of the Court was to closely scrutinize the classification to ensure that it was not motivated by prejudice against the discrete and insular minority.

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<sup>2</sup> Seven years after *Graham*, the Court explicitly adopted this rationale for extending suspect classification status to aliens. See *Foley v. Connelie*, 435 U.S. 291, 294 (1978) (aliens deserve “heightened judicial solicitude” because “aliens – pending their eligibility for citizenship – have no direct voice in the political process.”).

The suspect classification determination continued to lack a judicially administrable standard. But after *Kramer* and *Graham*, the Court began to construct a rationale for its choice to apply one form of scrutiny over the other. Two years later, a liberal plurality of the Court in the case addressing the suspect status of gender, *Frontiero v. Richardson*, fleshed out a standard for suspect classification determinations that combined factors relevant to race and national origin classifications and a factor that was drawn from both the analogy to race and national origin but also the rationale underlying *Carolene Products* footnote four. Three factors drawn from the analogy to race and national origin included the history of discrimination that the class faced, the immutability and visibility of the classifying trait, and the relevance of the classifying trait to the individual's ability to contribute to society. The history of discrimination evidenced the past subordination of the class into a separate caste and that class's need for special judicial protection. The focus on immutable traits arose from the idea that such "characteristics [are] determined solely by the accident of birth." As a result, "the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" Finally, the absence of any relation of the classification to the class's "ability to perform or contribute to society" was an indicator that the distinction involved an invidious relegation of individuals to an "inferior status without regard to the actual capabilities of its individual members."

The liberal plurality in *Frontiero* referenced more obliquely a fourth factor drawn both from the analogy to race and national origin but also more specifically from the rationale underlying *Carolene Products* footnote four, the political power of the class. The Court explained that the history of discrimination against women contributed to their current pervasive discrimination in the political arena. Conceding that because of their composition in the populace that women "do not constitute a small and powerless minority," the liberal plurality pointed out, "women are vastly underrepresented in this Nation's decisionmaking councils." This was evidenced by the fact that at the time "[t]here ha[d] never been a female President, nor a female member of th[e] Court. Not a single woman presently [sat] in the United States Senate, and only 14 women [held] seats in the House of Representatives." And this vast underrepresentation not only existed at the highest echelons of the federal government, but at all levels of the state and federal governments.

The liberal plurality never directly equated descriptive representation in government with political power, but the citation for the claim about the underrepresentation of women suggested that the justices were thinking along this line. They cited a book by Kirsten Amundson called *The Silenced Majority: Women and American Democracy*. In the book, Amundson argued that the lack

of presence of women in government contributed to the lack of representation of their interests in the formulation and adoption of public policy. The liberal plurality thus perhaps unwittingly took sides on a question that would later be the source of a major political science debate: the degree to which the substantive representation of groups requires their descriptive representation in politics.

That same term, a conservative majority of the Court consolidated the suspect classification determination standard laid out in *Frontiero*. In *San Antonio Independent School Districts v. Rodriguez*, the Court described as “the traditional indicial of suspectness” whether “the class ... is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a political powerlessness as to command extraordinary protection from the majoritarian process.” In this formulation that subsequent courts would rely on their suspect classification determination, the political power of the class is front-and-center in the assessment about whether a class is suspect. However, the Court never defined what it meant by political powerlessness or what would be needed to prove that a class was in such a position. Would evidence of the descriptive underrepresentation of the class be sufficient? Or did the conservative majority have in mind another indicator of political powerlessness? As discussed in the next section, the Court subsequently embraced the absence of favorable democratic action as the primary indicator of political powerlessness.

Perhaps paradoxically, the very point of the judicial establishment of a standard for suspect classification determination marked the demise of the suspect class. The Court has not declared suspect a single class under the standard. Although the Court in later cases declared explicitly that classifications on the basis of gender and illegitimacy, and more implicitly that classifications on the basis of undocumented status were entitled to quasi-suspect status, these determinations were made according to a different rationale. The Court in extending quasi-suspect status to gender focused on the source of these classifications in broadly held overbroad generalizations about gender roles. A more rigorous form of scrutiny than rational basis review was necessary to root out laws premised on such stereotypes. The Court settled on what we currently refer to as intermediate scrutiny. The Court applied this form of scrutiny to classifications on the basis of illegitimacy and undocumented status because it was “illogical and unjust” to impose disabilities on the basis of these statuses for which the members of the class have no control and are at no fault.

