

PARTISAN GERRYMANDERING, THE FIRST AMENDMENT, AND THE POLITICAL OUTSIDER

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The most recent call for judicial intervention into state partisan gerrymandering practices ran aground on the shoals of standing doctrine in Gill v. Whitford. The First Amendment stood at the center of this latest gerrymandering challenge. Democratic voters claimed that the legislative districting scheme infringed on their associational rights by denying their party an opportunity for fair representation in the state legislature. For the Gill majority, the voters' alleged representational harm was the sort of generalized grievance that failed to satisfy standing's particularized injury requirement.

Gill was the latest in a series of First Amendment freedom of association fights between partisan insiders—members or supporters of one of the two major political parties—that dates back to the 1970s. In these fights, the interests and needs of political outsiders—both nonvoters and those unaffiliated with the major political parties—have gone unheard and unaddressed. Political outsiders were not always marginalized in legal controversies involving the freedom of association. In fact, the Supreme Court originally constructed its First Amendment freedom of association doctrine in the 1950s to protect the political activity of dissident minority groups excluded from democratic politics.

In this Essay, I argue that advocates should return to the Court's initial freedom of association concern with ensuring the inclusion of political outsiders' voices in the democratic space. Gerrymandering can inflict multiple harms, on both insiders and outsiders. While partisan gerrymandering may deprive one political party of holding power in a way that corresponds to its electoral support in the jurisdiction (a "representational harm"), it can also prevent individuals who do not belong to the majority party in the gerrymandered districts from being able to effectively participate in elections (a "participatory harm"). Both political outsiders and members of the minority party experience this latter harm. I argue that the participatory harm should drive future

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gerrymandering challenges. Such claims could empower political outsiders, advance minority parties' interest in fair representation, and overcome the standing obstacles laid out by the Court in Gill.

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INTRODUCTION

The Supreme Court's decision in *Gill v. Whitford* dealt partisan gerrymandering opponents a significant setback. In an opinion written by Chief Justice Roberts, the majority found that the plaintiffs failed to show they had standing to challenge the Wisconsin legislature's districting for state legislative elections.¹ The problem for the Court was the statewide nature of the injury claimed by the plaintiffs.² For the Democratic plaintiffs in *Gill*, the constitutional harm arose from the Republican legislature's decision to draw a statewide map that deliberately diluted Democratic voters' electoral influence statewide.³ The Republican legislature pulled this trick off in the same way that political parties have since the beginning of the Republic.⁴ It did so by "packing" Democrats in cities into as few districts as possible and spreading other Democrats in the state into the remaining districts through a process called "cracking."⁵ This cracking and packing of Democratic voters virtually eliminated the opportunity

1. *Gill v. Whitford*, 138 S. Ct. 1916, 1932 (2018) (finding that "the plaintiffs failed to meaningfully pursue their allegations of individual harm" at trial).

2. *Id.* at 1931.

3. See Brief for Appellees at 34, *Gill*, 138 S. Ct. 1916 (No. 16-1161), 2017 WL 3726003. The Court described the plaintiffs' assertion of a statewide harm from partisan gerrymandering as a "harm to their interest 'in their collective representation in the legislature,' and in influencing the legislature's overall 'composition and policymaking.'" *Gill*, 138 S. Ct. at 1921 (quoting Brief for Appellees, *supra*, at 31).

4. See generally Elmer C. Griffith, *The Rise and Development of the Gerrymander* 23–29 (1907) (discussing the development of gerrymandering during the early 1700s).

5. See *Gill*, 138 S. Ct. at 1931–32 (describing the plaintiffs' allegation that the Wisconsin legislature packed and cracked Democratic voters).

for the Democratic party to ever win a majority of seats in the state legislature under the map.⁶

For the Court, these statewide harms amounted to a “generalized grievance” insufficient to support legal standing for the individual Democratic voters bringing constitutional claims under the First and Fourteenth Amendments.⁷ Since individuals do not have a right to elect their preferred representatives in a district and no individual district alone produces unfair partisan representation, the plaintiffs failed to show that they suffered a concrete harm from the legislature’s drawing of the particular district in which they lived.⁸ Unable to surmount this standing requirement, the plaintiffs’ primary claim against partisan gerrymanders—that they distort partisan representation in the state legislature⁹—went unaddressed.

While the *Gill* majority appeared to leave a remnant of hope for partisan gerrymandering opponents through its decision to remand the case to the lower courts to assess whether any of the plaintiffs have standing, the leading theory of the partisan gerrymandering harm appears to be dead in the Supreme Court.¹⁰ A new theory of the constitutional harm is therefore needed if gerrymandering challenges are ever to prevail.

In a concurring opinion joined by three other Justices, Justice Kagan offered an alternative theory of the constitutional harm. Rather than view the harm through the lens of the Fourteenth Amendment and its emphasis on asymmetry in representation produced by the dilution of the vote, Justice Kagan suggested that lower courts focus their attention on the First Amendment associational harms from partisan gerrymandering.¹¹ This theory of the harm was not new. Justice Kennedy referred to the freedom of association as a potential constitutional basis for adjudicating partisan gerrymandering claims fifteen years ago in *Vieth v. Jubelirer*, one of the last major gerrymandering cases to reach the Court.¹²

6. *Whitford v. Gill*, 218 F. Supp. 3d 837, 898 (W.D. Wis. 2016) (describing the Wisconsin legislature’s gerrymander as having “achieved the intended effect . . . by allocating votes among the newly created districts in such a way that, in any likely electoral scenario, the number of Republican seats would not drop below 50%”), vacated, 138 S. Ct. 1916 (2018).

7. *Gill*, 138 S. Ct. at 1931.

8. *Id.* at 1930. In a case rejecting a challenge to multimember districts in the early 1970s, the Court famously announced that it is not a denial of equal protection “to deny legislative seats to losing candidates [and their supporters].” *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

9. See Brief for Appellees, *supra* note 3, at 35 (arguing that “vote dilution is so invidious” because it “results in representation that is not responsive to voters’ needs and interests”).

10. See *Gill*, 138 S. Ct. at 1934.

11. *Id.* at 1938 (Kagan, J., concurring).

12. See 541 U.S. 267, 314 (2004) (Kennedy, J., concurring) (suggesting that “[t]he First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering”).

Justice Kagan, citing Justice Kennedy's reasoning in *Vieth*, tried to revive this theory as a basis for adjudicating partisan gerrymandering claims in the future.¹³

However, Justice Kagan construed the associational harm in statewide terms. According to Justice Kagan, "the associational injury flowing from a statewide partisan gerrymander . . . has nothing to do with the packing or cracking of any single district's lines."¹⁴ Instead, a gerrymander "burden[s] the ability of like-minded people across the State to affiliate in a political party and carry out the organization's activities and objects."¹⁵ Since "the valued association and the injury to it are statewide, so too is the relevant standing requirement."¹⁶ In the case of Wisconsin, the disfavored Democratic Party and its members suffered an associational harm from being deprived of their "natural political strength by a partisan gerrymander."¹⁷ This "natural strength" referred to the number of seats the Democratic Party would be expected to win statewide in the absence of the gerrymander.¹⁸ To remedy this deprivation, the state would presumably need to redraw the statewide map to secure fairer representation for the Democratic Party in the state legislature.

In providing a constitutional roadmap for future challengers of partisan gerrymandering, Justice Kagan appeared to miss the central element in the majority's standing ruling: that they disapproved of statewide harm as a basis for litigants' standing. A theory of the First Amendment harm from partisan gerrymandering that is specifically applicable to individual districts must be developed, or such claims apparently will not overcome the standing obstacle.

In this Essay, I argue for a particular way of conceptualizing the First Amendment harm from gerrymandering that arises in individual districts. This conceptualization requires gerrymandering opponents to abandon their nearly exclusive focus on the constitutional rights of political insiders—those who are affiliated with or otherwise consistently vote for candidates of one of the two major parties. Instead, they would need to shift their attention to political outsiders—nonvoters or those who generally do not affiliate with or vote for candidates of either of the two parties. Doing so reveals how gerrymandering infringes upon *individuals'* associational freedoms by inflicting cognizable harms at the district level.

To date, a consistent thread across partisan gerrymandering suits is the political-insider status of the litigants. One set of political insiders,

13. See *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring).

14. *Id.* at 1939.

15. *Id.*

16. *Id.*

17. *Id.* at 1938.

