

MINIMUM RESPONSIVENESS AND THE POLITICAL EXCLUSION OF THE POOR

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I

INTRODUCTION

Representative government is a principal feature of American democracy. The prevailing view is that a representative government is one that is responsive to the views and interests of the people.¹ Scholars often define “the people” as a majority subset of the whole and measure the representativeness of government in terms of its responsiveness to the interests of the majority of the electorate.² Supreme Court doctrine has been seen as following this prevailing view by establishing a “one person, one vote” requirement that is explained as prioritizing majority rule to the exclusion of other law-of-democracy values.³

But there is an alternative, richer account of representative government and responsiveness that incorporates additional values beyond simple adherence to

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1. See HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* 209 (1967) (“Representing . . . means acting in the interest of the represented, in a manner responsive to them.”); KENNY J. WHITBY, *THE COLOR OF REPRESENTATION: CONGRESSIONAL BEHAVIOR AND BLACK INTERESTS* 5 (1997) (contending that the main component of substantive representation is policy responsiveness); Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103, 1149 (2002) (“Responsiveness is the linchpin of democratic governance and the sine qua non of a representative democracy.”). Even the debate between descriptive and substantive representation is about how to best secure a more responsive government. See, e.g., JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 44–45 (1958) (arguing in favor of inclusion of descriptive members of all classes into the government because of the danger that the interests of the excluded will be overlooked and “seen with very different eyes from those of the person whom it directly concerns”); MELISSA S. WILLIAMS, *VOICE, TRUST, AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION* 3 (1998) (linking descriptive representation to responsiveness to “the distinctive political interests” of marginalized groups).

2. See BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS’ POLICY PREFERENCES* 2 (1992) (describing studies that show that the government does adequately on this measure of representativeness).

3. See *infra* text and accompanying note 102.

majority rule. According to this account, “the people” should also be understood in a disaggregated sense as individuals—and particularly groups of individuals—with shared interests and experiences. Since there is no monolithic majority of people with shared interests, but instead shifting majorities based on combinations of various minority interests,⁴ a government is representative if it is open to the consideration of all interests and preferences existent in society, with equal consideration serving as the ideal.⁵ Under this view, responsiveness cannot be measured simply as the degree to which government policy tracks majority preferences, but must also take into account the consideration given to minority group views.

Consideration is a rather amorphous concept, but we define it as the process by which minority group interests are heard by elected actors in the political process. It is only on the basis of consideration, and the process of bargaining and compromise within the political process, that minority interests can evolve into majoritarian public policy. Lack of consideration of minority group interests within the political process is problematic because when a particular minority group’s interests are overlooked—whether it is because one party takes for granted the group’s support or neither party seeks the group’s support for fear of alienating median-swing voters—there are systemic democratic consequences. In particular, to the extent that a group and its interests are excluded from consideration, the members of the group are less likely to vote or participate in the democratic process, and, equally important, democratic government has failed in its principal objective of being representative.

We argue that overlooked Supreme Court doctrine in the area of voting rights takes heed of this concern and seeks to ensure that the political process provides fair consideration of minority group interests. In this article we propose a new paradigm for understanding the Court’s view of the constitutional and democratic requirements for representative government, which we term minimum responsiveness.

To understand the minimum responsiveness doctrine properly, it is necessary to situate it within the Court’s broader jurisprudence on the law of democracy. Too frequently, it has been assumed that the marginalization of minority group interests must be addressed via antidiscrimination principles.⁶ However, by nesting the principles underlying representative government in antidiscrimination doctrine, its applicability would be limited unnecessarily to suspect classes. The minimum responsiveness standard instead has a doctrinal

4. See V. O. KEY, *POLITICS, PARTIES, AND PRESSURE GROUPS* 207 (1947) (explaining that given the differentiation in American society, it is difficult for any single interest group to constitute a majority and govern and “[a] combination of interests is necessary to win elections and to govern”); see also *THE FEDERALIST* NO. 10 (James Madison).

5. See, e.g., LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE GILDED AGE* 252 (2008) (“One of the most basic principles of democracy is the notion that every citizen’s preferences should count equally in the realm of politics and government.”).

6. *Contra* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 *HARV. L. REV.* 1, 44–45 (1976) (placing the cases establishing this standard within the antidiscrimination paradigm).

home in the Court's burgeoning jurisprudence on the law of democracy and, as a result, its applicability is not dependent on the prescriptions of antidiscrimination doctrine. The requirement that there be a minimum level of responsiveness is therefore applicable not only to politically marginalized racial and gender groups, but also to groups such as the poor that fall outside of antidiscrimination discourse.

We flesh out this new paradigm by offering a case study of the minimum responsiveness standard and its applicability to the poor. In part II, we argue that defects in the political process are a source of nonresponsiveness to the interests of politically marginalized groups. In particular, in the American two-party competition model, both parties have incentives to appeal to median-swing voters at the expense of marginalized group interests. In part III, we offer examples of this defect in the political process by describing the divergence in responsiveness to southern Blacks and the poor by the Democratic Party and the lack of responsiveness by the Republican Party to these two groups over the last forty years. We do this both anecdotally, by examining the parties' support for major legislation consistent with the interests of these groups, and empirically, through social-science studies showing changes in responsiveness to these groups over time. We argue from this evidence that in the current political context, the poor should be considered a politically excluded group, to which neither of the political parties is responsive. In part IV, we describe the Court's development of a minimum responsiveness standard and argue for the standard's applicability to politically excluded groups such as the poor. As part of this discussion, we show that this standard is appropriately located within the Court's law-of-democracy jurisprudence. In part V, we offer brief suggestions for changes in democratic organizational structures that would provide one or both of the parties with incentives to become, at the very least, minimally responsive to the poor.

II

SOURCES OF NONRESPONSIVENESS TO MARGINALIZED GROUP INTERESTS

The sources of nonresponsiveness to marginalized group interests cannot be understood without reference to political parties.⁷ Parties are an integral part of the process of creating representative government. Through their competition for the support of various groups and interests in order to win elections,⁸ parties

7. See Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1608 (1999) (“[T]he central fact of democratic politics . . . is that individual participation can be meaningful only when mediated through organizational forms,” such as political parties.).

8. This prevailing view of parties is contrary to the classical view held by Edmund Burke, who conceived of parties as “a body of men united, for promulgating by their joint endeavors the national interest, upon some particular principle in which they are all agreed.” MARC J. HETERINGTON & WILLIAM J. KEEFE, *PARTIES, POLITICS, AND PUBLIC POLICY IN AMERICA* 1 (2007) (quoting EDMUND BURKE, *WORKS*, vol. 1, 375 (1897)). Most scholars agree that this does not accurately describe the two major political parties in the United States. *See id.* at 2.

are central to any democratic government because they are the essential instrument through which varied interests are considered, and thus represented, in the political process.⁹ The conventional view is that two-party competition will result in the inclusion and mobilization of all interests and groups because every vote is needed to secure a majority and ultimate control of the governing apparatus.¹⁰ Even though one party must lose in any election, the interests of the losing minority are still represented in the political process by an opposition that can bargain with the majority and could later emerge as the governing party.

Consistent with this view is the orthodoxy that lack of political participation by a politically marginalized group leads to the parties' lack of responsiveness to that group's interests. Since the competitive political market requires that the two parties compete for all voters in order to put together a majority coalition, a lack of responsiveness to a particular group by both political parties can occur only when that group of voters chooses not to participate. V. O. Key famously expressed this view of nonresponsiveness when he stated, "The blunt truth is that politicians and officials are under no compulsion to pay much heed to classes and groups of citizens that do not vote."¹¹ Within this perspective lies the argument that there is little that courts and legislatures can do to address nonresponsiveness to marginalized group interests except remove barriers to participation such as registration requirements and voter identification laws.¹²

Paul Frymer has recently challenged the conventional view that party competition leads to inclusive parties and inclusive government.¹³ He argues that the system of two-party competition creates incentives for parties to appeal to "median, 'swing' voters."¹⁴ In order to capture the majority needed to win elections, he contends, centrist voters are pivotal; therefore, to the extent that peripheral group interests conflict with those in the center, neither party will

9. See E. E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* 1, 62 (1970) (describing political parties as the creator of democracy and modern democracy as being "unthinkable save in terms of the parties" because of their role in securing representative government that considers the interests of a multitude of people); Carl A. Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 52 ("To mobilize a majority of the votes in an election, each political party must appeal to a variety of 'interests' and a wide spectrum of opinion.").