But when it came to suspect classification determinations, the Court proved unwilling to extend suspect class status to any more groups. Rather than employing the standard as part of a more systematic assessment about whether classes should be considered suspect, conservative majorities of the Court used it as a source of limiting principles that would be nearly impossible for future

classes to surmount. The next section describes the emergence of these limiting principles and the demise of the suspect class.

*B. The Emergence of Limiting Principles and the Demise of the Suspect Class*

In cases applying the suspect classification standard the Court emphasized two factors—one drawn from *Frontiero* and the other from *Rodriguez*—in denying suspect class status to groups. These two factors—the relevance of the classification to the individual’s ability to contribute to society and political powerlessness—have functioned as limiting principles that contributed to the demise of the suspect class.

The Court first addressed the suspect class status of the aged. In a case challenging a state mandatory retirement law, the Court held in a per curiam opinion that the elderly were not a discrete and insular group. The Court conceded that the elderly faced a history of discrimination, but distinguished this from a history of purposeful unequal treatment, which it concluded members of this group had not experienced. The per curiam opinion also determined that age was relevant to a person’s ability to contribute to society and that state actors should therefore have the leeway to classify on that basis. Justice Marshall dissented, arguing for the importance of employment to individuals and the lack of a sufficient justification for this form of employment discrimination. But Justice Marshall added a third reason for why the aged should not be considered a suspect class. He pointed to the fact that the elderly were protected by anti-discrimination and other forms of legislation “that provides them with positive benefits not enjoyed by the public at large.” The Justice was not clear about the relevance of the existence of this legislation to the suspect class determination, but a conservative majority of the Court would later treat such evidence as indicative of the political power of the group.

Prior to equating legislation with favorable democratic action, the Court once again grounded suspect class determinations in presumptions about the operation of politics. In *Vance v. Bradley*, a second case denying suspect class status to the aged, the Court in an oft-cited statement explained, “[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.” Although the Court did not cite *Carolene Products*’ footnote four as support for this assertion, there is a clear parallel between the footnote and the judicial presumption. Reasons to infer antipathy ordinarily arise from laws that target discrete and insular minorities marginalized from politics. These disfavored minorities cannot protect themselves in the political process because

prejudice or indifference makes it impossible for them to develop coalitions with other groups to comprise the majority necessary to secure favorable democratic actions. However, when the minority targeted by the law is not marginalized, the political process should be presumed to operate properly to protect their interests. Such favored minorities may not always win in politics, but they are capable of winning through the democratic process by building coalitions and marshaling broader support for their interests. As an example of the capacity of the aged to win in politics, the Court in a footnote referenced “Congress’ recent [favorable] action with respect to mandatory retirement ages” as evidence that “the political system is working.”

In the seminal decision, *City of Cleburne v. Cleburne Living Center*, a conservative majority of the Court denied suspect class status to the mentally disabled. While the focus in the scholarly literature has focused on *Cleburne*’s development of the rational basis with bite standard, the case also involved the Court’s most comprehensive application of the suspect classification standard and reasons for denying such status. The Court explained that rational basis review is the default standard of review when social or economic legislation is at issue. This deferential standard of review that provides “states with wide latitude” is applicable because “the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process.” But such deferential review gives way when laws are “deemed to reflect prejudice or antipathy” toward a burdened class that is not viewed as “worthy or deserving” as others. Laws burdening these classes are subject to a heightened form of scrutiny “because such discrimination is unlikely to be soon rectified by legislative means.”