18. See *id.* (explaining that a party deprived of its "natural political strength . . . may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office").

members of the political party out of power, is seeking constitutional protection against another set of political insiders, members of the political party that controls the state political institutions responsible for drawing district lines. This context of First Amendment contestation stands in marked contrast to the original controversies raising freedom of association claims before the Supreme Court in the 1950s and 1960s. In these early cases, members of the Communist Party and the National Association for the Advancement of Colored People (NAACP) sought judicial protection against state actions designed to disrupt the associations' political activities and ultimately dismantle the associations.¹⁹ The Supreme Court initially proved reluctant to provide constitutional protection to Communist Party members subject to legal and political persecution during the Second Red Scare of the McCarthy era.²⁰ But the Court did eventually rely on the First Amendment's freedom of association to protect NAACP members against Southern state efforts to expose Association members to intimidation and disturb the Association's expressive activities targeting Jim Crow segregation.²¹ In justifying its protection of freedom of association and associational expression, the Court explained that "[o]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association."²²

In these early cases, the Court connected the freedom of association to the expressive needs of political outsiders in the two-party political space: "All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups"²³

Yet in recent decades, advocates and courts have neglected the First Amendment freedom of association's origin as a tool for protecting political outsiders.²⁴ Litigants challenging partisan gerrymandering focus exclusively on the rights of political insiders. Those who support gerrymandering claims generally argue that the states are discriminating against the viewpoint of members of the party out of power through the partisan gerrymandering of districts.²⁵ The primary target of this claim

19. See *infra* text accompanying notes 34–56.

20. See *infra* notes 42–43 and accompanying text.

21. See *infra* note 44 and accompanying text.

22. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

23. *Id.* at 250–51. While the Court in *Sweezy* was not particularly assertive in protecting the associational activities of Communist Party members, it would rely on this description of the First Amendment freedom to more assertively protect the associational rights of NAACP members. See *NAACP v. Button*, 371 U.S. 415, 431 (1963).

24. See *infra* Part II.

25. Several briefs in the recent partisan gerrymandering cases advance this viewpoint discrimination claim. See, e.g., Brief of Appellants at 30, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333), 2018 WL 557076; Brief for Appellees, *supra* note 3, at 36; Brief of Amici Curiae Election Law and Constitutional Law Scholars in Support of Appellees at 12–13, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), 2017 WL 3948425.

that I label the fair representation claim of associational freedom is the legislature's use of districting to maximize partisan advantage in legislative seats held, which is said to deprive members of the party out of power of their representational rights in state legislatures and congressional delegations.²⁶ The goal is thus to protect the representational rights of political insiders by targeting a statewide harm from partisan gerrymandering.

In addition to the fact that a majority of the Court appeared to close off such claims in *Gill*, even the plaintiffs' success would have done little to promote the democratic inclusion of political outsiders. Rational choice theory, which is broadly accepted among political scientists, suggests that representatives are primarily motivated by the desire to be reelected.²⁷ If the Court had struck down the Wisconsin statewide map on the basis of a fair representation claim, representatives' desire to be reelected would likely have led the party in power to continue to draw as many safe districts as feasible within the constitutional limitation of giving the party out of power something close to a fair opportunity to elect a majority of representatives.

In this alternative universe in which such partisan gerrymandering claims succeed, incumbents would rarely have to compete with other viable candidates in elections and would not need to engage in the resource-expenditure and mobilization efforts required to attract new or unaffiliated voters to win elections.²⁸ Political outsiders, the original focal point for protection under the First Amendment freedom of association, would therefore be equally or increasingly marginalized from the political process.

Partisan gerrymandering opponents have overlooked an alternative First Amendment freedom of association claim centering on individuals' inability to participate effectively in gerrymandered districts. Unlike current challenges to gerrymandering, the theory I propose emphasizes the harm from states' packing and cracking of opposing party members in individual districts and provides constitutional redress for political outsiders as well as political insiders.

In the first case to reach the Supreme Court challenging a districting practice for the partisan advantage it produced, the American Civil Liberties Union (ACLU) and the Indiana Civil Liberties Union (ICLU) advanced a variant of this associational-freedom claim, which I label the

26. See *Shapiro v. McManus*, 203 F. Supp. 3d 579, 595 (D. Md. 2016) (finding that gerrymandering for partisan advantage infringes on certain citizens' representational rights).

27. See *infra* note 116.

28. See, e.g., Benjamin Plener Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 *Stan. L. Rev.* 1131, 1197 (2018) ("The proliferation of safe districts may . . . discourage high-quality challengers, reduce party mobilization, and depress voter participation . . ." (footnote omitted)).

electoral competition claim.²⁹ In their amicus brief to the court in *Davis v. Bandemer*, the ACLU and ICLU targeted partisan districting as a device that reduced competitiveness between parties in the electoral marketplace of ideas.³⁰ Safe districts produced through packing and cracking opposing party members, the brief explained, entrenched representatives in power and undercut the competitiveness necessary for opposing party members to express themselves through an effective ballot—that is, one providing them with a realistic opportunity to elect their preferred candidate.³¹

The ACLU and ICLU’s proposed freedom of association claim—and the one I elaborate on here—targets the legislature’s intentional drawing of individual noncompetitive districts. The state’s construction of safe districts imposes a constitutional injury to both party insiders from the opposing party and party outsiders by rendering ineffective any political-associational activity that they might engage in within the individual district. A judicial embrace of this alternative electoral competition model of associational freedom would likely force states to respond in a way that promotes political insiders’ and outsiders’ opportunity for association within districts and their broader inclusion in the political process.³² The party in power would likely continue to seek to maximize partisan advantage in statewide maps but would be able to do so only by

29. See Brief of the American Civil Liberties Union & the Indiana Civil Liberties Union as Amici Curiae at *8–10, *Davis v. Bandemer*, 478 U.S. 109 (1986) (No. 84-1244), 1985 WL 670036 [hereinafter Brief of the Civil Liberties Unions]. The American Civil Liberties Union and others continued to advance this associational-rights claim over thirty years later in the constitutional challenge to the Wisconsin statewide map. See Brief of the American Civil Liberties Union et al. as Amici Curiae, in Support of Appellees at 2, *Gill*, 138 S. Ct. 1916 (No. 16-1161), 2017 WL 3948434 (“When a redistricting plan intentionally and effectively entrenches the state’s preferred party in office against voters’ choices, the associational aspect of the right to vote is substantially burdened.”).

30. See Brief of the Civil Liberties Unions, *supra* note 29, at *16–17 (describing the electoral system as a “more formalized and structured marketplace of expression” that involves “an organized competition of ideas presented by opposing candidates and political parties”).

31. *Id.* at *21 (citing to the Court’s vote-dilution jurisprudence and arguing that partisan gerrymandering runs afoul of the Constitution when it “minimize[s] or cancel[s] out the voting strength of racial or political elements of the voting population” (internal quotation marks omitted) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965))).

32. Other scholars have also identified competitiveness harms from partisan gerrymandering. But they have thus far failed to identify a clear and justiciable constitutional basis for courts to strike down noncompetitive districts. See, e.g., Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 *Cornell J.L. & Pub. Pol’y* 397, 401–02 (2005) (describing the competitiveness harm from partisan gerrymandering as a structural harm that “suffers from the lack of a clear constitutional basis”); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 *Harv. L. Rev.* 593, 600, 614–15 (2002) (identifying the harm from gerrymandering as being “the insult to the competitiveness of the process resulting from the ability of insiders to lessen competitive pressures” and then describing as a constitutional source of the harm a “richer concept of republicanism” that the Court has never recognized or enforced).

drawing districts that meet whatever competitiveness constraint the Court constructs. This greater district competitiveness would not only enhance the opportunity for political insiders of the opposing party to cast an effective ballot in electoral contests with two viable candidates. It would also increase the likelihood that candidates would devote resources to mobilizing and associating with unaffiliated and nonvoters whose support is more likely to prove pivotal to winning elections.³³

A viable path forward for partisan gerrymandering opponents after *Gill* should therefore focus on returning to the roots of First Amendment associational freedom as a tool for protecting political outsiders. Challenging the harms that result from noncompetitive districts offers the potential to do so.

The rest of this Essay proceeds as follows. In the first Part, I describe the origins and evolution of the First Amendment freedom of association claim. In the second Part, I disaggregate two associational-freedom claims for challenging partisan gerrymanders. In the third Part, I employ theory and empirical evidence to demonstrate the likely effects of the two associational-freedom claims on political outsiders in partisan gerrymandering controversies. On the basis of these differing effects, I argue that courts should embrace the electoral competition associational-freedom claim as the constitutional path forward after *Gill*. Finally, in the fourth Part, I argue that challenges to partisan gerrymandering premised on the electoral competition associational-freedom claim would not only advance political inclusion and equality. They would also overcome the standing obstacles to constitutional challenges of partisan gerrymandering that the Court constructed in *Gill*.

I. FIRST AMENDMENT ASSOCIATIONAL FREEDOM: FROM PROTECTING POLITICAL OUTSIDERS TO POLITICAL INSIDERS

The First Amendment freedom of association has undergone a striking transformation. The doctrine emerged in the 1950s McCarthy-era Communist Red Scare and African American mobilization against Jim Crow in the South. In the early cases, political outsiders' claims for First Amendment protection reached a mostly responsive Court that advanced disfavored minorities' associational rights against political insiders and the entrenched two-party system. But in recent cases, the primary First Amendment fights are between political insiders—the political outsiders that were once the beneficiaries of freedom of association protections have been ignored.

In the 1950s, both Communists and African Americans, through the NAACP, sought change outside of the ordinary political channels. For

33. Empirical evidence showing that competitive districts enhance turnout through increased campaign expenditures on mobilization efforts supports this prediction about candidate behavior. See *infra* notes 128–134.

Communists, the American system of capitalism needed to be abolished through the organization of workers to overthrow the bourgeois world order.³⁴ For the NAACP, a democratic process that excluded African Americans through a combination of voting barriers and violent intimidation necessitated a campaign for change through protest and litigation in the courts.³⁵ Political insiders did not stand idly by in the face of these threats to the status quo. Elected actors at the state and federal levels also mobilized and passed laws to undercut these political outsiders' activities.