10. See, e.g., HETERINGTON & KEEFE, *supra* note 8, at 39 (2007) (describing the conventional view of parties as inclusive of all elements in society).

11. KEY, *supra* note 4, at 527; see also Kenneth L. Karst, *Participation and Hope*, 45 UCLA L. REV. 1761, 1767 (1998) ("If you don't participate, you can be pretty sure that public officers aren't paying attention to you.").

12. See FRANCIS FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* 17 (1988) (viewing registration barriers as the biggest impediment to voting); RAYMOND WOLFINGER & STEVEN J. ROSENSTONE, *WHO VOTES?* 61–62 (1980).

13. PAUL FRYMER, *UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA* 6–7 (1999) (challenging the conventional assumption of parties as inherently inclusive). His argument draws from the median voter theory famously promulgated by Anthony Downs. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 114–22 (1985).

14. FRYMER, *supra* note 13, at 8.

seek to appeal to these interests for fear of losing elections.¹⁵ Frymer describes this dynamic in the context of capture, in which an ideologically peripheral group (Blacks) that overwhelmingly votes for one party (the Democratic Party) is taken for granted by that party while it appeals to median voters (moderate-to-conservative white voters).¹⁶ But “captured” minorities are not the only groups underserved by a two-party system. Frymer overlooks the fact that this dynamic also results in exclusion, in which an ideologically peripheral group is ignored by *both* parties because of the perceived cost of inclusion in terms of interest-based conflict with median voters.

This party nonresponsiveness resulting from exclusion ultimately affects participation by members of politically marginalized groups.¹⁷ As E. E. Schattschneider argued, “[a]bstention reflects the suppression of the options and alternatives that reflect the needs of the nonparticipants.”¹⁸ In other words, contrary to Key’s account, it is nonresponsiveness that causes lack of participation; members of groups on the periphery abstain because they perceive no differences between the parties in terms of responsiveness to their interests.¹⁹

A recent shift in the political science literature on the causes of lack of political participation seems to provide further support for the view that lack of responsiveness to marginalized groups’ interests is caused by something more than lack of participation by members of that particular group. In the 1970s and 1980s, the prevailing view in political science was that resources—particularly education and to a lesser extent income—were positively correlated with

15. Frymer was not the first political scientist to identify the tendency of parties to appeal to the center at the exclusion of the interests of individuals on the periphery. E.E. Schattschneider identified in a different era the tendency of the two parties to compete for sixty percent of the electorate that voted while ignoring the forty percent on the periphery that did not. E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 97–113 (1960).

16. FRYMER *supra* note 13, at 7–10 (describing the process of capture and providing an example of Blacks overwhelmingly voting for the Democratic Party, which takes them for granted and instead appeals to moderate-to-conservative white voters). Professor Terry Smith has described the racially disparate impact of the median voter model:

The median voter model is inherently inconsistent with [a] view of race as a defining issue because the median voter—who is white—is strongly skewed to one side of the political continuum on the race question, while black voters are strongly skewed to the opposite extreme. Moreover, even if the gap between black and white perspectives on issues of race is overstated, the racial harm of the median voter theory lies as much in the common perception among political leaders that the median voter does not support black interests as it does in parties’ efforts to cater to the reality of the white median voter’s beliefs about race.

Terry Smith, *Parties and Transformative Politics*, 100 COLUM. L. REV. 845, 852 (2000). These racial harms are analogous to the harms that inure to the poor when they are shut out of the process of party coalition-building.

17. DOWNS, *supra* note 13, at 39 (explaining that when a voter perceives the difference between his expected utility incomes from voting for one party as opposed to voting for another to be zero, he abstains).

18. E.E. SCHATTSCHEIDER, *supra* note 15, at 105.

19. In other words, the expected benefits from voting are exceeded by the costs. DOWNS, *supra* note 13, at 39.

voting.²⁰ This “resource model of participation” thus attributed individual decisions to participate to personal characteristics and the so-called costs of voting in terms of time, money, and knowledge. This model, which was consistent with the conventional account that lack of participation leads to lack of responsiveness, attributed the nonparticipation of the poor to their lack of resources as opposed to the lack of responsiveness by the parties and elected officials.

This consensus in favor of the resource model of participation began to break down because of the inability to account for the paradoxical trend that as average Americans were becoming more educated over time their willingness to vote had declined.²¹ Mobilization theorists found a solution to this paradox by examining the benefits side of voting.²² They found 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.”²³ Political parties play an important role in creating these benefits to voting by mobilizing individuals and groups—contacting voters and urging them to vote for a particular candidate on the basis of shared interests—and it is the choice of political parties to focus these mobilization efforts on middle- and upper-class individuals that has led marginalized groups, like the poor, to abstain from voting.²⁴

A more recent empirical study by some of the original proponents of the resource model of participation provides further support for mobilization theory.²⁵ This study, which includes the previously omitted variable “political interest” in its empirical model, found that it, not education or income, has the most substantial impact on participation.²⁶ Political interest is associated more with the benefits side of voting and is primarily generated through the mobilization efforts of political parties to attract voters. Thus, mobilization theory supports the argument that it is the lack of responsiveness—through public policy promulgated by legislators while in office and mobilization efforts during campaign season—that results in lack of participation. The sources of

20. WOLFINGER & ROSENSTONE, *supra* note 12, at 24 (finding that education has the most powerful independent effect on turnout); SIDNEY VERBA & NORMAN H. NIE, *PARTICIPATION IN AMERICA* 13 (1972) (finding that job, education, and income are determinants of political participation).

21. Richard A. Brody, *The Puzzle of Participation in America*, in *THE NEW AMERICAN POLITICAL SYSTEM* 287 (Anthony King ed., 1978).

22. STEVEN J. ROSENSTONE & JOHN MARK HANSEN, *MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA* 5 (1993) (“People participate in politics not so much because of who they are but because of the political choices and incentives they are offered.”).

23. *Id.* at 6.

24. *Id.* at 213 (“[C]hanging patterns of mobilization by parties, campaigns, and social movements account for at least half of the decline in electoral participation since the 1960s.”).

25. Henry E. Brady, Sidney Verba, & Kay Lehman Schlozman, *Beyond SES: A Resource Model of Political Participation*, 89 *AM. POL. SCI. REV.* 271 (1995).

26. *Id.* at 283.

responsiveness bias therefore must be found elsewhere such as within the incentives structures of the two-party system.

Vulnerable groups, such as Blacks²⁷ and the poor,²⁸ have historically been most in danger of having their interests excluded from the political process as a result of the defects within the incentive structure of the two-party system.²⁹ A history of discrimination and political marginalization has left these two groups without representation in the political process at different periods of time.³⁰ During the past forty years, however, the political fortunes of these two groups have diverged dramatically. Blacks, particularly those who live in the South, have emerged from a state of political exclusion to one of political inclusion. Prior to 1970, the southern wing of the Democratic Party, which had historically dominated southern politics, consistently ignored Blacks' interests; today, however, that same party is dependent on their support for election.³¹ At the same time, the poor, who were once the putative beneficiaries of the Democratic Party's "war on poverty" in the 1960s, have become increasingly politically invisible as Democrats seek the support of the middle class at the expense of policies favorable to the poor. In addition, the Republican Party during this period has shown little interest in incorporating the poor into its electoral coalition.³² As a result, the poor are in a state of political exclusion not unlike the position of southern Blacks before the 1970s: their interests and needs are rarely considered in the political process. In response, the poor, for the most part, abstain from voting.³³ Like the political exclusion of southern

27. Blacks are obviously included among the poor. Although this overlap may present complexities requiring a more granular analysis in a different context, it does not for present purposes. In this article, we seek only to identify a constitutional floor for representation below which neither group may fall.