In denying suspect class status to the disabled, the Court relied on two of the limiting principles that it employed to deny suspect class status to the elderly. First, the Court found that mental disability is a status relevant to a person’s ability to contribute to society. Those that are mentally disabled, the Court explained, “have a reduced ability to cope with and function in the everyday world.” States should therefore be given latitude to classify on the basis of disability status so that they can be responsive to their different capacities. This latitude is even more important, the Court explained, given the great degree in variation amongst the mentally disabled in terms of their ability to function in society. “How this large and diversified group is to be treated under the law is a difficult and often technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.”

Second, the Court emphasized democratic actions favoring the disabled as a reason for not subjecting the classification to heightened scrutiny. The favorable

democratic actions included federal laws outlawing discrimination against the mentally disabled and providing them with the “right to receive ‘appropriate treatment, services, and habitation’ in a setting that is ‘least restrictive of [their] personal liberty’” and conditioning federal education funds on providing the mentally disabled with education integrated with nonmentally disabled children “to the maximum extent appropriate.” It also included the executive regulatory facilitation of “the hiring of the mentally [disabled] into the federal civil service by exempting them from the retirement of competitive examinations.” And finally, the Court cited similar legislation enacted by the State of Texas, the location of the disability discrimination suit in *Cleburne*. This included state legislation conferring upon the mentally disabled “the right to live in the least restrictive setting appropriate to [their] individual needs and abilities.”

These favorable democratic actions evidenced to the Court that the mentally disabled did not suffer a history of discrimination and “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.” The Court concluded that the limiting principle focused on favorable democratic actions provided a basis for distinguishing such favored minorities from those disfavored “who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large.”

The problem with this analysis and the Court’s reliance on the limiting principle of favorable democratic action is that it will result in the denial of claims to nearly every group seeking suspect class status. The federal government and states pass laws all the time that benefit or protect the most disfavored groups. Perhaps the only class of individuals that seems to be consistently persecuted in our society without the benefit of protective laws is sexual deviants. And even for that class, there are probably laws out there repealing more harmful laws and that therefore can be seen as beneficial or protective. It is therefore no accident that not only the Supreme Court but lower federal courts have failed to extend suspect status to virtually every class that has sought such judicial protection from the democratic process. The one exception, in the lower courts at least, has been gays and lesbians—a group whose class status has raised a controversy about the meaning of political power that the Court has thus far avoided. We turn to that controversy in the next section.

However, it is important to first reflect on the path not taken in the development of the suspect classification standard. One could easily imagine a different path in which the Court focused on the history of discrimination due to a general societal dislike for a particular group’s members. Rather than focusing narrowly on instances of “purposeful unequal treatment” or the absence of favorable democratic action, the Court could have approached this history more

holistically, as the plurality did in *Frontiero*. The Court could have also incorporated into its standard other measures of political power such as the class's level of descriptive representation in politics or the degree to which interest groups are mobilized to advance their interests. But a conservative majority of the Court did not travel this path. The Court's choice of an alternative standard emphasizing difficult-to-surmount limiting principles led the demise of the suspect class.

*C. The Current Controversy of the Measurement of Political Power*

In the nearly thirty years since *Cleburne*, gays and lesbians have been the group most active in seeking suspect class status. Between the year that the Court decided *Cleburne* and the year it first addressed a claim by gays and lesbians for suspect classification status in *Romer* eleven years later, most circuit courts of appeals decided the issue. And each court determined that gays and lesbians were not a suspect class. Some of the circuit courts mirroring the actions of the pre-*Frontiero* Supreme Court made suspect classifications by judicial fiat. They asserted without reasons that gays and lesbians were not a suspect class, or cited precedent to that effect that also lacked reasons. Other circuits held that sexual orientation classifications were classifications of conduct, not an immutable status, and as such would not be subject to heightened scrutiny. A third set of courts treated sexual orientation as a status, but concluded that classifications on the basis of the status would not be subject to heightened scrutiny because the Supreme Court in *Bowers v. Hardwick* had decided that the criminalization of sexual conduct involving gays was not subject to heightened scrutiny. As the D.C. Circuit explained in one of the cases, “[i]f the 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.”