To disrupt the Communist Party, the states and the federal government passed loyalty-oath requirements for labor union officers and state workers.³⁶ For example, the federal Labor Management Relations Act of 1947 required a labor union officer to declare that he was "not a member of the Communist Party or affiliated with such party, . . . that he [did] not believe in, and [was] not a member of or support[ed] any organization that believe[d] in or t[ought], the overthrow of the United States Government by force or by any illegal or unconstitutional methods."³⁷ If the labor union failed to provide the National Labor Relations Board with signed oaths of their labor union officers, the Board would not carry out investigations requested by the labor union or respond to any complaints or petitions it submitted.³⁸

Governmental bodies also tried to disrupt and ultimately dismantle the Communist Party and the NAACP through forced-disclosure laws and practices. States passed laws or engaged in actions designed to force Communist-affiliated individuals and NAACP members to disclose their associational relationships and the Communist Party and the NAACP to

34. See, e.g., Communist Party of America, Manifesto and Program, Constitution: Report to the International Communist International 1 (1919) ("The Communist Party [of America] proposes to end Capitalism and organize a workers' industrial republic.").

35. See, e.g., August Meier & John H. Bracey, Jr., The NAACP as a Reform Movement, 1909–1965: "To Reach the Conscience of America," 59 *J.S. Hist.* 3, 8–26 (1993) (describing the litigation and protest movement activity of the NAACP during an era of black disfranchisement).

36. See, e.g., Harold M. Hyman, To Try Men's Souls 333–37 (1959) (describing the loyalty-oath requirements adopted during the Second Red Scare of the 1940s and 1950s).

37. See *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 385–86 (1950) (quoting Labor Management Relations Act § 9, 29 U.S.C. § 159(h) (repealed 1959)).

38. *Id.* States also enacted loyalty-oath requirements. In *Wieman v. Updegraff*, the Court reviewed an Oklahoma loyalty-oath requirement for all state officers. 344 U.S. 183, 185–86 (1952). In *Sweezy v. New Hampshire*, the Court reviewed a New Hampshire law authorizing the attorney general to question the associational affiliations of individuals subject to investigation as potential subversives. 354 U.S. 234, 236–43 (1957). In *Shelton v. Tucker*, the Court reviewed an Alabama statute requiring "every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years." 364 U.S. 479, 480 (1960).

disclose their membership lists.³⁹ These disclosure demands were often made in the context of investigations into whether the organization had engaged in subversive activities. Compelled disclosure of membership lists, particularly in the case of the NAACP, would have opened the door to severe state and private intimidation of the associations' members.⁴⁰

In addition to compelling disclosure, the state tried to disrupt the NAACP's activities through the prohibition of activities outside of the political process. For example, Southern States attempted to prohibit the NAACP from soliciting participants in litigation as a way to undercut the association's efforts to advance antidiscrimination goals in the courts.⁴¹

These state efforts had a dramatic chilling effect on both individuals associating with the Communist Party and the NAACP and the organizations' political activities.⁴² Unable to resist the force of the state alone, these outsider political associations turned to the Constitution and the courts for protection. In the context of the Second Red Scare of the 1950s, the Court proved only weakly responsive to Communist Party members' claims that the state actions violated their First Amendment right to associate.⁴³ But when reviewing Southern state actions intended to disrupt and dismantle the NAACP, the Court proved much more receptive to the freedom of association claims. Over the period of a decade, the Court struck down as infringements on the freedom of association state efforts

39. See *Uphaus v. Wyman*, 360 U.S. 72, 74 (1959) (describing efforts by New Hampshire to subpoena the membership list of an allegedly subversive association); *Sweezy*, 354 U.S. at 239–45 (describing efforts by the state to compel an individual to disclose his knowledge of persons involved in a Communist-affiliated organization); see also *infra* note 44 and accompanying text (describing state efforts to force the NAACP to disclose membership lists).

40. See Brief for Petitioner at *12–17, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (No. 91), 1957 WL 55387 (describing the climate of intimidation in Alabama that surrounded the state's request that the NAACP disclose its membership list).

41. See Brief for Petitioner at 7–9, *NAACP v. Button*, 371 U.S. 415 (1963) (No. 5), 1961 WL 101714 (describing the NAACP's solicitation activities and identifying them as a tool for advancing the Association's goals of eliminating racial discrimination through litigation).

42. See, e.g., *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (finding "evidence that fear of community hostility and economic reprisals that would follow public disclosure of the membership lists had discouraged new members from joining the organization and induced former members to withdraw"); *Patterson*, 357 U.S. at 462–63 (identifying the deterrent effect on associational activity from the state's compelled disclosure of the NAACP's membership list); *Am. Commc'ns Ass'n*, 339 U.S. at 402 (acknowledging that a statute pressuring unions to deny Communists officer roles amounted to an indirect discouragement that could "have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes").

43. See *supra* note 38 (identifying cases in which the Supreme Court upheld a state statute mandating disclosure of the membership list of an allegedly subversive organization and struck down state loyalty-oath requirements, but not on the grounds that they infringed on an organization's First Amendment right to associate).

at compelled disclosure in Alabama, Arkansas, and Florida that targeted NAACP members and the organization's membership list.⁴⁴

In striking down state laws targeting the NAACP under the First Amendment freedom of association, the Court drew a connection between associational privacy and viable outsider political activities. The Court recognized that an association of political outsiders "espous[ing] dissident beliefs" could not survive without constitutional protection for its members' associational privacy.⁴⁵ The NAACP presented evidence in the compelled-disclosure cases that past exposure of its members' identities led "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."⁴⁶ Such targeting of association members, as the Court later found, "had discouraged new members from joining the organizations and induced former members to withdraw."⁴⁷

In addition to protecting the NAACP's associational privacy from compelled disclosure, the Court also granted constitutional protection for the association's activities intended to advance African American rights and interests through the courts. The combination of Southern states' poll taxes, literacy tests, and other voting barriers along with acts of private intimidation and violence directed toward African Americans who attempted to register and vote forced African Americans to pursue actions to advance their rights and interests outside of the democratic process.⁴⁸ One such action was litigation in the courts.⁴⁹ Virginia reacted to the NAACP's litigation efforts in the state with a law banning legal solicitation.⁵⁰ According to the NAACP, the state designed this law to discourage the Association's legal activities by preventing it "from underwriting the cost and providing counsel in litigation designed to test the validity of state-imposed racial discrimination."⁵¹

44. See *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 557–58 (1963) (finding unconstitutional a Florida legislative committee's attempt to compel the NAACP to disclose its membership records); *Bates*, 361 U.S. at 525 (striking down a local occupational-license-tax ordinance requiring that the NAACP disclose member names); *Patterson*, 357 U.S. at 466 (striking down Alabama's attempt to compel the NAACP to disclose member names).

45. *Gibson*, 372 U.S. at 544 (internal quotation marks omitted) (quoting *Patterson*, 357 U.S. at 462).

46. *Patterson*, 357 U.S. at 462.

47. *Bates*, 361 U.S. at 524.

48. See Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States 195–202* (rev. ed. 2009) (describing state voting practices that left nearly three-quarters of African Americans in the South disenfranchised in 1960).

49. See Patricia Sullivan, *Lift Every Voice: The NAACP and the Making of the Civil Rights Movement 287–434* (2009) (describing the Association's litigation activities following World War II).

50. See *NAACP v. Button*, 371 U.S. 415, 423–26 (1963) (describing the solicitation ban as construed and applied by the Virginia Supreme Court of Appeals).

51. Brief for Petitioner at 2, 29–30, *Button*, 371 U.S. 415 (No. 5), 1961 WL 101714.

The Supreme Court struck down the law and, in the process, established constitutional protections for associational expression. The Court construed solicitation for litigation to be a form of expression protected under the First Amendment. “In the context of NAACP objectives” to end segregation and eliminate all racial barriers that deprive African Americans of their “privileges and burdens of equal citizenship rights,” the Court explained, “litigation is not [merely] a technique of resolving private differences.”⁵² Instead, it is “a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country.”⁵³

The Court recognized expression through litigation as the only tool that many political outsiders like the NAACP had to advance their goals. “Groups which find themselves unable to achieve their objectives through the ballot,” the Court noted, “frequently turn to the courts.”⁵⁴ “And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.”⁵⁵ The Court concluded by legitimizing political outsiders and their expression as worthy of broader societal attention and engagement. “The NAACP is not a conventional political party,” the Court recognized, “but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, . . . makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society.”⁵⁶

The Supreme Court thus originally protected associational-freedom and associational-expressive activity as a means to protect political outsiders from state suppression. The goal of political and societal inclusiveness for associations continued to serve as a guide when the Court started to review challenges to ballot access restrictions under the First Amendment. In a series of cases beginning in the late 1960s, political outsiders to the entrenched two-party system challenged state ballot access requirements imposed on third parties and other outsider candidates.⁵⁷ For example, in Ohio, a new party had “to obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last preceding gubernatorial election.”⁵⁸ The ballot access law combined with other Ohio election laws “ma[d]e it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties.”⁵⁹

52. *Button*, 371 U.S. at 419, 429.

53. *Id.* at 429.

54. *Id.*

55. *Id.* at 430.

56. *Id.* at 431.

57. See James S. Jardine, *Ballot Access Rights: The Constitutional Status of the Right to Run for Office*, 1974 *Utah L. Rev.* 290, 296–302 (describing the series of ballot access cases that the Court reviewed in the late 1960s and early 1970s).