28. The poor are usually described as those living below the official federal poverty line. U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES 2006 (2007), available at <http://www.census.gov/prod/2007pubs/p60-233.pdf>. As local efforts to raise the poverty line upward demonstrate, this metric is underinclusive. DOUGLAS J. BESHAROV & PETER GERMANIS, UNIVERSITY OF MARYLAND WELFARE REFORM ACADEMY, RECONSIDERING THE FEDERAL POVERTY MEASURE (2004), available at <http://www.welfareacademy.org/pubs/poverty/povmeasure.description.pdf>. Moreover, because the poor are not a static subset of the population—families and individuals move in and out of poverty over time—the descriptor paints as aberrational something that is much more common than widely appreciated. Mark R. Rank, *Toward a New Understanding of American Poverty*, 20 WASH. U. J.L. & POL'Y 17, 32–35 (2006). Finally, while household incomes may lift families above poverty status, individual workers' wages in the United States are astonishingly low. David Cay Johnston, *Joe the Plumber's Taxes*, 121 TAX NOTES 471 (2008) (finding that more than half of all workers had an annual salary of less than \$25,000 in 2007).

29. See *infra* III.

30. See *infra* III.

31. See *infra* III.

32. The Republican Party has appealed to voters in these groups on the basis of shared social values, like abortion and gay marriage. See THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA 67–77 (2005). While this is an important step, the unwillingness to appeal to interests distinct to these groups, such as civil rights and social welfare, acts as a continued impediment to inclusiveness. See *infra* III.

33. In the 2004 presidential election, less than forty percent of the poor reported voting, the lowest percentage of any income class. U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE

Blacks prior to the 1970s, the current political exclusion of the poor raises important concerns about the representativeness of American democracy.

III

THE DIVERGENCE IN PARTY RESPONSIVENESS TO SOUTHERN BLACKS AND THE POOR

During his 1964 State of the Union Address, President Lyndon Johnson declared a “war on poverty.”³⁴ As part of this war, the Democratic-controlled Congress enacted legislation over the next four years that established social-welfare programs targeting the structural sources of poverty including inadequate jobs, health, and education, as well as programs targeting the immediate needs of the poor. Addressing the structural sources of poverty, Congress enacted the Economic Opportunity Act in 1964, which established Community Action Programs that empowered the poor by incorporating them into local committees responsible for designing and administering antipoverty programs and services, such as job training.³⁵ The next year, Congress passed the Elementary and Secondary Education Act, which increased federal spending on education and focused this spending on educationally disadvantaged children living in impoverished areas.³⁶ It also amended the Social Security Act to establish Medicare, a federal health-insurance program for the elderly, and Medicaid, a federal health-insurance program for the poor.³⁷ In addition to this legislation focused on addressing the structural sources of poverty, Congress targeted the immediate needs of the poor by making permanent the Food Stamp Program, which appropriated money to address the nutritional needs of the poor, and by increasing the minimum wage to the highest real-value level in its history.³⁸

ELECTION OF 2004 (2005), available at <http://www.census.gov/population/www/socdemo/voting/cps2004.html>.

34. In his address, President Johnson described the broad goals of the war on poverty:

The war on poverty is not a struggle simply to support people, to make them dependent on the generosity of others. It is a struggle to give people a chance. It is an effort to allow them to develop and use their capacities, as we have been allowed to use ours, so that they can share, as others share, in the promise of this nation. . . . It strikes at the causes, not just the consequences of poverty.

Bernard R. Gifford, *War on Poverty: Assumptions, History, and Results, a Flawed but Important Effort*, in *THE GREAT SOCIETY AND ITS LEGACY: TWENTY YEARS OF SOCIAL POLICY* 60, 63 (Marshall Kaplan & Peggy L. Cuciti eds., 1986).

35. SAR A. LEVITAN, *THE GREAT SOCIETY'S POOR LAW: A NEW APPROACH TO POVERTY* ix (1969).

36. Patrick McGuinn & Frederick Hess, *Freedom from Ignorance: Great Society and the Evolution of the Elementary and Secondary Education Act*, in *THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM* 289, 297–98 (F. Piven & R. Cloward eds., 2005).

37. Edward Berkowitz, *Medicare, The Great Society's Enduring National Health Insurance Program*, in *THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM* 320, 320 (F. Piven & R. Cloward eds., 2005).

38. BARTELS, *supra* note 5, at 226.

Measuring responsiveness in terms of the crude measure of passage of major legislation, the war on poverty represented an explosion in Democratic Party responsiveness to the poor that had not been seen since the Great Depression. This increased responsiveness was driven in part by moral considerations and the influence of intellectuals such as Michael Harrington, whose book *The Other America: Poverty in the United States* poignantly described the extent of poverty and led to a parade of commentary on the issue.³⁹ Political considerations also played an important role. Presidents John F. Kennedy and Johnson approached the antipoverty program with an eye towards maintaining the poor, which comprised nearly twenty percent of the national population in 1964, as part of the Democratic Party's electoral coalition that had prevailed since the New Deal.⁴⁰ This proved to be especially important in light of the defection of many southern Whites from the Democratic Party as a result of the national party's promotion of a civil-rights agenda favorable to Blacks.⁴¹ In total, the Democratic Party, with the exception of southern Democrats, who viewed legislation like the Economic Opportunity Act as disproportionately benefiting Blacks,⁴² overwhelmingly supported the "war on poverty" legislation, while the Republican Party, consistent with its historical leaning since the New Deal towards the more affluent classes, expressed lukewarm support for these programs.⁴³

In contrast to the national Democratic Party's efforts to incorporate the poor into its electoral coalition, the southern wing of the Democratic Party in the one-party-dominated South continued to resist the growing influence of Blacks that flowed from the dramatic increase in registration and voting stimulated by the Voting Rights Act (VRA) of 1965.⁴⁴ Southern Democratic candidates continued to seek the support of white voters who saw growing

39. Gifford, *supra* note 34, at 61.

40. See, e.g., JAMES T. PATTERSON, AMERICA'S STRUGGLE AGAINST POVERTY IN THE TWENTIETH CENTURY 130 (2000) (describing President Kennedy's efforts to keep poor voters in the Democratic electoral coalition through the creation of antipoverty programs).

41. See Merle Black, *The Transformation of the Southern Democratic Party*, 66 J. POL. 1001, 1010 (2004) (describing the devastating combination of racial and economic liberalism required to maintain southern white support). The efforts to maintain the New Deal Coalition ultimately proved unsuccessful as racial animosity proved central to white southerners' exodus. Kevin Phillips estimates that the civil rights program probably accounted for between one third and one half of white southerners' flight to the Republican Party. KEVIN PHILLIPS, AMERICAN THEOCRACY: THE PERILS AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY 180 (2006).

42. See LAWSON BOWLING, SHAPERS OF THE GREAT DEBATE ON THE GREAT SOCIETY 105 (2005).

43. JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974 538-40 (1996).

44. See ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 264 (2000) (noting that approximately a million new voters were registered in the South within a few years after the Act was passed).

black political power as a threat.⁴⁵ On the basis of this support, three segregationist governors were elected to office in the late 1960s.⁴⁶ In addition, a majority of southern Democratic congressmen catered to this constituency when they voted against the Fair Housing Act of 1968 and the reauthorization of the VRA in 1970.⁴⁷ For those few white elected officials who were responsive to the interests of black voters through their support for civil rights legislation, such responsiveness often proved costly; for example, of the five Democratic southern congressmen who voted in favor of the VRA in 1965, four lost their seats in the 1966 election.⁴⁸ Again, measuring responsiveness in terms of support for major legislation, Blacks in the South remained an excluded political minority through the early 1970s.