Two circuit courts of appeals, the Seventh and Ninth, were the only ones to provide any reasoning within the Supreme Court's suspect classification framework. Both circuits agreed that the group suffered a history of discrimination. However, both denied suspect class status to gays and lesbians on the basis that the group had political power. The Seventh Circuit surmised, “homosexuals are proving that they are not without growing political power.” 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 homosexuals.” It also pointed to a *Chicago Tribune* article reporting that the “Mayor of Chicago participated in a gay rights parade.” From this evidence, the Court rejected any contention that gays and lesbians “have no ability to attract the attention of lawmakers.”

To support its contention that gays and lesbians had political power, the Ninth Circuit relied on more than newspaper anecdotes. It instead followed the path of *Cleburne* and pointed to the passage of legislation favorable to gays and lesbians as evidence of their political power. 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 laws.” It cited examples of such laws in a footnote, which included laws passed in Wisconsin, California, and Michigan, an executive order issued in New York, and regulations in the cities of New York, Los Angeles, Washington D.C., Atlanta, Boston, Philadelphia, Seattle, and San Francisco prohibiting different forms of discrimination on the basis of sexual orientation.<sup>3</sup> The Court concluded that gays and lesbians “are not without political power; that they have the ability to and do ‘attract the attention of the lawmakers,’ as evidenced by such legislation.”

Despite the consistency amongst the circuits in denying suspect class status to gays and lesbians, when the question reached the Supreme Court in *Romer*, it punted on the issue. The Court explained that it did not need to decide the question of suspect status because the challenged sexual orientation classification failed under rational basis review as a law motivated by animus. Justice Scalia writing in dissent disagreed vehemently with the majority’s characterization of the law. In fact, he suggested that gays and lesbians were a political powerful group that used their power “to achiev[e] not merely grudging social toleration, but full social acceptance, of homosexuality.” As evidence of this political power, Justice Scalia pointed to non-discrimination 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. Given that gays and lesbians are 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.” While the majority in *Romer* never addressed the political power of gays and lesbians, we see in Justice Scalia’s dissent a focus on favorable democratic actions as the measure of such power.

After *Romer*, the question of the suspect class status of gays and lesbians entered into a period of dormancy in the Supreme Court and the circuits. But in 2012, the Second Circuit Court of Appeals decided the constitutionality of the federal Defense of Marriage Act’s (DOMA’s) denial of federal benefits to same sex couples. The case marked the first time that any circuit declared gays and

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<sup>3</sup> Missing from this list were any federal laws, which is notable considering that the case in the ninth circuit and that in several other circuits involved challenges to federal laws and regulations discriminating on the basis of sexual orientation.

lesbians to be a suspect class and subjected a sexual orientation to heightened scrutiny. And in doing so, the court systematically applied the suspect classification standard.

The court easily disposed of issues surrounding the history of discrimination that gays and lesbians faced and the relationship of sexual orientation to the ability of the group to contribute to society. It also relied on a broader understanding of the requirements for the nature of the characteristic. Rather than focus on questions of whether sexual orientation is an immutable characteristic, the court cited Supreme Court cases finding it sufficient that the characteristic is obvious or distinguishable enough to define the group as discrete.<sup>4</sup> And it concluded that gays and lesbians certainly met this standard.

Finally, the court in its most extensive analysis of any of the suspect classification factors, found that gays and lesbians lacked political power. But importantly, the Second Circuit used a different measure of political power than that relied on by the Court in *Cleburne* and the other circuit court of appeals in assessing the suspect class status of gays and lesbians. For the court, the question of political power “is not whether homosexuals have achieved political successes over the years; they clearly have.” But instead, it “is whether they have the strength to politically protect themselves from wrongful discrimination.” To assess this strength, the court returned to the measure of political power advanced in *Frontiero* that focused on representation in the decision-making councils. The court explained that like women in the early 1970s, open gays and lesbians were vastly underrepresented “in positions of power and authority.” The fact that there might be more gays and lesbians in politics who have not come out is “attributable to a hostility that excludes them,” suppresses their political activity, and prevents them from building coalitions in politics that advances their political interests. Ultimately, this absence of representation in politics indicated to the court that “homosexuals are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public.”