58. *Williams v. Rhodes*, 393 U.S. 23, 24–25 (1968).

59. *Id.* at 25.

Third-party political outsiders seeking inclusion in the political process advanced two complementary constitutional claims. First, third-party members drew on the Court's "one person, one vote" jurisprudence and argued that ballot access restrictions, by denying them the opportunity to vote for their candidate of choice, violated their Fourteenth Amendment right to cast a meaningful vote.⁶⁰ Second, the third parties argued that the ballot access restrictions unconstitutionally infringed on their members' freedom of association.⁶¹

The Court embraced both of the third parties' constitutional claims. "The right to form a party for the advancement of political goals," the Court determined, "means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."⁶² Further, "the right to vote," the Court found, "is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."⁶³ The Court concluded in a later case that "[t]he exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens."⁶⁴

In these ballot access cases, competition emerged as a broader democratic structural goal that promoted the political inclusion at the heart of the third parties' constitutional claims. As the Court explained, constitutional protection of associational and voting rights advances "[c]ompetition in ideas and governmental policies [that] is at the core of our electoral process and of the First Amendment freedoms."⁶⁵

The ballot access cases represented the last time the Court specifically targeted outsiders for protection under the freedom of association framework. As the Warren Court shifted to the more conservative-leaning Burger Court, the justices turned their attention from political outsiders to political insiders.⁶⁶ In the Burger Court's first freedom of association case, the Court invalidated a state statute prohibiting a person from voting in a party's primary if she had voted in another party's primary

60. See Statement as to Jurisdiction at 62–63, *Williams*, 393 U.S. 23 (No. 543), 1968 WL 129460 (arguing that the ballot restriction infringes on rights of third parties, independent voters, and candidates to be free from discriminatory impairment of the right of suffrage).

61. See Appellees' Brief at 9, *Dies v. Carter*, 403 U.S. 904 (1971) (No. 1606), 1971 WL 133723 (arguing that a filing fee requirement for candidate ballot access "threaten[ed] the cherished freedom of association protected by the First Amendment").

62. *Williams*, 393 U.S. at 31.

63. *Id.*

64. *Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983).

65. *Williams*, 393 U.S. at 32.

66. See Michael J. Graetz & Linda Greenhouse, *The Burger Court and the Rise of the Judicial Right 7–8* (2016) (arguing that the Burger Court shifted constitutional jurisprudence in a conservative direction).

within the preceding 23 months.⁶⁷ The majority announced that “[t]he right to associate with the political party of one’s choice is an integral part” of the First Amendment freedom to associate.⁶⁸ That universalist declaration laid the foundation for the Court to extend the freedom of association mandate to political insiders.

In a series of First Amendment cases that followed, the Court struck down state political patronage practices that resulted in the firing or refusal to promote public employees because of their affiliation with the party out of power. Individuals faced with the choice of maintaining their party affiliation or losing their job, the Court explained, will often have to sacrifice their political beliefs and associational freedom.⁶⁹ Forcing a public employee to make this choice runs counter to the constitutional “freedom to associate with others for the common advancement of political beliefs and ideas.”⁷⁰

As the Court shifted toward protecting political insiders in the political patronage cases, it continued to emphasize the democratic structural goal of a competitive political process. As the Court detailed in its opinion in the foundational political patronage case of *Elrod v. Burns*:

Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, as well as the multitude seeking jobs. As government employment . . . becomes more pervasive, the greater the dependence on it becomes, and therefore the greater becomes the power to starve political opposition by commanding partisan support, financial and otherwise. Patronage thus tips the electoral process in favor of the incumbent party, and where the practice’s scope is substantial relative to the size of the electorate, the impact on the process can be significant.⁷¹

Favoring political incumbents through political patronage thus ran counter to the fundamental principle announced in the ballot access cases that “[c]ompetition in ideas and governmental policies is at the core of our electoral process.”⁷² But rather than competition between political outsiders and insiders, the Court in the political patronage cases suggested that competition between political insiders was a constitutional value entitled to protection as well.

Next, the Court turned its attention to state party primary requirements. In these cases, the Court extended the freedom of association to

67. See *Kusper v. Pontikes*, 414 U.S. 51, 61 (1973).

68. *Id.* at 57.

69. See *Elrod v. Burns*, 427 U.S. 347, 355–56 (1976) (explaining how an employment requirement that public employees pledge allegiance to a party constrains an individual from “act[ing] according to his beliefs” and “associat[ing] with others of his political persuasion”).

70. *Id.* at 357.

71. *Id.* at 356.

72. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

the political parties themselves.⁷³ In a case invalidating Connecticut's closed-primary requirement, which (against the party out of power's preferences) limited primary voting to party registrants, the Court explained that "[t]he Party's attempt to broaden the base of public participation in and support of its activities [through an open primary] is conduct undeniably central to the exercise of the right of association."⁷⁴ The state's closed-primary requirement, the Court continued, infringed on the associational rights of the party out of power and "the freedom of its adherents" by "plac[ing] limits upon the group of registered voters whom the Party may invite to participate in the 'basic function' of selecting the Party's candidates."⁷⁵

Nearly a decade and a half later, the Court also struck down California's blanket primary requirement in which all voters, regardless of partisan affiliation, could vote for any candidate during the primary.⁷⁶ "[A] corollary of the right to associate," the Court declared, "is the right not to associate."⁷⁷ "Freedom of association," the Court concluded, "would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."⁷⁸

As the Court shifted focus from political outsiders to political insiders in the political patronage and party primary cases, it opened the door to the freedom of association claim that has emerged in the current partisan gerrymandering controversies. In the next Part, I describe the nature of this new constitutional challenge to partisan gerrymandering, then show how it neglects political outsiders' rights to democratic inclusion.

II. THE FIRST AMENDMENT AND PARTISAN GERRYMANDERING

The origin of First Amendment claims against partisan gerrymandering is commonly attributed to Justice Kennedy's concurrence in the 2004

73. For accounts of the party primary cases engaging the tension between party autonomy, associational harms, and competition in the political marketplace, see, e.g., Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 *U. Pa. L. Rev.* 793, 801–10 (2001) (discussing the impact of blanket-primary rules in California); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 *Colum. L. Rev.* 274, 282–93 (2001) (addressing the Court's analysis of California's primary system and its encroachment on the freedom of association).

74. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986).

75. *Id.* at 215–16 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)).

76. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 582 (2000) (declaring California's blanket primary unconstitutional).

77. *Id.* at 574.

78. *Id.* (internal quotation marks omitted) (quoting *Democratic Party of the U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981)).

case of *Vieth v. Jubelirer*.⁷⁹ But nearly twenty years earlier, it was the American Civil Liberties Union and the Indiana Civil Liberties Union that first advanced a First Amendment claim against partisan gerrymandering in the Supreme Court. In the amicus brief supporting the Democratic Party members' constitutional challenge to Indiana's state-legislative-district map in *Davis v. Bandemer*, the ACLU and ICLU advanced a First Amendment claim derived from the NAACP associational freedom, ballot access, and political patronage cases.⁸⁰ According to this claim, the gerrymandered map infringed on Democratic Party members' freedom of association and the right to cast an effective ballot by undermining competition in the electoral space.

As a starting point, the ACLU and ICLU asserted a relationship between free expression and competition in the democratic process. "We commonly understand that our system of free expression depends upon a marketplace of ideas, an environment in which policies and programs compete for acceptance by the American people."⁸¹ The key to "fair ideological competition," according to the amicus brief, is ensuring the neutrality of government actors responsible for "regulating the political and ideological activities of its citizens."⁸² This means that the government can neither "favor one speechmaker over another [nor] one ideological association or political party over others."⁸³ The requirement of government neutrality that applied to protect the competition of ideas in public forums thus also applied to the electoral space in which government neutrality protects the competition of ideas between opposing candidates and parties. "[U]nless government remains neutral in fashioning and administering the rules of the contest," the ACLU and ICLU contended, "the electoral competition cannot operate fairly."⁸⁴

Biased government action through the drawing of uncompetitive districts favorable to one party over the other infringed on the losing party's members' associational expression by denying them the opportunity to effectively participate in the electoral space. Such biased government action, the ACLU and ICLU argued, has been found unconstitutional when "districting plans were employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population' . . . [and] in a long-line of vote dilution cases."⁸⁵ "These vote dilution and reapportionment cases," the brief concluded, "implicitly recognize that when a state regulates its election machinery and when it

79. See *infra* notes 89–95 and accompanying text.

80. See Brief of the Civil Liberties Unions, *supra* note 29, at *8–29.

81. *Id.* at *5.

82. *Id.*

83. *Id.*

84. *Id.* at *17.

85. *Id.* at *21 (citation omitted) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)).

defines electoral boundaries, it must do so in a neutral and even-handed way.”⁸⁶

In its opinion in *Davis v. Bandemer*, the Court ignored the ACLU and ICLU’s First Amendment claims as it established a standard for adjudicating partisan gerrymandering claims under the Fourteenth Amendment Equal Protection Clause.⁸⁷ But the brief nonetheless provided an associational model of constitutional protection potentially applicable to partisan gerrymanders. According to this model, partisan gerrymandering raises constitutional concerns when it undercuts competition in the electoral space.⁸⁸ The lack of competition infringes on the right of members of the minority party in uncompetitive districts to associate with like-minded voters to advance their political goals because their vote is rendered ineffective in a district where they have no opportunity to elect their candidate of choice.