Over the next forty years, the position of Blacks evolved from that of a politically excluded group to which most southern Democratic elected officials proved unresponsive, to one in which the Democratic Party proved to be greatly responsive. By 2000, Blacks comprised approximately forty percent of Democratic voters in the South.⁴⁹ Along with these advances in black political participation came an increase in responsiveness to black interests by Democratic Party elected officials.⁵⁰ As an example of this increased responsiveness, over ninety percent of southern Democratic members of Congress supported the Voting Rights Amendment Act of 1982 and the Civil Rights Act of 1991,⁵¹ while the Voting Rights Act of 2006 received unanimous support. Although this increase in responsiveness by the Democratic Party has been impressive, it is important not to overstate the political progress of Blacks in the South.⁵² The exodus of many Whites from the Democratic Party has led to the hegemony of a Republican Party in the South that fails to consider black interests in much the same way that the Democratic Party had failed to forty years earlier.

For the poor, the war on poverty in the 1960s and early 1970s evolved into a war on the poor in the 1980s and 1990s. Conservative economic policies and

45. In the period after the passage of the VRA in 1965, the perceived threat of growing black political power amongst white constituents and elected officials can be inferred from the fact that representatives of political jurisdictions with high black populations were less responsive to the interests of Blacks than elected officials in political jurisdictions with relatively low black populations. See Charles Bullock & Susan A. MacManus, *Policy Responsiveness to the Black Electorate: Programmatic Versus Symbolic Representation*, 9 AM. POL. Q. 357, 365 (1981); Merle Black, *Racial Composition of Congressional Districts and Support for Federal Voting Rights in the American South*, 59 SOC. SCI. Q. 435, 443 (1978).

46. Black, *supra* note 45, at 444.

47. *Id.* at 443–44.

48. *Id.* at 444.

49. See Black, *supra* note 41, at 1011.

50. *Id.* at 1002 (describing the shift of the Democratic Party from “[t]he party of white supremacy” to “the party of racial inclusion and ethnic diversity”).

51. WHITBY, *supra* note 1, at 32, 65.

52. It is also important to note that the comparisons between responsiveness to Blacks and the poor are relative; the authors do not contend that the VRA or any other legal tool has adequately remedied the problem of electoral capture as it applies to Blacks.

political rhetoric combined with virtual abandonment by the Democratic Party resulted in the poor being both economically more vulnerable and politically more impotent. Republican Presidents Richard Nixon and Ronald Reagan eliminated many of the “war on poverty” programs and cut spending on antipoverty measures.⁵³ With the exception of an evolving state health-insurance program for children living in poverty,⁵⁴ there has been little in terms of antipoverty legislation since the establishment of the relatively successful Earned Income Tax Credit (EITC) in 1972. Even the success of the EITC, which provides tax credits to the working poor, has been offset by the declining real value of the minimum wage.⁵⁵ The decreased spending and lack of legislation responsive to the interests and needs of the poor over the past forty years has continued in spite of the fact that 12.5 % of Americans continue to live below the poverty line,⁵⁶ a measure that some argue understates the current levels of poverty.⁵⁷ This is exactly the same percentage that lived below the poverty line in 1971⁵⁸ when American support for the war on poverty began to wane.

The success of the conservative strategy of racialization and personalization of poverty contributed importantly to the political marginalization of the poor. Conservatives employed stories about “welfare queens,” who were described as “black wom[e]n with a long-term addiction to the dole and a willingness to use childbirth as a way to prolong and increase [their] welfare check[s].”⁵⁹ Many Americans were influenced by this type of rhetoric and adopted stereotypes of the poor as black (even though most were not), undeserving, and lacking in morals, values, and work ethic.⁶⁰ This shift from a view of poverty as driven by structural defects in the economic system to poverty as driven by race and personal defects in the individual also led many Americans to believe that government had a limited role in alleviating the problem.⁶¹

53. See Frances Fox Piven & Richard A. Cloward, *The Politics of the Great Society*, in *THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM* 253, 264–65 (Sidney Milkis & Jerome M. Mileur eds., 2005).

54. For a description of state health-insurance programs for low-income children, see JOEL HANDLER & YEHESEKEL HASENFELD, *BLAME WELFARE, IGNORE POVERTY AND INEQUALITY* 122–28 (2007).

55. BARTELS, *supra* note 5, at 246.

56. U.S. CENSUS BUREAU, *POVERTY STATUS OF PEOPLE BY FAMILY RELATIONSHIP, RACE, AND HISPANIC ORIGIN: 1959 TO 2007* (2008), available at <http://www.census.gov/hhes/www/poverty/histpov/perindex.html>.

57. HANDLER & HASENFELD, *supra* note 54, at 23.

58. U.S. CENSUS BUREAU, *supra* note 56.

59. Joe Soss et al., *Setting the Terms of Relief: Explaining State Policy Choices in the Devolution Revolution*, 45 *AM. J. POL. SCI.* 378, 390 (2001).

60. See William JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 13–18 (1987) (describing the growing influence of this conservative perspective in the 1980s).

61. *Id.* at 6–18 (describing and assessing the effects of the shifting views of poverty and the poor).

As a result of this shift, the Democratic Party has over the last twenty years largely abandoned the poor as part of its effort to bring middle-class whites, the median-swing voters in recent elections, back into its electoral coalition. This abandonment was best symbolized by President Bill Clinton's support for the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 that garnered about half the votes of congressional Democrats.⁶² This Act transferred responsibility over welfare programs to the states and imposed stiff new work requirements without addressing the structural deficiencies in the low-wage labor market or the inadequate education and job training of the poor. The Act also limited lifetime eligibility for the receipt of aid to five years.⁶³

By 2004, promises of programs and legislation appealing to the interests of the middle class dominated the Democratic Party platform, and the only measures directed to the poor were support for an increase in the minimum wage and the EITC. These policies, which were low on the Democratic agenda, merely serve as Band-Aids to the problems of poverty.⁶⁴ In 2008, Senator Barack Obama's presidential campaign focused on putting America's "middle class first."⁶⁵ The poor seemed to be a distant second for Obama,⁶⁶ who along with Republican opponent Senator John McCain, rarely addressed their interests on the campaign trail and proposed few new policies that would specifically target the poor.⁶⁷ Consequently, from the perspective of policy responsiveness in the form of favorable legislation, the poor seemed to have become politically invisible. The Democratic Party has recently paid very little

62. In the Senate, seventeen Democrats voted in favor of the Act, thirteen opposed; in the House, seventy voted in favor of the Act and seventy-seven opposed. All but two Republicans in Congress, both in the House, supported the bill.

63. HANDLER & HASENFELD, *supra* note 54, at 1.

64. Strong at Home, Respected in the World, The 2004 Democratic National Platform for America (July 27, 2004), *available at* www.democrats.org/pdfs/2004platform.pdf.

65. *See, e.g.*, Senator Barack Obama, Prepared Remarks for Obama's Event in Dover, New Hampshire, THE PAGE, Sept. 12, 2008, *available at* <http://thepage.time.com/prepared-remarks-for-obamas-event-in-dover-new-hampshire/> (describing how if he were elected he would be a President that put the "middle class first" and outlining a set of campaign promises directed towards this group of people).

66. The importance of the middle class was further demonstrated by the Obama Administration's establishment of a middle-class task force led by Vice President-elect Joseph Biden and including four prospective cabinet members as well as presidential advisers. *Biden to Run Middle Class Task Force*, CBS NEWS, Dec. 21, 2008, *available at* <http://www.cbsnews.com/stories/2008/12/21/politics/main4680733.shtml> (last visited July 7, 2009). The task force is designed to "ensure the middle class is 'no longer being left behind.'" *Id.*

67. Although the 2008 Democratic Party platform described poverty as a "national priority," the only specific policies proposed were those that have essentially become boilerplate components of prior Democratic platforms, including expansion of the Earned Income Tax Credit, raising the minimum wage, and indexing it to inflation. *See* *Renewing America's Promise*, The 2008 Democratic National Platform *available at* <http://www.democrats.org/a/party/platform.html>. The only two discussions of the poor and poverty in the Republican Party platform involved poverty abroad and poverty associated with single-parent families. *See* 2008 Republican Platform *available at* <http://platform.gop.com/2008Platform.pdf>. No specific policies were proposed to address the economic needs and interests of the domestic poor. *Id.*

attention to the interests and needs of the poor and the Republican Party has done little to fill the responsiveness deficit.