The Second Circuit’s measurement of political power set off a major debate in the briefs presented to the Supreme Court after it granted the petition for certiorari. Several of the briefs focused on the suspect class status of gays and lesbians. There was some disagreement about whether sexual orientation was an immutable status or malleable behavioral conduct. But the greater focal point of debate was the political power of gays and lesbians. The same sex couple that brought the suit and several of their advocates writing as friends of the court emphasized the *Frontiero* measure of political power. The briefs introduced more evidence of the dramatic underrepresentation of gays and lesbians in democratic

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<sup>4</sup> Lyng at 638.

councils throughout the country and equated this with the group's lack of political power. Many of the opponents to granting suspect class status to gays and lesbians relied on the *Cleburne* measure of political power. They focused on evidence of favorable democratic action in the form of legislation, regulations, and executive orders protective of the interests of gays and lesbians. This indicated to the opponents that the group could attract the attention of lawmakers and had sufficient political power to defend its interests in the democratic process.

The Supreme Court in *Windsor* once again punted on the question of the suspect class status of gays and lesbians. As in *Romer*, the Court determined that it did not need to decide the question; the statute failed under rational basis review because it was motivated by animus. Justice Scalia, along with three other conservative dissenters, once again disagreed but he also did not address the question of the political power of gays and lesbians.

In sum, the question of the political power of groups claiming suspect class status is central to the suspect classification determination. But how to measure such political power remains an open one. The Supreme Court in *Frontiero* adopted a measure of political power that emphasized representation in politics. But later, without engaging *Frontiero*, the Court in *Cleburne* shifted course and adopted another measure of political power focused on favorable democratic actions. Prior to *Windsor* two circuits addressing questions of political power involving gays and lesbians employed the *Cleburne* measure, but the Second Circuit most recently relied on the *Frontiero* measure. Which, if any, is the right measure of political power? Given the dominance of the *Cleburne* measure of political power, in the next part I will empirically test the hypothesis that democratic action favorable to a group is the product of the political power of the group. Because of the availability of data that provides the opportunity to measure the relationship between favorable democratic action and political voting strength, I will test this hypothesis on a group whose status as a suspect class is very much under-determined in doctrine, the poor.

## II. TESTING THE SUPREME COURT'S HYPOTHESIS ABOUT POLITICAL POWER

[Intro and Roadmap to Part]

### A. *The Curious Case of the Suspect De-Classification of Wealth*

It is generally understood that the Supreme Court does not consider wealth to be a suspect classification. How did the Court arrive at this determination? As examined in Part I, the Court in the mid-1960s case of *Harper v. Virginia State Board of Elections* appeared to find wealth to be a suspect classification. In the

case involving a challenge to a state poll tax, the Court explained, “[l]ines drawn on the basis of wealth or property, like those of race are traditionally disfavored.” The Court justified this apparent finding of wealth as a suspect classification status on the basis of the irrelevance of the characteristic to an individual’s ability to contribute to society. Specifically, in *Harper*, the Court determined that “[w]ealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.”

In a case decided three years later, the Court re-confirmed its determination that wealth was a suspect classification. In a case addressing the constitutionality of a state action depriving inmates awaiting trial access to absentee ballots, the Court cited *Harper* for its conclusion that wealth and race are “two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.”<sup>5</sup> In subsequent cases, Justice Douglas sometimes writing alone and at other times with the more liberal justices in concurrences and in dissents re-asserted the suspect classification status of wealth. No other justice contradicted these assertions.

The same year that the Court decided *Frontiero*, it addressed a challenge in the case of *San Antonio Independent School District v. Rodriguez* to a law alleged to classify on the basis of wealth. Scholars, courts, and commentators often attribute to this case the denial of suspect class status to the poor. The Court in *Rodriguez*, however, never decided the question. To understand what the Court ultimately decided, it is necessary to provide an account of the facts and the reason for the rejection of the equal protection claim.