Eighteen years after the ACLU and ICLU’s brief in *Davis v. Bandemer*, a First Amendment freedom of association claim reappeared in the context of the next partisan gerrymandering controversy to reach the Supreme Court. In briefs submitted to the Court in *Vieth v. Jubelirer*,⁸⁹ a case challenging a statewide map in Pennsylvania, remnants of the electoral competition claim of associational freedom lingered, but a new model of constitutional protection against gerrymandering also emerged and found a supporter on the Court.

In their brief challenging the constitutionality of the Pennsylvania partisan gerrymander, the appellants in *Vieth v. Jubelirer* advanced a First Amendment claim as an alternative to the equal protection claim against the statewide map.⁹⁰ Drawing on the political patronage cases, the appellants argued that the partisan gerrymander violated the First Amendment prohibition on viewpoint discrimination, which “serves, in part, to prevent indirect distortions of democracy and majority rule.”⁹¹ On its face, the source of democratic distortion that the appellants identified in *Vieth* was the same as the one identified by the ACLU and ICLU in *Bandemer*. The appellants argued that viewpoint discrimination (in the form of the partisan gerrymander) distorted democracy because of its

86. *Id.* at *22.

87. See 478 U.S. 109, 127 (1986) (establishing a standard for adjudicating partisan gerrymandering claims under the Equal Protection Clause in which the challenger must prove “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group”).

88. See Brief of the Civil Liberties Unions, *supra* note 29, at *5 (“[F]or this electoral competition to operate fairly government must remain neutral. . . . It cannot enact laws designed to petrify the political process or skew the fairness of the electoral competition.”).

89. 541 U.S. 267 (2004).

90. See Brief for Appellants at *18, *Vieth*, 541 U.S. 267 (No. 02-1590), 2003 WL 22070244.

91. *Id.* at *23.

impact on “effective competition in the marketplace of political ideas.”⁹² But upon closer examination, it seems clear that the *Vieth* appellants’ concern with partisan gerrymandering’s impact on competition in the marketplace of ideas focused on a different political arena. Whereas the ACLU and ICLU seemed to argue that partisan gerrymandering ran afoul of the goal of fair competition of voter ideas in the electoral space, the appellants in *Vieth* appeared to emphasize the goal of more equitable representation in the legislative space to advance the fair competition of ideas and policy preferences between elected representatives.⁹³ To ensure fair competition of ideas, the *Vieth* appellants asserted, voters from the two major parties needed “a fair opportunity to elect representatives” because otherwise “freedom of political association yields no policy fruit.”⁹⁴

This model of associational freedom found an audience with Justice Kennedy, who authored the pivotal concurrence in *Vieth*. After considering the equal protection claims, the focus of most of the briefing in the case, Justice Kennedy pointed to the First Amendment as a potentially more viable constitutional basis for adjudicating partisan gerrymandering claims.⁹⁵ Following the lead of the appellants’ brief, Justice Kennedy analogized to the political patronage and party primary cases. He construed those decisions as establishing protections for individuals against viewpoint discrimination on the basis of partisan affiliation.⁹⁶ Like political patronage, Justice Kennedy explained, partisan gerrymandering implicates “the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.”⁹⁷ Then, drawing on the political primary cases, Justice Kennedy described the harm to representative democracy from partisan gerrymandering’s infringement on associational freedoms: “Representative democracy in any populous unit of governance is unimaginable

92. *Id.* (quoting Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* 499 (1968)).

93. Compare *id.* at *24 (noting that partisan gerrymandering “can replace the ‘consent of the governed’ with a system in which legislators decide who will remain in office and whom they will represent”), with Brief of the Civil Liberties Unions, *supra* note 29, at *5–6 (emphasizing that our electoral system “is an organized competition of ideas presented [to voters] by opposing candidates and political parties”).

94. Brief for Appellants, *supra* note 90, at *23 (internal quotation marks omitted) (quoting Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* 499 (1968)).

95. For the equal protection claim, Justice Kennedy acknowledged the weighty arguments for finding challenges to partisan gerrymandering claims nonjusticiable. These include: (1) the permissibility of politics as a classification, (2) the absence of “agreed upon substantive principles of fairness in districting,” and (3) the lack of a “basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights.” *Vieth*, 541 U.S. at 307–09 (Kennedy, J., concurring).

96. *Id.* at 314.

97. *Id.*

without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.”⁹⁸ The focus of the First Amendment viewpoint discrimination analysis in a partisan gerrymandering dispute, Justice Kennedy concluded, should therefore be “on whether the legislation burdens the representational rights of the complaining party’s voters for reasons of ideology, beliefs, or political association.”⁹⁹

Justice Kennedy did not define “representational rights” in *Vieth*, but in past cases construing the Voting Rights Act (VRA) in particular, representational rights referred to the opportunity of individuals from racial minority groups to elect their candidate of choice to advance their views in the legislative process.¹⁰⁰ The Court, following the directions of Congress, found violations of representational rights when the state deprived members of racial minority groups of a fair opportunity to elect representatives of their choice.¹⁰¹ In the context of judicial application of the VRA, this remedy was often to provide the proportionate opportunity to elect representatives statewide from the statutorily protected group by requiring the state to construct a proportionate number of districts that were majority minority.¹⁰²

There is a subtle, but important, distinction between these representational rights that are the focus of the fair representation model of associational freedom and the participatory rights at the center of the electoral competition model of associational freedom. As construed in the Court’s voting rights jurisprudence, effective participation refers to the

98. *Id.* (internal quotation marks omitted) (quoting *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)).

99. *Id.* at 315.

100. See Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 *Calif. L. Rev.* 1565, 1605–09 (2013) (describing the Court’s conceptualization of representational rights for racial minorities under the VRA as “the opportunity to elect their preferred candidate”).

101. Section 2 of the amended Voting Rights Act of 1982 provides that:

A violation [of the Act] is established if, based on the totality of circumstances, it is shown 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 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.

Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (2012).

In the seminal case interpreting section 2, the Court established a legal standard subjecting state and political subdivisions to liability when they deprived geographically compact, politically cohesive racial communities of an opportunity to elect their preferred candidate in contexts of racially polarized voting. See *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (establishing the three preconditions for assessing liability under section 2 of the VRA).

102. See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 *Mich. L. Rev.* 1077, 1097–98 (1991) (describing the Supreme Court’s focus after *Gingles* on protecting opportunities for racial minority groups to elect members of their group).

opportunity for individuals to have their voices heard by candidates in the political process at the individual district level.¹⁰³ Ensuring that opportunity requires construing electoral districts such that candidates are incentivized to take into account the interests of individual members of most, if not all, groups during elections and when governing.¹⁰⁴ Importantly, and distinguishing the participatory model from the representational model, this right to participate does not guarantee to individuals the proportionate opportunity to elect preferred candidates or candidates from one's group.¹⁰⁵ So long as candidates are forced by the electoral context to

103. The Court first recognized an equal protection right to full and effective participation when reviewing the constitutionality of malapportioned districts. See *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964). While equally apportioned legislative districts were necessary to satisfy the equal protection standard, they were not sufficient. In cases immediately following the establishment of one person, one vote, the Court in its review of the constitutionality of multimember districts said that properly apportioned multimember districts could still run afoul of the Constitution. In a case decided a year after *Reynolds*, the Court surmised, “It might well be that, designedly or otherwise, a multimember 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.” *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). “When this is demonstrated,” the Court continued, “it will be time enough to consider whether the system still passes constitutional muster.” *Id.*

In the multimember districting cases that followed, the Court rejected constitutional challenges that focused on the representational harms to minorities from such districts and accepted constitutional challenges that focused on the participatory harms to minorities perpetuated by such districts in contexts of participatory inequality. Compare *Mobile v. Bolden*, 466 U.S. 55, 65, 73 (1980) (holding that at-large elections of city officials do not run afoul of the Fourteenth and Fifteenth Amendments because such elections do not disenfranchise voters), and *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971) (“The short of it is that we are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them.”), with *Rogers v. Lodge*, 458 U.S. 613, 622–24 (1982) (“We are . . . unconvinced that we should disturb the District Court’s finding that the at-large system . . . was being maintained for the invidious purpose of diluting the voting strength of the black population. . . . [T]he fact that [no black candidate] ha[d] ever been elected is important evidence of purposeful exclusion.”), and *White v. Regester*, 412 U.S. 755, 769 (1973) (“The District Court . . . conclude[d] that the multimember district . . . invidiously excluded Mexican-Americans from effective participation in political life On the record before us, we are not inclined to overturn these findings . . .”).

104. In the first partisan gerrymandering case, the Court construed the right to effective participation established in the multimember districting cases as protecting the right of group members to exercise influence in the political process, such that their interests cannot be entirely ignored by the candidate elected to represent that district. See *Davis v. Bandemer*, 478 U.S. 109, 131–32 (1986).