The account of divergence in the inclusion of southern Blacks into the political process through increasing Democratic party responsiveness and the exclusion of the poor from the political process through increasing Democratic Party neglect over the past forty years is supported by empirical studies drawn from the social sciences. A study of responsiveness prior to, and immediately after, the enactment of the VRA showed somewhat paradoxically that the more Blacks there were in a particular district, the less likely that white Democratic elected official representing that district would support legislation favorable to Blacks.⁶⁸ By the mid-1970s, this inverse relationship had been replaced by a positive relationship between the proportion of Blacks in a district and the responsiveness of political actors to black interests.⁶⁹ The VRA, which not only increased voting by southern Blacks but also led to the creation of districts in which Blacks constituted a majority, has been an important source of increased responsiveness by southern Democrats as a whole.⁷⁰ By the mid-1980s, southern Democrats were just as liberal as nonsouthern Democrats in their voting pattern on civil rights issues; the responsiveness bias favoring southern Whites over Blacks had virtually disappeared.⁷¹

For the poor, the account of interest group exclusion based on the lack of favorable legislation and policies over the past forty years also finds support in the empirical studies. The one study to examine responsiveness bias in the 1970s

68. See Black, *supra* note 45, at 443 (describing this inverse relationship in the roll-call votes of members of Congress for the Voting Rights Act in 1965). This pattern of roll-call voting is consistent with what V. O. Key famously described as the threat hypothesis, which claims that the more Blacks there are in a district, the more whites perceive a threat to their hegemony and the greater their hostility to Blacks. V. O. KEY, *SOUTHERN POLITICS IN STATE AND NATION* 5–10 (1949).

69. Early studies showed a curvilinear relationship between the proportion of Blacks in a district and responsiveness of elected officials; responsiveness increased linearly up to a point at which Blacks comprised approximately twenty-five percent of the electorate, decreased up to a point at which Blacks made up thirty-five percent of the electorate, and then again increased linearly. Black, *supra* note 45, at 445; Charles S. Bullock, *Congressional Voting and the Mobilization of a Black Electorate in the South*, 43 J. POL. 662, 670 (1981). A subsequent study found that the differences in responsiveness and increased conservatism of districts with approximately thirty-percent black population had to do with the rural character of these districts. Michael W. Combs et al., *Black Constituents and Congressional Roll Call Votes*, 37 W. POL. Q. 424, 430 (1984). Later empirical studies introduced an interaction black-urban variable into their regressions and found a linear relationship in urban districts between the proportion of Blacks and responsiveness. Kenny Whitby, *Measuring Congressional Responsiveness to the Policy Interests of Black Constituents*, 68 SOC. SCI. Q. 367, 374 (1987). The most recent empirical studies have shown a linear relationship without the introduction of this interactive term. Mary Herring, *Legislative Responsiveness to Black Constituents in Three Deep South States*, 52 J. POL. 740, 752 (1990); Vincent L. Hutchings, *Issue Salience and Support for Civil Rights Legislation Among Southern Democrats*, 23 LEG. STUD. Q. 521, 522 (1998).

70. See Charles S. Bullock, *The Impact of Changing the Racial Composition of Congressional Districts on Legislators' Roll Call Behavior*, 23 AMER. POL. SCI. Q. 141, 148 (1995) (demonstrating that aggressive drawing of majority-black districts in the 1990 round of redistricting increased responsiveness).

71. Kenny J. Whitby & Franklin D. Gilliam, Jr., *A Longitudinal Analysis of Competing Explanations for the Transformation of Southern Congressional Politics*, 53 J. POL. 504, 510 (1991).

found that “the vast majority of cities exhibit[ed] higher levels of responsiveness to high-income citizens and whites than to low-income citizens and blacks.”⁷² Thus, early evidence indicated the ephemeral nature of the increased responsiveness of elected officials during the war on poverty.⁷³ A more recent study examined public opinion polls on major changes in U.S. policy from 1981 to 2002. It found that on issues in which the rich and the poor disagree, the policy outcomes were strongly related to the preferences of the rich and “wholly unrelated to the preferences of the poor.”⁷⁴ In a similarly troubling study, Larry Bartels examined the voting patterns and specific roll-call votes of U.S. senators in the late 1980s and early 1990s and found that on bills involving minimum wage, civil rights, government spending, and abortion, “the views of low-income constituents had no discernible impact on the voting behavior of their senators.”⁷⁵ The consistency with which the preferences of the poor were not adhered to by the senators strongly supports an inference that their interests were not even incorporated into the interest-bargaining and compromises of the political process. As further support for this inference, Bartels found that the poor were not only politically irrelevant to Republican senators, but also to Democratic senators, who were found to have paid no attention to the views of the poor.⁷⁶ The poor, at least according to these empirical studies, have essentially become an excluded group in the political process.

Both accounts of the sources of lack of responsiveness to marginalized group interests—lack of participation and defects in the political process—provide plausible explanations for this divergence in responsiveness between southern Blacks and the poor that are not mutually exclusive. According to the conventional account that attributes lack of responsiveness to lack of participation, political officials have become responsive to southern Blacks because they vote and unresponsive to the poor because they do not.⁷⁷ The data provide some support for this view. Specifically, the proportion of individuals below the poverty line that reported voting in presidential elections has declined from above fifty percent in 1964 to less than forty percent in 2004, while the proportion of Blacks that reported voting has remained relatively stable at just below sixty percent since the 1968 presidential election.⁷⁸

72. Paul D. Schumaker & Russell W. Getter, *Responsiveness Bias in 51 American Communities*, 21 AM. J. POL. SCI. 247, 257 (1977).

73. See PIVEN & CLOWARD, *supra* note 53, at 266 (“[O]nce the extraordinary political conditions that had spurred the Great Society programs receded, the political influence temporarily exercised by the minority poor in American politics evaporated.”).

74. Martin Gilens, *Inequality and Democratic Responsiveness*, 69 POL. SCI. Q. 778, 788 (2005).

75. BARTELS, *supra* note 5, at 253–54.

76. *Id.* at 254.

77. See *supra* text and accompanying notes 11 and 12.

78. U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004, available at <http://www.census.gov/population/www/socdemo/voting/cps2004.html>; U.S. CENSUS BUREAU, VOTER PARTICIPATION IN THE NATIONAL ELECTION: NOVEMBER 1964, available at <http://www.census.gov/population/www/socdemo/voting/p20-143.html> (last visited Nov. 20, 2008). These

However, the alternative account—that lack of responsiveness is caused by particular defects in the two-party system that create incentives to exclude particular groups—can also explain the stable participation of southern Blacks and the decline in turnout amongst the poor over the past forty years.⁷⁹ Specifically, the data provide support for the view that changes to democratic organizational structures mandated by the Constitution, and later the VRA, created incentives for political parties to be responsive to southern Blacks.⁸⁰ These changes included the invalidation of certain multimember districts under the Equal Protection Clause and the mandated creation of majority-minority districts under the VRA.⁸¹ At the same time, no such changes in organizational structures have been specifically targeted towards creating incentives for responsiveness to the interests of the poor.

It is difficult to disentangle the effect of each of these sources on the increase in party responsiveness to southern Blacks and the decline in responsiveness to the poor. Nonetheless it seems relatively uncontroversial to assume that the divergence in responsiveness to these two groups are driven by both the changes in participation rates of these groups and defects in the incentive structures of the two-party system. To the extent that political parties' lack of responsiveness is caused by defects in the political process, such nonresponsiveness raises issues of a constitutional dimension. In particular, the Court has established a much overlooked standard under the Equal Protection Clause to ensure representative government through “minimum responsiveness” by political parties to groups with shared interests.