*Rodriguez* involved a challenge to Texas’s system of financing public education. The financing system apportioned money to school districts on the basis of property taxes and therefore resulted in the unequal distribution of money to property-tax-rich districts and property-tax-poor districts. Poor school children, who resided in districts having low property tax bases, challenged the financing system under the equal protection clause claiming that it discriminating on the basis of a suspect status and failed to meet strict scrutiny. The Court held that strict scrutiny was not applicable in the case, but it did not determine that wealth was not a suspect classification. Instead, it addressed three separate definitions of the class that the law discriminated against and found them all wanting for reasons unrelated to the suspect class status of the poor. The first definition of the class that the law allegedly discriminated against was “‘poor’ persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally ‘indigent.’” This definition of the class

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<sup>5</sup> The Court did not ultimately apply strict scrutiny to the absentee ballot restriction because it found that the distinctions in the statute were “not drawn on the basis of wealth or race.”

was most closely related to the indigent class found suspect in the criminal process cases and Harper. In rejecting the claim of discrimination against this class, the Court argued first that the challengers to the financing system “made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level.” Since there are poor persons in property rich districts and non-poor persons in property poor districts, the Court determined that the financing system did not classify on the basis of wealth. Second, the Court explained that the Texas financing system was distinguishable from prior wealth classifications in that it did not absolutely deprive the indigents of a desired benefit. Instead, the most that the class can claim is that poor persons residing in property poor districts are receiving a lower quality education. The Court concluded, “for these two reasons – the absence of any evidence that the financing system discriminates against any definable category of ‘poor’ people or that it results in the absolute deprivation of education – the disadvantaged class is not susceptible of identification in traditional terms.”

As an alternative, the challengers argued that the Texas financing system discriminated against a class of individuals “who are relatively poorer than others.” To the extent that the challengers to the law sought to define the class in these terms, the Court determined that the class did not prove that “the financing system [was] designed to operate to the peculiar disadvantage to the comparatively poor.” Even if the challenges could prove the disadvantaging purpose of the law, they had not shown that “a class of this size and diversity could ever claim the special protection accorded ‘suspect’ classes.”

Finally, the challengers argued that the law discriminated “against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts.” The Court determined that this class was too large, diverse, and amorphous to be considered suspect. This latter class, which would include schoolchildren of poor, middle, class and wealthy households, had “none of the traditional indicia of suspectness.” “The class is not 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 process.” The Court did not elaborate on why this particular class did not meet the suspect classification standard, but it seems clear that the Court was referring to was not the poor.

As further evidence that the Court in *Rodriguez* did not deny suspect class status to the poor, the dissenters, who included Justice Douglas, a staunch advocate for the poor in his jurisprudence, never engaged the question. The dissent disputed the majority’s contention that the Texas financing system in its mal-distribution of resources to property tax rich and property tax poor districts

did not classify on the basis of wealth. The justices argued that through its maldistribution of resources, the system disadvantaged children in property-tax-poor districts relative to property-tax-rich districts and made public education a function of wealth. Therefore, the financing system, the dissenter contended, classified on the basis of wealth. And on the basis of precedence, the classification should have been subjected to heightened scrutiny.

Despite the fact *Rodriguez* never directly addressed the question of the suspect class status of the poor, the Court used the case as the jumping off point for de-classifying the poor. The first move in the de-classification of the poor was the Court's re-characterization of past cases. The Court re-interpreted these cases from ones that essentially declared wealth a suspect classifications to ones that only found such classifications suspect when they deprived the poor of a fundamental right to a fair criminal process or to vote. In *Maher v. Roe*, a case involving a challenge to a state welfare regulation that provided funds for childbirth but did not for abortions, the Court asserted it "ha[d] never held that financial need alone identifies a suspect class for purposes of equal protection analysis." For this proposition, the Court cited *Rodriguez*. The second move was to use this re-characterization to deny suspect class status to the poor. In a later case, the Court quoted *Maher v. Roe*'s re-characterization of past cases and concluded from it "that poverty, standing alone is not a suspect classification."