105. See *id.* at 131 (“[T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm.”).

consider the interests of voters and potential voters in their campaign and when governing, the participatory right has been protected.¹⁰⁶

Justice Kennedy's invitation to litigants to bring First Amendment claims against partisan gerrymandering stood for over ten years before challengers to such gerrymanders made a serious attempt to apply the fair representation model. The difficulty of developing a manageable standard for assessing when viewpoint discrimination amounted to a constitutional violation of political party members' representational rights fueled the delay. More than a decade after *Vieth*, challengers to a statewide plan in Wisconsin advanced First Amendment freedom of association claims accompanied by novel empirical tests for assessing when party members' representational rights had been violated.

The challengers to the statewide map in Wisconsin argued that "partisan gerrymandering offends First Amendment values by 'penalizing citizens because of . . . their association with a political party, or their expression of political views.'"¹⁰⁷ In support of the challengers' constitutional claim, New York University's Brennan Center, in an amicus brief, contended that "[e]xtreme partisan gerrymandering—the government's intentional burdening of the efficacy of citizen's votes 'because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views,'—is plainly irreconcilable with . . . First Amendment principles."¹⁰⁸ An amicus brief by election law and constitutional law scholars joined the fray, asserting that "the right of association . . . limits the dominant political group's ability to discriminate against groups that espouse a rival point of view."¹⁰⁹

These First Amendment claims and others contained in the briefs were arguably consistent with both the fair representation and the electoral competition models of associational freedom. But the briefs' assessments of the harm from partisan gerrymandering and the suggested tools for measuring the harm relied upon the fair representation model of associational freedom.

According to the challengers, the viewpoint discrimination embedded in the Wisconsin statewide map produced the constitutional harm of

106. See *id.* at 132 (requiring proof that "the candidate elected will entirely ignore the interests of [a group of] voters" before establishing a presumption of unconstitutionality).

107. Brief for Appellees, *supra* note 3, at 36 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring)).

108. Brief for the Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae in Support of Appellees at 34, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), 2017 WL 4311106 (emphasis added by the Brennan Center) (citation omitted) (quoting *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring)).

109. Brief of Amici Curiae Election Law and Constitutional Law Scholars in Support of Appellees, *supra* note 25, at 5.

partisan asymmetry in state legislative representation.¹¹⁰ A statewide map suffers from partisan asymmetry when there is a difference between the parties in the number of votes that would be necessary under a statewide plan to elect a majority of the legislators.¹¹¹ For example, a map is considered asymmetric if it would require the Democratic Party to win at least 55% of the statewide votes to secure a legislative majority and the Republican Party to win only 45% of the statewide vote to secure a legislative majority. Partisan asymmetry can be measured according to either the vote–seat ratio developed over five decades ago or the more recently developed efficiency gap—a measure of the two parties’ relative wasted votes in elections statewide.¹¹² Whatever the measure, the focus of the constitutional harm from partisan asymmetry is on representational disparities between the parties in the legislature.

In *Whitford v. Gill*, the district court found that the Wisconsin statewide map violated Democratic voters’ representational rights.¹¹³ The court considered the partisan asymmetry in Wisconsin, in which Democratic candidates received approximately 50% of the vote statewide but less than 40% of the seats in the state assembly, to be probative of a constitutional violation.¹¹⁴ The Supreme Court, however, vacated the decision and remanded the case back to the district court after finding that the challengers had failed to show they had standing to bring a constitutional claim against the statewide harm alleged to arise from the Wisconsin map.¹¹⁵

110. See Brief for Appellees, *supra* note 3, at 35 (identifying partisan asymmetry as the harm caused by the Wisconsin statewide map).

111. See Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 *Am. Pol. Sci. Rev.* 540, 542 (1973) (developing the original measure of partisan asymmetry).

112. See, e.g., Brief of Appellants, *supra* note 25, at 30 (advancing a First Amendment viewpoint discrimination claim against the alleged partisan gerrymandering of an individual district in Maryland); Brief for Appellees, *supra* note 3, at 36 (advancing a First Amendment viewpoint discrimination claim against the alleged statewide partisan gerrymandering in Wisconsin). Researcher Eric McGhee and Professor Nicholas Stephanopoulos developed a novel empirical measure for assessing when gerrymandering should be considered presumptively unconstitutional. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 *U. Chi. L. Rev.* 831, 850–53, 884–91 (2015) (defining and computing the efficiency gap and identifying a standard that courts can use in assessing the constitutionality of partisan gerrymanders). This measure, called the efficiency gap, is a more simplified and user-friendly way of determining partisan asymmetry. See *id.* at 855–63 (comparing the efficiency gap to other measures of partisan asymmetry). The district court in *Whitford* relied in part on the efficiency gap in finding the Wisconsin statewide map unconstitutional. See *Whitford v. Gill*, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016), vacated, 138 S. Ct. 1916 (2018).

113. See *Whitford*, 218 F. Supp. 3d. at 898–901.

114. *Id.* at 901.

115. See *Gill*, 138 S. Ct. at 1923; see also *supra* text accompanying note 28 (examining the Court’s ruling in *Gill*).

In the next Part, I show that even if litigants were to overcome the standing hurdle, judicial enforcement of the fair representation model of associational freedom would further incentivize the principal source of political-outsider marginalization—state legislators’ construction of incumbent-protective safe districts. Rather than fixate on the statewide harm that is the target of the fair representation claim, challengers should shift their focus to the associational-freedom harm arising from reducing the competitiveness of individual districts. This shift, I argue, could contribute to a more politically inclusive and equal democracy. In Part IV, I return to the question of standing. I argue that a constitutional challenge premised on the electoral competition model of associational freedom should overcome the two standing obstacles presented in *Gill*.

III. A PARTISAN GERRYMANDERING REMEDY FOR THE POLITICAL OUTSIDER

The question of remedy has been overlooked in First Amendment challenges to partisan gerrymandering. While the two First Amendment models advanced in the briefs and the case law offer an account of the harm from partisan gerrymandering, and seek to provide an objective basis for assessing when that harm has occurred, they do not address the specific remedies for constitutional violations that should follow. Once likely remedies are considered, though, it becomes clear that the two models are likely to differ markedly in their impact on political outsiders.

My starting point for predicting the impact of potential gerrymandering remedies is rational choice theory. According to rational choice theory, elected officials are primarily motivated by the desire to be reelected.¹¹⁶ When drawing district lines, rational elected officials should try to advance their reelection goals in two ways. First, they should support the district map that best ensures their opportunity to be reelected in all foreseeable elections under the districting plan. Simply put, legislators should support the drawing of safe districts for themselves and oppose the drawing of competitive districts that would put their reelection at greater risk. Second, legislators should support a statewide map that, consistent with their first objective, ensures their party the greatest degree of control in the state legislature and sends as many of their party members to Congress as possible. Greater party representation in the state legislature and in the congressional delegation increases the likelihood that the state legislature and Congress will pass laws favorable to their partisan supporters, which should also increase the legislators’

116. See David R. Mayhew, *Congress: The Electoral Connection* 5 (2d ed. 2004) (articulating the rational choice assumption of representatives “as single-minded seekers of reelection”); see also John W. Kingdon, *Congressmen’s Voting Decisions* 31, 60–66 (3d ed. 1989) (corroborating the rational choice assumption through a survey of congresspersons in which constituency was the second-most-mentioned factor influencing the congressman’s decision because of fear that a wrong roll-call vote would cost them in the next election).

likelihood of being reelected. The constitutionally unconstrained result that should follow when the districting process is entirely controlled by one party is a statewide map that provides representative members of the party with safe districts and the party with a durable asymmetric advantage in the state legislature and congressional delegation.¹¹⁷

What effect would First Amendment constraints have on rational legislators' approach to districting? If the fair representation model of associational freedom were adopted, then legislators' primary means of ensuring their own reelection—the drawing of safe districts—would remain constitutionally unconstrained. Courts would presumably require the legislature to minimize partisan asymmetry but would not address district-level electoral competitiveness. Rational legislators would therefore continue to support statewide maps with safe districts for themselves.

If the Court were to adopt and enforce the fair representation model, however, it would create a constitutional obstacle to rational legislators' second means of advancing their reelection goal: maximizing partisan advantage in the state legislature or in the congressional delegation. The state's response to judicial enforcement of a fair representation model will likely be to draw as many safe districts for its own members while packing as many members of the opposing party into as few districts as possible within the constraint of partisan symmetry. To satisfy the partisan-symmetry constraint, the state might need to construct a few more competitive districts with most of these districts, if not all, drawn to

117. In *Bandemer*, Justice O'Connor famously argued in dissent that partisan gerrymandering is a "self-limiting enterprise" rendering judicial intervention unnecessary. *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring); see also Peter H. Shuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 *Colum. L. Rev.* 1325, 1345 (1987) (expanding on Justice O'Connor's argument regarding the self-limitations inherent in partisan gerrymandering). Since there are only so many partisan supporters to go around in any particular state or jurisdiction, the party in power would have to trade off drawing safe districts for its members with asymmetric partisan advantage for its party. *Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring). If the party in power drew safe districts for its members, it would leave the remaining districts competitive and undercut partisan advantage. If the party in power drew districts to secure a high degree of partisan advantage, it could not draw safe districts for its members. Either way, the party in power would be unable to secure durable asymmetric partisan advantage. What this argument does not account for is voters' different levels of party loyalty and mapmakers' ability to account for that variation in the data that is used to draw districts. See Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, *Atlantic* (Oct. 28, 2017), <http://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888> [https://perma.cc/VB74-TBBX] (describing how advances in technology and data collection have allowed politicians to gerrymander with greater precision). A district need not have a twenty- or thirty-point party-registration advantage to be safe for a representative if voters have a history of voting consistently and frequently for one party over the other. Drawing a district with a ten-point registration advantage or less might do the trick of safely securing the reelection of the party's representative in the district if that district has more loyal voters. This variation in voters' party loyalty allows the party in power to avoid trade-offs between safe districts and partisan advantage to secure more-durable partisan advantage.

give the party in power an advantage, albeit not a safe and durable advantage. Thus, a fair representation constitutional constraint might force states to draw a few more competitive districts than they would have if left constitutionally unconstrained, but safe districts will likely continue to dominate the electoral scene.