This constitutional protection is especially important for a marginalized group like the poor because of the lack of a foreseeable social movement that will contribute to shifts in national politics analogous to the civil rights movement of the 1950s and 1960s and the changes it brought to southern politics for Blacks. In addition, it is unlikely that the political parties will voluntarily change, through legislation, the organizational structures of the two-party system in a manner responsive to the poor. Such responsive legislation to the poor presupposes a level of responsiveness that is nonexistent.

numbers exceed the percentage of persons that actually voted, but there is no evidence that misreporting has varied over time. *See, e.g.,* Lee Sigelman, *The Nonvoting Voter in Voting Research*, 26 J. POL. 47, 54-55 (1981).

79. Studies have generally shown that particular districting arrangements, such as majority-minority districts in which a particular minority racial group constitutes a majority of voters, has led to an increase in responsiveness by political officials and greater participation by Blacks and Latinos in those districts as compared to non-majority-minority districts. *See e.g.,* CLAUDINE GAY, THE EFFECT OF MINORITY DISTRICTS AND MINORITY REPRESENTATION ON POLITICAL PARTICIPATION IN CALIFORNIA 55-57 (2001); Matt A. Barreto et al., *The Mobilizing Effect of Majority-Minority Districts on Latino Turnout*, 98 AMER. POL. SCI. REV. 65, 74 (2004); *but see* Kimball Brace et al., *Minority Turnout and the Creation of Majority-Minority Districts*, 23 AM. POL. Q. 190, 201 (1995) (finding that the creation of majority-minority districts “does not invariably lead to greater participation”).

80. *See supra* note 79.

81. *See infra* IV.

IV

THE MINIMUM RESPONSIVENESS STANDARD

Chief Justice Earl Warren once described the legislative-reapportionment cases as his most important contribution to the law.⁸² That is rather remarkable considering that he was the author of *Brown v. Board of Education*,⁸³ which declared school segregation unconstitutional, and that he was an important contributor to the criminal-procedure revolution that established an array of constitutional protections for criminal defendants.⁸⁴ Of course, when assessing the effect of the reapportionment cases on the redistricting practices of every state in the Union, Chief Justice Warren's description seems not only more defensible but understated.

What has been overlooked by many scholars is that these cases stand for more than the requirement that states maintain equal-population legislative districts; the cases established as well a constitutional principle of fair representation premised on majority rule. This principle would later incorporate a requirement of minimum responsiveness to politically marginalized groups. In light of the states' consistent compliance with the equal-population principle over the last two redistricting cycles, this latter, minimum responsiveness requirement is the more relevant constitutional concern given the prevalence of politically marginalized groups like southern Blacks and the poor.

The "reapportionment revolution" began in 1962 when the Supreme Court entered what had previously been described as the "political thicket."⁸⁵ In the absence of constitutional constraints, states maintained malapportioned districts to protect incumbents and empower minority voters, particularly rural voters.⁸⁶ Generally, states would either draw districts in accordance with county lines or maintain systems of voting that gave geographical units equal voting power irrespective of differences in population.⁸⁷ The growing movement of people to urban centers over the course of the twentieth century increased the differences in population between counties and led to vastly unequal weighting of urban and rural votes in many states.⁸⁸ In light of the examples of gross malapportionment of districts, the Court in *Baker v. Carr*⁸⁹ held that the

82. MICHAL R. BELKNAP, *THE SUPREME COURT UNDER EARL WARREN, 1953-1969* 109 (2005).

83. 347 U.S. 483 (1954).

84. For a description of the most important criminal-procedure cases of the Warren Court era, see YALE KASIMAR, *THE WARREN COURT AND CRIMINAL JUSTICE IN THE WARREN COURT, A RETROSPECTIVE* 116-58 (Bernard Schwartz ed., 1996).

85. See *Colegrove v. Green*, 328 U.S. 549, 555 (1946). It could be argued that the Supreme Court had already entered the political thicket two years earlier in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), in which it held a redistricting arrangement that disenfranchised Blacks in Tuskegee, Alabama, unconstitutional under the Fifteenth Amendment.

86. Auerbach, *supra* note 9, at 68-70.

87. *Id.*

88. *Id.*

89. 369 U.S. 186 (1962).

Fourteenth Amendment's Equal Protection Clause established a constitutional constraint on the establishment and maintenance of these districts. Over the next three terms the Court would identify the constraint and its theoretical basis.

In *Gray v. Sanders*, the Court, addressing a party primary voting system, held that the Equal Protection Clause required one person, one vote.⁹⁰ In other words, all individuals regardless of race, sex, occupation, income, residence or any other characteristic must have an equally weighted vote;⁹¹ therefore, all geographical voting units had to be comprised of an equal number of individuals. The Court would later apply this one person, one vote standard to federal congressional districts under Article I, § 2 of the Constitution.⁹² In these early cases, the Court grounded the one person, one vote standard on the idea of participatory equality and the theory derived from prior case law that the right to vote is preservative of all other rights.⁹³ Much as the denial of the right to vote makes the exercise of other rights illusory, the Court determined that the unequal weighting of votes through malapportioned districts would abridge the right to vote and concomitantly impair other rights.⁹⁴

The Court further developed the theoretical justification for one person, one vote in *Reynolds v. Sims*, in which it held malapportioned state legislative districts unconstitutional because they undermined representative government by “sanction[ing] minority control of state legislative bodies” and impeding government responsiveness to “the popular will.”⁹⁵ Representative government, the Court insisted, required majority rule and responsiveness to the majority of the electorate.⁹⁶ Fair representation in accordance with majority rule therefore required the “opportunity for equal participation by all voters in the election of state legislators.”⁹⁷ As for minority groups, such as rural voters, that states sought to protect through malapportioned districts, the Court explained that “[o]ur constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures.”⁹⁸

Justice Potter Stewart, unsatisfied with the Court's association of representative government with majority rule, dissented and provided an alternative theory of representative government. For Justice Stewart,

90. *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

91. *Id.* at 379.

92. Specifically in *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964), the Court explained that the phrase “by the People of the several States” as stated in Art. I, § 2, required that “one man's vote in a congressional election [be] worth as much as another's.”

93. *Id.* at 17. *See also* *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (explaining that voting is regarded as “a fundamental political right, because preservative of all rights”).

94. *Id.* at 17–18.

95. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

96. *Id.* (“In a society grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators.”).

97. *Id.*

98. *Id.* at 566.

representative government involved “a process of accommodating group interests through democratic institutional arrangements.”⁹⁹ The function of government, therefore, is “to channel the numerous opinions, interests, and abilities of the people of a State into the making of the State’s public policy.”¹⁰⁰ In accordance with this theory, legislative apportionment should not be focused on ensuring equally populous legislative districts, but rather on safeguarding “effective representation in the State’s legislature, in cooperation with other organs of political power, of the various groups and interests making up the electorate.”¹⁰¹ Fair representation, therefore, meant responsiveness in the form of fair consideration of the views of the “medley of component voices” representing the many diverse interests that make up society.¹⁰²

Although initially expressed only in dissent, Justice Stewart’s notion of representative government would soon be incorporated, in limited form, into the Court’s fair representation principle. In the often overlooked case of *Fortson v. Dorsey*,¹⁰³ decided a year after *Reynolds*, voters challenged multimember districts as contrary to one person, one vote. Multimember districts are districts in which constituents elect multiple representatives to a legislative body. In order to be consistent with one person, one vote, multimember districts must be proportionally larger in terms of population than a single-member district. In other words, a multimember district in which constituents elect two representatives must be twice as large in terms of population as a single-member district. The multimember districts in *Fortson* met the proportionality requirement;¹⁰⁴ nonetheless, voters challenged the district because it had the potential, because of its size, to nullify the preferences of a minority group of voters.¹⁰⁵

According to the fair-representation-as-majority-rule principle espoused in *Reynolds*, the fact that a districting arrangement nullified the preferences of a minority subset of voters would seem irrelevant since there are ostensibly other constitutional means of protecting minorities. Nonetheless, instead of simply denying the claim, the Court announced in dicta that, while it had not been

99. *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 749 (Stewart, J., dissenting).