Thus, the Court by judicial fiat de-classified wealth from suspect class status. Specifically, despite the availability of the suspect classification standard articulated in *Frontiero*, the Court concluded on the basis of disingenuous re-interpretations of *Rodriguez* that the poor were not a suspect class. With this precedent available to cite, the Court has never squarely addressed the status of the poor under the suspect classification standard. The next part turns to the question of how the suspect classification standard might be applied to the poor. This analysis suggests that the question of political power would be central to the determination.

### *B. Applying the Suspect Classification Standard to the Poor*

How would the suspect classification standard be applied to the poor? A court would need to assess whether the poor as a class, or wealth classifications more generally, met the four criteria under the suspect classification standard: (1) whether the poor "exhibit obvious, immutable, or distinguishable characteristics that define them as a discrete group; (2) whether the poor have suffered a history of discrimination; (3) whether wealth is relevant to the individual's ability to contribute to society; and (4) whether the poor have sufficient political power to command the attention of lawmakers.

## THE MEASUREMENT OF POWER

The poor should meet the first three criteria rather easily. First, being poor is an obvious and distinguishable characteristic. People determine who is poor on the basis of where they live, what they possess, and their demonstrated levels of education among other things. While some poor persons and families are integrated into working and middle class neighborhoods, are able to hide their lack of possessions, and have attained high levels of education, this variation among the poor should not be a basis for denying suspect class status any more than variations among African Americans in the color of their skin and their performance of race should be a basis for denial. Second, the poor have suffered a well-chronicled history of discrimination. Third, wealth has no relevance to an individual's ability to contribute to society. The poor are not distinguishable on the basis of a characteristic relevant to their ability, but rather based on the money that they possess.

The remaining question that has been central to the Supreme Court's suspect classification determinations is whether the poor lack the political power necessary to protect their interests in the democratic process. As a facial matter, this would seem to depend on the measure of political power that the Court uses. If it relies on the *Frontiero* measure, it seems clear that the poor lack political power because of their vast under-representation in decision-making councils. As a result of the still growing need for money in politics, poor persons lacking means and often networks to those means are unable to run campaigns or win office. Looking at the median worth of Congresspersons, it is clear that there are no poor people in Congress. And it is probably fair to venture that there are very few, if any, poor people in state and local office. The *Frontiero* measure of political power suggests that because of their absence from politics, the poor are not positioned to protect their interests through the democratic process. The Court should therefore subject wealth classifications to heightened scrutiny.

But if it 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 a host of measures protecting or benefitting the poor, particularly during the ten year period in the latter half of the 1960s and the first half of the 1970s in which the government conducted a War on Poverty. There are even recent examples of high profile legislation favorable to the poor such as the Affordable Care Act and the increase in minimum wages in several states and local jurisdictions. Now it is true that there are many examples of democratic actions harmful to the poor, but the Court would likely attribute that to interest group politics, which necessarily includes winners and losers. What the favorable democratic actions suggest is that the poor can attract the attention of lawmakers and protect their interests in the democratic process. The Court should therefore not provide the group with special judicial protection from the

democratic process.

Which measure of political power is the right one? Given the prominence of the *Cleburne* measure in the jurisprudence of both the Supreme Court and lower courts, the next section offers a theoretical model of the relationship between favorable democratic actions and political voting strength. We will then use this model to test the hypothesis that democratic actions reflect a particular group's political power.

*C. A Model for Measuring the Relationship between Favorable Democratic Actions and Political Power*

The main assumption under the *Cleburne* standard is that legislators' vote for laws in response to the influence of the group being protected or favored. These laws are assumed to not merely be the product of ideology or conceptions of the public good. If they were then the laws would not indicate anything about political power. This main assumption is consistent with a leading theory of political behavior. Under the rational choice model, politicians are principally motivated in their actions by the desire to be re-elected. They will favor bills and oppose bills on the basis of a calculation about what improves their chances of being re-elected. The two things most relevant to re-election are votes and campaign finance. Therefore, under the rational choice model, politicians are motivated to engage in actions that will maximize both.