The state districting practices likely to result from judicial enforcement of the fair representation model can be contrasted with those likely to result from judicial enforcement of the electoral competition model of associational freedom. Under the electoral competition model, the constitutional harm arises from districting practices that deny voters in particular districts the opportunity to effectively participate in the electoral process.¹¹⁸ Safe districts cause this harm by denying individuals not affiliated with the majority party in the district an opportunity to influence election outcomes. In safe districts, incumbents run either unopposed or against an opponent without a viable chance to win. In these districts, the incumbent can ignore minority party voters' interests and needs, adopting a policy platform and governing approach that uncompromisingly advances partisan supporters' needs and interests.

Judicial invalidation of districting practices that violate the electoral competition model would result in states drawing districts within judicially established competitiveness parameters. Legislators would therefore be constrained from advancing their reelection goal through the construction of safe districts. The party in power could still advance the secondary goal of partisan advantage unconstrained, but its members would not be able to create a durable partisan advantage for themselves because of the competitiveness constraint. The most likely result would be that the ruling party would create as many competitive districts that lean in their favor as possible.

When examining the choice of associational-freedom models from the perspective of which one best advances the constitutional rights of political insiders, there is no clear answer. It all depends on whether, as a normative matter, one feels that the guarantee of representation in the legislative process is more or less valuable than the guarantee of effective participation in the electoral process. Neither the Constitution nor democratic theory helps us resolve this normative conundrum.

Clearer answers emerge when we compare the probable effects of judicial enforcement of the two models on one group of political outsiders—nonvoters. To understand the disparate effects of judicial enforcement of the two models on this group, it is necessary to understand the reasons why certain individuals do not vote. In their seminal book *Who Votes*, political scientists Raymond Wolfinger and Steven Rosenstone used a cost-benefit theoretical framework for voting to offer an empirical

118. See supra note 29 and accompanying text.

account of why certain people do not vote.¹¹⁹ According to the cost-benefit framework initially developed by economist Anthony Downs, individuals will not vote when the costs of voting exceed its benefits.¹²⁰ Wolfinger and Rosenstone's empirical analysis identified specific resource constraints that made it relatively more costly for certain people to vote. The study found that those with less education, who also tended to be poor, voted significantly less than those with more education, who tended to be wealthier.¹²¹ Since the early 1970s, there has been a consistent 25–35% turnout gap between individuals in the highest and lowest income quintiles in the United States.¹²²

The turnout disparity between the wealthy and the poor is unsurprising if one views voting through the cost-benefit lens. Voting entails the cost of obtaining information necessary to make informed choices about candidates and issues. Education can overcome this cost by “increas[ing] cognitive skills, which facilitates learning about politics.”¹²³ When individuals are educated about politics and the electoral process, they “are likely to get more gratification from political participation” and to understand how elections are administered, which further facilitates their participation.¹²⁴

If education is the principal barrier to voting that renders nonvoters political outsiders, then there is not much that a change in districting practices can do about their outsider status. Whether the state legislature draws safe districts that give a durable partisan advantage to the party in power or competitive districts that give neither party a durable advantage, the effect on nonvoter participation and inclusion into the political process should be minimal or nonexistent.

A little over a decade after Wolfinger and Rosenstone's account of nonvoting, Rosenstone joined with political scientist John Mark Hansen to conduct a different empirical test of voting that shifted the scholarly conversation.¹²⁵ In their empirical test, Wolfinger and Rosenstone had

119. See generally Raymond E. Wolfinger & Steven J. Rosenstone, *Who Votes?* 1–12 (1980) (explaining their approach to determining the relationship between voter turnout and certain demographic characteristics).

120. See Anthony Downs, *An Economic Theory of Democracy* 260–65 (1957) (advancing the cost-benefit rational choice model of voting).

121. See Wolfinger & Rosenstone, *supra* note 119, at 22–36 (isolating the effect of education and income on turnout). Specifically, the study found that “[c]itizens with a college degree are 38 percent more likely to vote than are people with fewer than five years of schooling.” *Id.* at 34.

122. Jan E. Leighley & Jonathan Nagler, *Who Votes Now? Demographics, Issues, Inequality, and Turnout in the United States* 29 fig.2.2 (2014); Jan E. Leighley & Jonathan Nagler, *Electoral Laws and Turnout, 1972–2008*, at 24 tbl.3 (Nov. 20, 2009) (unpublished manuscript), <https://ssrn.com/abstract=1443556> (on file with the *Columbia Law Review*).

123. Wolfinger & Rosenstone, *supra* note 119, at 35.

124. *Id.* at 36.

125. Steven J. Rosenstone & John Mark Hansen, *Mobilization, Participation, and Democracy in America* 228 (1993) (“Over and over we have shown that resources, interests,

not included variables measuring “political interest, information, sense of citizen duty, attitudes about issues, political disaffection, party identification, or any other individual perspective on politics.”¹²⁶ Rosenstone and Hansen addressed this omission in their influential book, *Mobilization, Participation, and Democracy in America*, and found that a decline in electoral mobilization by candidates, political parties, campaigns, interest groups, and social movements, which correlated positively with individuals’ interest in voting, explained half of the decline in turnout between the 1960s and 1980s.¹²⁷ Later experimental studies reinforced the Rosenstone and Hansen study findings that candidate and party efforts to reach out to voters by phone or in person increased individuals’ likelihood of turning out to vote.¹²⁸

Empirical studies have thus found nonvoting to be the product of individuals’ lack of resources, particularly education, and lack of campaign-mobilization efforts toward certain populations. The consequence of such nonvoting is clear. As V.O. Key asserted more than a half century ago, “The blunt truth is that politicians and officials are under no compulsion to pay much heed to classes and groups that do not vote.”¹²⁹

A vicious cycle of marginalization has emerged in which undereducated and low-income individuals tend not to vote due to resource constraints. Campaigns respond to their nonvoting behavior by making a strategic decision to not expend campaign resources or energy on mobilizing individuals whose past behavior suggests they will not vote in future elections.¹³⁰ Then, once in office, candidates who do not owe any

and social positions distinguish people who participate in politics from people who do not.”); see also Donald P. Green & Michael Schwam-Baird, *Mobilization, Participation, and American Democracy: A Retrospective and Postscript*, 22 *Party Pol.* 158, 158 (2015) (“The publication of Stephen J. Rosenstone and John Mark Hansen’s *Mobilization, Participation, and Democracy in America* in 1993 marked an important turning point in the study of political participation.”).

126. Wolfinger & Rosenstone, *supra* note 119, at 4.

127. Rosenstone & Hansen, *supra* note 125, at 216–18 (explaining how the change in canvassing methods, decline in electoral competition, increasing demands on campaign resources, and decline in social-movement activity all contributed to the overall decline in voter turnout between the 1960s and 1980s).

128. In a study that initiated a slew of experiments seeking to identify the effect of mobilization activities on voter turnout, political scientists Alan Gerber and Donald Green found that personal contact with individuals to encourage them to vote increased turnout by 9.8%. Alan S. Gerber & Donald P. Green, *The Effects of Canvassing, Telephone Calls, and Direct Mail on Voter Turnout: A Field Experiment*, 94 *Am. Pol. Sci. Rev.* 653, 660 (2000). Other studies found similar positive effects of personal contact on turnout. See, e.g., Donald P. Green, Alan S. Gerber & David W. Nickerson, *Getting Out the Vote in Local Elections: Results from Six Door-to-Door Canvassing Experiments*, 65 *J. Pol.* 1083, 1094 (2003) (finding that personal contact led to a seven percent boost in turnout on average in six local elections).

129. V.O. Key, Jr., with Alexander Heard, *Southern Politics in State and Nation* 527 (Alfred A. Knopf ed., Univ. of Tenn. Press Knoxville reprinted 1984) (1949).

130. See Green & Schwam-Baird, *supra* note 125, at 159 (noting that “strategic politicians target their mobilization efforts in ways that are designed to maximize electoral

of their electoral success to nonvoters tend to support policy programs that are not responsive to the needs and interests of those individuals.¹³¹

If party and candidate voter-mobilization activities provide at least a partial explanation for who does and does not vote, then districting practices *can* make a difference for political outsiders. As political scientist E.E. Schattschneider famously theorized, “The root of the problem of nonvoting is to be found in the way in which the alternatives in American politics are defined, the way in which issues get referred to the public, the scale of competition and organization and above all by *what* issues are developed.”¹³²

State legislatures’ drawing of safe districts appears to be the central districting practice that directly implicates political outsiders. According to a series of empirical studies, electoral competition has a positive impact on turnout.¹³³ One apparent reason why competition contributes to higher turnout is that candidates tend to expend more money and effort on electoral contests that are anticipated to be close.¹³⁴ A large

returns,” which means that they “focus their efforts on segments of the electorate that look much like those who already participate”).