100. *Id.*

101. *Id.*

102. *Id.* at 751. Other commentators writing at the time were also critical of the *Reynolds* majority narrow notion of fair representation as majority rule as opposed to fair representation as the inclusion of all interests in the political process. See Auerbach, *supra* note 9, at 51; Phil C. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 277. *Reynolds*, however, was equivocal in its invocation of majority rule as the underlying rationale for one-person, one-vote. The Court was concerned that Alabama’s malapportionment “den[ie]d majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.” *Reynolds*, 377 U.S. at 565. Thus, majority rule did not appear to be the Court’s sole measure of “fair and effective” representation. Rather, Alabama had overweighted minority interests in a manner that was not “relevant to the permissible purposes of legislative apportionment.” *Id.*

103. 379 U.S. 433 (1965).

104. *Id.* at 437.

105. *Id.*

proven in the case, “[i]t might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.”¹⁰⁶ The next year, the Court would intimate in another case that apportionment schemes other than multimember districts could also operate to have this effect.¹⁰⁷

Despite the establishment of a standard that seemed to open the door for some limited requirement of group-based responsiveness, the meaning of this ambiguous standard would not be made clear for another eight years. Part of the confusion with the new standard and why it would lie dormant had to do with the missing component in the Court’s development of the fair representation principle—political parties.¹⁰⁸ The individualist, fair-representation principle based on majority rule that was developed in *Reynolds* seems to imagine a democracy comprised of atomistic parts that vote in a manner that produces a majority that must be respected and a minority that is irrelevant. The more group-based, fair representation principle described by Justice Stewart, on the other hand, seemed to imagine a representative government comprised of an infinite number of interest groups that must be accommodated directly in the governing apparatus. Both of these models of representative government are undertheorized because they omit political parties, which are instrumental to ensuring responsiveness both to the majority and to the varied group interests that comprise society, but which also have the capacity to exclude groups from the political process.

In two cases decided in the early 1970s, the Court established a minimum responsiveness standard reliant on the ambiguous dicta in *Fortson* that incorporated a pivotal role for political parties. The standard formulated was one of minimum responsiveness because it did not require that governments enact public policy favorable to particular group interests or that groups be guaranteed the election of candidates responsive to their interests. It merely required that groups have their interests considered by one or both of the parties so as to ensure that they are part of the bargaining and compromise of the political process.¹⁰⁹

In *Whitcomb v. Chavis*,¹¹⁰ residents of a ghetto area in Marion County, Indiana, complained that the multimember districting arrangement diluted their voting strength. The residents described themselves as a group of poor, black

106. *Id.* at 439.

107. *Burns v. Richardson*, 384 U.S. 73, 88 (1966).

108. See William P. Irwin, *Representation and Election: The Reapportionment Cases in Retrospect*, 67 MICH. L. REV. 730, 737 (1969) (criticizing the failure of the Court to acknowledge the existence of political parties in its development of a theory of representation).

109. The central role of political parties is now expressly acknowledged in the Court’s most recent law of democracy decisions. See, e.g., *Clingman v. Beaver*, 544 U.S. 581 (2005) (recognizing as an important state interest the preservation of political parties as “viable and identifiable interest groups”).

110. 403 U.S. 124 (1971).

individuals that have distinctive interests in “urban renewal and rehabilitation, health care, employment training and opportunities, welfare and relief of the poor, law enforcement, quality of education, and antidiscrimination measures” that were underrepresented in the political process.¹¹¹ As evidence of the underrepresentation of their interests, they cited the fact that disproportionately few of the legislators elected from 1960 to 1968 had been residents of the ghetto.¹¹²

The Court rejected this proxy for responsiveness and held that the ghetto residents had been fairly represented in the political process on the basis of three factors. First, the political process was open because poor Blacks were able “to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen.”¹¹³ Second, there was no evidence that the political parties were unresponsive to this particular group, noting that the ghetto residents had failed to produce evidence demonstrating “that inhabitants of the ghetto were regularly excluded from the slates of both parties, thus denying them the chance of occupying legislative seats.”¹¹⁴ Finally, the Court relied on historical contextual factors. It inferred, probably on the basis of its support for the war on poverty during the 1960s, that the Democratic Party was responsive to the interests of ghetto residents.¹¹⁵ The Court therefore determined that the ghetto residents would not have any “justifiable complaints about representation” if Democrats, as opposed to Republicans, had won four of the five elections from 1960 to 1968.¹¹⁶ It concluded that the “canceling out” of voting strength that the ghetto residents complained about was not based on a “built-in bias against poor Negroes” but instead seemed to be “a mere euphemism for political defeat at the polls.”¹¹⁷

In the second case, *White v. Regester*,¹¹⁸ the Court for the first time found a constitutional violation of the minimum responsiveness standard. In this case, members of the black community in Dallas County, Texas, challenged the multimember districting scheme as a violation of the Equal Protection Clause. As in *Whitcomb*, the Court focused on the openness and responsiveness of the party system. This time, it found that the party system excluded Blacks and their interests from the political process and invalidated the districting arrangement. Looking to nearly identical factors as it did in *Whitcomb*, the Court in *White* first cited the district court’s findings that members of the black community were not able to participate in the Democratic Party’s affairs,

111. *Id.* at 132.

112. *Id.* at 133.

113. *Id.* at 149.

114. *Id.* at 150.

115. *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

116. *Id.*

117. *Id.* at 151.

118. 412 U.S. 755 (1973).

concluding that they had been “effectively excluded from participation in the Democratic Party primary selection process.”¹¹⁹ In addition, the evidence that only two Blacks had been slated since Reconstruction by the Dallas Committee for Responsible Government (DCRG), a White-dominated organization that controlled the Democratic Party’s slating process, demonstrated to the Court that Blacks were not equally represented on those occasions in which candidates were chosen.¹²⁰

Second, the Court relied on evidence that the Democratic Party was unresponsive to black interests because the party “did not need the support of the Negro community to win elections in the county and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community.”¹²¹ Finally, it looked to historical context and the use by the DCRG of racist campaign tactics to defeat the black communities’ candidates of choice in previous elections.¹²² The Court concluded on the basis of this evidence that Blacks in Dallas County had “less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.”¹²³

As shown by *Whitcomb* and *White*, the Court in its development of a minimum responsiveness standard focused on three factors: the openness of the parties to the membership of the particular group, the openness of the parties to putting forward candidates responsive to the group, and the prior responsiveness of at least one of the political parties to the group’s interests.¹²⁴ The constitutional requirement of minimum responsiveness did *not* mandate that the group’s party or candidate win a certain number of seats in elections.¹²⁵ In fact, the Court first explained in *Whitcomb* that there was no requirement that the group’s party or candidate of choice win *any* election;¹²⁶ it then reiterated in *White* that it is not enough that a group “has not had legislative seats in proportion to its voting potential.”¹²⁷ The minimum responsiveness standard required only that members of minority groups have an opportunity to participate and elect a legislator of their choice, with a key determinant being that at least one of the parties be responsive to the group’s interests.

Congress ultimately expanded the minimum responsiveness standard through its power under Section 5 of the Fourteenth Amendment in its reauthorization of the VRA in 1982. Adopting the language of *White*, Congress amended Section 2 of the VRA to prohibit election laws that result in

119. *Id.* at 767.

120. *Id.* at 766.

121. *Id.* at 767.

122. *Id.*

123. *White v. Regester*, 412 U.S. 755 (1973).

124. *See Whitcomb*, 403 U.S. at 149–52.

125. *See id.* at 153.