Politicians will therefore be responsive to the interest of voters and campaign contributors and spenders. On issues that divide voters, the politicians will either seek to avoid taking a position or when she has to, she will take a position that maximizes votes. According to the leading pluralist model of group behavior, individuals form groups of shared interests that develop coalitions with other groups to influence politicians. The coalition that comprises the largest number of voters should win the support of their representative for actions favorable to the group. The larger the group in a political unit, the easier it should be for that group to develop the coalition necessary to secure favorable actions from representatives. The larger group has to attract fewer coalition partners to influence politicians to act in its behavior than a smaller group. This model thus predicts that the larger the group in the political unit, the more likely that elected representatives will favor laws beneficial to that group.

That condition might not hold in two circumstances. First, according to a defective pluralist model, when a group is marginalized from politics in that other groups are unwilling to enter into coalitions with that group out of antipathy or prejudice, then so long as the group comprises a minority in a political unit, it will not be able to influence politics no matter their size. This to varying degrees

describes the situation of African Americans in parts of the South since the Voting Rights Act extended the vote to members of the group in 1965. The federal government's response to this political marginalization of African Americans was to enforce the VRA to require that southern states draw legislative majority-minority districts— districts comprising more than a majority of African Americans. In these districts, African Americans did not have to develop coalitions with whites in order to elect candidates that supported laws favorable to the group. In these circumstances, when the political marginalized group comprises less than a majority of the political unit, there will be a negligible correlation between the size of the group in the unit and the likelihood that the politician will favor laws beneficial to the group. Instead, such laws are more likely to be the product of ideology, conceptions of the public good, or some other factor. If there is an absence of such a correlation and political marginalization explains the absence, then the poor and perhaps other groups that benefit from favorable democratic actions should not be considered classes able to attract the attention of lawmakers.

Second, under an alternative theory of group political behavior, public choice, smaller groups have an organizational advantage over larger groups. Smaller groups are better able to coordinate action and to police free rider problems than larger groups. These smaller groups form into special interest groups that influence politicians with campaign resources, votes, and promises of future employment in exchange for actions favorable to the group. The politician then supports these actions favorable to the special interest group but usually cloaks them behind a veil of public regarding purposes to avoid attention from the more diffuse, disorganized public. When this account of politics is true, the size of the group in a political unit would also not correlate positively with the likelihood with favorable votes from the representative. Instead, smaller groups in a unit would be more capable of securing favorable democratic actions than larger groups. If the absence of correlation between group size and representative support for favorable democratic actions is explained by this public choice account, then there is much less justification for treating the class as suspect.

In the next section, I will test the hypothesis that the larger the proportion of a group in a political unit, the more likely that the representative will vote for legislation favorable to the group. I will rely on census data identifying the proportion of poor in a district and our unique collection of anti-poverty legislation from 1960s to the present to assess the correlation. If there is a correlation between proportion poor in a district and the likelihood that representatives support legislation favorable to the poor, it would suggest that favorable democratic action is an appropriate measure of political power. But if there is no correlation, then the question is which of the two conditions describes

## THE MEASUREMENT OF POWER

the political status of the poor—are they a politically marginalized group as the pluralist model might suggest or still a potentially politically powerful group under the public choice model. I address this question after discussing the findings from the test of the hypothesis about political power in the next section.

### *D. Assessing Status, Measuring Power: Are the Poor a Discrete and Insular Minority*

#### Data being collected:

1. Representative information – party, race, gender
2. District information – demographic variables including race and income composition (incorporate other variables from E. Scott Adler district data)
3. Roll call votes on anti-poverty legislation - we are coding of legislation found in Congressional Quarterly policy tracker and matching it with roll call information found in govtrack

#### Statistical tools:

Regression analysis

Causal inference? Not sure about what to use as a treatment effect.

Matching?

## III. ALTERNATIVE MEASURES OF POLITICAL POWER

### *A. Descriptive Representation in Politics*

### *B. Political Responsiveness*

## CONCLUSION

## THE MEASUREMENT OF POWER