131. Over the past twenty years, political scientists Larry Bartels, Martin Gilens, and others have provided empirical support for this final stage in the cycle of nonresponsiveness, showing that politicians are not at all responsive to the preferences and needs of the poor, a group that makes up the greatest proportion of nonvoters. See Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* 259–60 (2008) (“[T]he views of low-income constituents had no discernible impact on the voting behavior of their senators.”); Martin Gilens, *Affluence and Influence* 79–81 (2012) (“[W]hen preferences between the well-off and the poor diverge, government policy bears absolutely no relationship to the degree of support or opposition among the poor.”).

132. E.E. Schattschneider, *The Semisovereign People: A Realist’s View of Democracy in America* 110 (1960).

133. See, e.g., Gary W. Cox & Michael C. Munger, *Closeness, Expenditures, and Turnout in the 1982 U.S. House Elections*, 83 *Am. Pol. Sci. Rev.* 217, 226 (1989) (finding a positive relationship between competitiveness of elections, campaign expenditures, and turnout); Ron Shachar & Barry Nalebuff, *Follow the Leader: Theory and Evidence on Political Participation*, 89 *Am. Econ. Rev.* 525, 545 (1999) (finding “that an increase of 1 percent in the closeness of the race . . . leads to a 0.34-percent increase in participation”). After these earlier studies suggested a modest positive relationship between competition and turnout, later studies overcoming attenuation and endogeneity bias in their empirical models found a much more robust correlation between competition and turnout. See, e.g., Gábor Simonvits, *Competition and Turnout Revisited: The Importance of Measuring Expected Closeness Accurately*, 31 *Electoral Stud.* 364, 369 (2012) (“[A] 1% decrease in the relative margin of the victory of the party that got the most of the votes in the first round is expected to increase turnout in the runoff by 0.2%.”); see also Sebastian Garmann, *A Note on Electoral Competition and Turnout in Run-Off Electoral Systems: Taking into Account Both Endogeneity and Attenuation Bias*, 34 *Electoral Stud.* 261, 261–62 (2014) (identifying the endogeneity and attenuation biases that arise in earlier studies seeking to measure the causal effect of competition on turnout).

134. See Christine Fauvelle-Aymar & Abel François, *The Impact of Closeness on Turnout: An Empirical Relation Based on a Study of a Two-Round Ballot*, 127 *Pub. Choice* 469, 481 (2006) (finding that an “increase in electoral spending leads to an increase in

proportion of those campaign expenditures are spent on mobilization activities that, as described above, have been found to be positively correlated with turnout.¹³⁵

As we see evidenced throughout the country in state legislatures' strong proclivity for drawing safe districts, rational elected officials acting without constitutional constraints are not going to construct more than a handful of competitive districts. In addition, as argued above, judicial enforcement of the fair representation model of associational freedom is unlikely to change this dynamic.¹³⁶ In contrast, if courts were to enforce a requirement of electoral competition, then elected officials would be forced to draw a robust number of competitive districts. The electoral logic that might follow is one in which competitive districts increase campaign expenditures, mobilization, and turnout. Consistent turnout by nonvoters might then lead to greater responsiveness to those who were once political outsiders; in turn, that should lead previous nonvoters to turn out more for future elections. Through that process, courts enforcing the First Amendment could transform the cycle of political marginalization into a cycle of political inclusion.

IV. OVERCOMING *GILL*'S STANDING OBSTACLE

The potential for greater democratic inclusion and equality is not the only benefit offered by a First Amendment challenge to partisan gerrymandering premised on the electoral competition model of associational freedom. Such claims are also much more likely to overcome the standing obstacles the Court raised in *Gill*.

The majority in *Gill* found that the challengers failed to show that the statewide map caused a concrete injury to them as individuals. The Court considered any individual's "abstract interest in policies adopted by the legislature [to be a] nonjusticiable 'general interest common to all members of the public.'"¹³⁷ This standing determination represented a fatal blow to the challengers' First Amendment claim and the leading fair representation model of associational freedom that it rested on.

The Court's standing determination in *Gill* is very much consistent with the Court's past review of districting challenges under the Fourteenth Amendment, as the Court has consistently refused to recognize a representational harm as the basis for state constitutional liability. In cases reviewing challenges to malapportioned, multimember, and racially gerrymandered districts under the Fourteenth Amendment, the Court has never found a constitutional violation on the basis of an asserted

electoral participation"); Shachar & Nalebuff, *supra* note 133, at 533 (finding that the "probability of a contact is a positive function of the predicted closeness of the race").

135. See *supra* note 127 and accompanying text.

136. See *supra* Part II.

137. *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (*per curiam*)).

representational harm.¹³⁸ Instead, when the Court has found a constitutional violation, it has been on the basis of a participatory harm—that is, the damage inflicted on an individual’s ability to effectively participate in the political process.¹³⁹ The Justices’ past recognition of participatory harms from districting practices provides an opening for the electoral competition model of associational freedom as the last viable opportunity to place constitutional constraints on partisan gerrymandering.

Unlike the public’s shared interest in particular policies adopted by the legislature, the opportunity to effectively participate is particular and unique to individuals marginalized in specific safe districts due to their associational choice. As the Court in *Gill* explained just before declaring an individual’s interest in policies too abstract for standing purposes, an individual’s interest “in the overall composition of the legislature is embodied in his right to vote for his representative.”¹⁴⁰ Past Supreme Court decisions have determined that this right to vote includes not only the right to cast a ballot but also the right to fully and effectively participate in the political process.¹⁴¹ Just like the districts that the Court has invalidated in its voting rights precedents because they make the votes of members of particular groups ineffective, safe districts render

138. In *Whitcomb v. Chavis*, the Court rejected an equal protection challenge by poor African Americans against multimember districts in Indiana on the basis of an asserted representational harm. The Court explained:

As our system has it, one candidate wins, the other loses. Arguably the losing candidates’ supporters are without representation since the men they voted for have been defeated; arguably, they have been denied equal protection of the laws since they have no legislative voice of their own. . . . But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called “safe” districts where the same party wins year after year.

Whitcomb v. Chavis, 403 U.S. 124, 153 (1971).

139. See *supra* note 101.

140. *Gill*, 138 S. Ct. at 1921.

141. In the seminal case of *Reynolds v. Sims* establishing the one person, one vote requirement under the Fourteenth Amendment Equal Protection Clause, the Court announced:

[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies. . . . Full and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature.

Reynolds v. Sims, 377 U.S. 533, 565 (1964). Over the next two years, the Court elaborated on this right to full and effective participation when it determined that districting schemes that “operate to minimize or cancel out the voting strength of racial or political elements of the voting population” would be deemed a violation of the Equal Protection Clause. *Burns v. Richardson*, 384 U.S. 73, 88 (1966) (internal quotation marks omitted) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)).

the votes of both minority-party political insiders and politically excluded outsiders ineffective as well.¹⁴²

Any such litigation premised on the electoral competition model of associational freedom will eventually have to identify the specific point at which a district's lack of competitiveness will infringe on an individual's associational rights. The confines of a symposium essay do not allow me to take on that question here. But I have offered an important first step in laying out the individual and particularized injuries that arise from the state's drawing of specific districts, with the goal of overcoming *Gill's* standing obstacle.

CONCLUSION

We do not yet know exactly how powerful competitive electoral districts will be in drawing political outsiders into the political process. Until courts decide to step in and adopt a constitutional mandate that forces states to draw such districts, the impact is impossible to precisely predict. But the available evidence suggests that judicial enforcement of the electoral competition model of associational freedom would not only protect political insiders' right to effective participation in the electoral process but also help incorporate political outsiders in democratic politics. That distinguishes this model from the fair representation model of associational freedom, in which the constitutional benefit, in the form of a guarantee of representation in the legislative process, accrues only to political insiders.

At the core of the First Amendment freedom of association is the goal of creating a more inclusive democracy through the protection of political outsiders and their voices. The less-educated, poor nonvoters of the present do not have the benefit of a formal association seeking to

142. In *White v. Regester*, the Court found that two multimember districting schemes in Texas violated the constitutional rights of African American and Mexican American voters. See 412 U.S. 755, 766 (1973). The Court explained that it is not enough to sustain a constitutional claim "that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." *Id.* at 765–66. Instead, "[t]he plaintiffs' burden is to produce evidence to support finding that the political processes leading up to nomination and election were not equally open to participation by the group in question," and plaintiffs must prove "that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* at 765; see also *Rogers v. Lodge*, 458 U.S. 613, 624–27 (1982) (finding that multimember districts in Georgia violated the participatory rights of African American voters).

The participatory nature of the constitutional harm in the so-called racial gerrymandering cases is less clear, but the Court's constitutional concern seems to be directed at white voters whose participation will be rendered meaningless in districts designed to secure representation for racial-minority voters. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (announcing as one of the harms associated with racial gerrymandering the belief it instills in elected officials that their "primary obligation is to represent only the members of [the favored] racial group, rather than their constituency as a whole").

advance their political goals outside of the political process, as the NAACP once did for African Americans. But judicial enforcement of the freedom of association in the partisan gerrymandering context can nonetheless force political insiders to respond to and promote the political goals of political outsiders.