126. *Id.*

127. *White*, 412 U.S. at 765.

discrimination on account of race, which can be proven by showing that “the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [racial or language minority groups] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”¹²⁸ The Section 2 standard would also be used to determine whether changes in election laws by southern jurisdictions would be approved by the Attorney General of the United States under Section 5 of the Act.¹²⁹

The application of the minimum responsiveness standard through the vehicle of the VRA has assured not only minimum responsiveness in southern jurisdictions that have historically excluded racial minorities from the political process, but also nearly proportionate representation in the U.S. House of Representatives and several state legislatures in southern jurisdictions through the Department of Justice’s aggressive enforcement of the Act.¹³⁰ The minimum-responsive standard as established in the Act has thus emerged as another important part of the story of increasing responsiveness by the southern Democratic Party to black interests.¹³¹

In spite of the focus of the minimum responsiveness standard on ensuring representative government, many scholars view the standard as merely part of Equal Protection antidiscrimination doctrine.¹³² Consistent with this doctrine, only districting arrangements that harm suspect classes, including racial and ethnic minorities, are entitled to the level of scrutiny that would generally invalidate practices that exclude groups from the political process. Since the poor are not a suspect class,¹³³ the standard would seem to offer limited protection for members of this group. But an examination of the evolution of the minimum responsiveness standard reveals that it is not about ensuring that officials do not discriminate against members of a particular group, but instead about addressing defects in representative government.

128. 42 U.S.C.A. § 1973 (a)–(b) (West 2009).

129. MAURICE T. CUNNINGHAM, MAXIMIZATION, WHATEVER THE COST: RACE, REDISTRICTING, AND THE DEPARTMENT OF JUSTICE 5, 71–73 (2001) (describing the Department of Justice’s incorporation of the § 2 results test into the § 5 preclearance process).

130. *Id.* at 3–5.

131. The only real questions concerning the VRA’s establishment of a minimum responsiveness standard have to do with the contours of that standard, not its existence. *See, e.g.*, Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1502–03 (1991) (proposing to remedy systematic diminution of a minority representative’s influence on the legislative process by, inter alia, requiring supermajority votes on issues of importance).

132. *See, e.g.*, Brest, *supra* note 6, at 43–44. Most scholars treat *Whitcomb* as being simply about race, *see, e.g.*, Heather Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1673 (2001), when in fact it is a complex case involving the interaction of race and class. For example, the Court excluded middle-class Blacks from the class of plaintiffs finding that they did not share interests with the poorer Blacks of the ghetto. *Whitcomb*, 403 U.S. at 131 (describing the decision of the lower court to exclude middle-class Blacks from the class).

133. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973).

As Justice Stewart explained in the vote dilution case, *City of Mobile v. Bolden*, “the focus in [these] cases has been on the lack of representation [that] multimember districts afford various elements of the voting population in a system of representative legislative democracy.”¹³⁴ Concurring in judgment in the same case, Justice Stevens reasoned that “there is no national interest in creating an incentive to define political groups by racial characteristics. But if the Constitution were interpreted to give more favorable treatment to a racial minority alleging an unconstitutional impairment of its political strength than it gives to other identifiable groups making the same claim, such an incentive would inevitably result.”¹³⁵

Though sometimes couching vote dilution claims in the language of discrimination, the Court has not distinguished between groups such that those considered suspect classes, like racial minorities, are deemed entitled to more protection than other groups; instead, it has identified in the minimum responsiveness standard a requirement to protect racial, ethnic, economic, and political groups equally by ensuring inclusion through an opportunity to participate in the political process and elect a candidate of choice.¹³⁶ In fact, in the most recent case in which the Court addressed a constitutional vote dilution claim, *Davis v. Bandemer*, it described a minimum responsiveness standard focused more on ensuring an open democratic process than on finding discriminatory conduct.¹³⁷ Specifically, Justice White, writing for a plurality, explained that “[t]he question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process” as measured by “the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning

134. *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1979).

135. *See id.* at 90 (Stevens, J., concurring).

136. *See Rogers v. Lodge*, 458 U.S. 613, 616 (1982); *Karcher v. Daggett*, 462 U.S. 725, 748 (1983) (Stevens J., concurring); *Davis v. Bandemer*, 478 U.S. 111, 130–31 (1986).

137. *Davis*, 478 U.S. at 130–33. There have been other more recent *constitutional* challenges to districting, but those have been directed to the process of drawing the districts as opposed to the effect of the districting arrangement on the dilution of the voting strength of a particular minority group. *See League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399, 416–17 (2006) (addressing a Constitution-based claim that “[a] decision . . . to effect mid-decennial redistricting, when solely motivated by partisan objectives, violates equal protection . . . because it serves no legitimate public purpose and burdens one group because of its political opinions and affiliation”); *Vieth v. Jubelirer*, 541 U.S. 267, 272–73 (2004) (addressing a Constitution-based complaint that the districts created by the legislative act “were ‘meandering and irregular,’ and ‘ignor[ed] all traditional districting criteria, including the preservation of local government boundaries, solely for the sake of partisan advantage”) (citing *Juris. Statement* 136a, ¶ 22, 135a, ¶ 20); *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (addressing a Fourteenth Amendment allegation that “the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a ‘color-blind’ electoral process,” while specifically recognizing that “appellants did not claim that the . . . reapportionment plan unconstitutionally ‘diluted’ white voting strength”). However, more recent cases such as *Vieth* and *LULAC* have addressed statutory-based vote dilution claims under the VRA. The evolution of the statutory standard is beyond the scope of this paper.

candidate.”¹³⁸ As a law-of-democracy doctrine, the minimum responsiveness standard is therefore obviously much more protective of groups, particularly those ordinarily excluded from constitutional recognition, than the antidiscrimination doctrine.

V

CONCLUSION

The constitutional minimum responsiveness standard has created opportunities for the inclusion of groups, such as southern Blacks, who had been historically excluded from the political process. To the extent that empirical studies show that neither the Democratic nor the Republican Party take into account the interests of the poor when governing, the minimum responsiveness standard is directly applicable; however, any challenge to districting arrangements requires a localized appraisal of party openness and responsiveness.¹³⁹ Specifically, such challenge would require an assessment of the openness of the party process to the participation of the poor in terms of party membership, putting forward candidates responsive to the poor, and the history of the local party’s responsiveness to the interests of the poor.

In addition, an assessment of the applicability of the minimum responsiveness standard requires an examination of the extent to which the poor have shared interests. It has been assumed throughout this article that the poor, because of their shared economic status, have shared interest; however, the applicability of the standard depends on proof of this assumption.

But assuming that districting arrangements result in the exclusion of the poor and their interests from the political process, it is necessary to identify the proper mechanisms for ensuring a more inclusive and responsive party system and government. The solution applied to southern Blacks under the VRA has been mandating the establishment and maintenance of majority–minority districts that ensure that this minority group has the opportunity to participate in the political process and elect candidates responsive to its interests. This structural approach seeks to change the electoral incentives of party actors by shifting black voters from the periphery to the median in certain districts.¹⁴⁰ Evidence seems to show that this approach has been successful; party candidates in these districts have had no choice but to appeal to, and be responsive to, the interests of black constituents in order to win elections.

138. *Davis*, 478 U.S. at 132–33. Although writing on behalf of a plurality of four, Justice Powell and Stevens, who concurred in part and dissented in part agreed that the Equal Protection Clause protected political groups. *Id.* at 161.

139. See *supra* III.

140. FRYMER, *supra* note 13, at 21 (describing the importance of changing electoral incentive structures to put parties “in a position to establish themselves as democratizing agents”); Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. Rev. 1411, 1417 (2002) (arguing for the need for a structural approach to address group voting harms).

However, we should be cautious about applying a remedy that seems successful for southern Blacks to the poor prior to addressing the viability of such an approach for the poor. For now, it is enough to identify the problem of the excluded poor and to identify a potential constitutional solution. As long as the poor remain excluded, our government will not be truly representative and the ideal of *Reynolds v. Sims* and its progeny will remain unfulfilled.