

BACK TO THE FUTURE: RECENTERING
THE POLITICAL OUTSIDER

RESPONSE TO PROFESSOR BERTRALL ROSS

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INTRODUCTION

Partisan gerrymandering has a lengthy history, as political parties in power have repeatedly sought to construct electoral districts in ways that disfavor the minority party and ensure majority-party dominance. While more recently it appears that Republicans have reaped more of the benefits of partisan gerrymandering,¹ over the past fifty years, each major political party, Republican and Democratic, has accused the other of reapportioning districts to stack the deck in favor of the party in power. Legal challenges to these practices have asserted that this use of political authority violates the minority party's First Amendment associational rights and Fourteenth Amendment right to equal protection.² The stakes in this dispute have risen ever higher, in part because, as commentators have noted, technology has made it possible to identify voter affiliation with

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1. See Laura Royden & Michael Li, Brennan Ctr. for Justice, *Extreme Maps 1* (2017), https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16_0.pdf [<https://perma.cc/R7CJ-BRKN>] (noting that in the twenty-six states that account for eighty-five percent of congressional districts, Republicans are favored by the district maps, deriving a net gain from partisan gerrymandering of about sixteen to seventeen seats); Amber Phillips, *These 3 Maps Show Just How Dominant Republicans Are in America After Tuesday*, Wash. Post (Nov. 12, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/12/these-3-maps-show-just-how-dominant-republicans-are-in-america-after-tuesday> [<https://perma.cc/CC5E-A7US>] (explaining that, following the 2016 elections, Republicans enjoyed a near-record level of political power nationally in the modern era in part because “Republicans got to draw the electoral maps for state and congressional seats in about three times as many states as Democrats did”).

2. Justice Stevens has been particularly vocal about this issue, pointing out that drawing district lines to benefit one party violates citizens' rights to equal protection. See *Vieth v. Jubelirer*, 541 U.S. 267, 333 (2004) (Stevens, J., dissenting) (contending that “the Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that every decision by the sovereign serve some nonpartisan public purpose”).

great precision,³ and traditional legal constraints on gerrymandering have been insufficient to prevent the practice.⁴ Yet, even as the debate has grown louder and more intense, left outside the discussion are the significant number of eligible voters who do not participate in elections. At a time when political power and party affiliation are enormously consequential in terms of law and policy, Professor Bertrall Ross's essay⁵ is a thoughtful doctrinal reframing that focuses on securing meaningful participation by the politically marginal.⁶

Ross's intervention is particularly welcome as the doctrine on partisan gerrymandering remains both unsettled and conceptually muddled despite recent high-profile cases. Although the legal arguments have been well-defended and rehearsed often, doctrinally there has been little consensus about the nature of the claims, the proof required, or the appropriate remedy.⁷ The most recent decision (or nondecision) by the Supreme Court in *Gill v. Whitford* is illustrative of the incoherence, even

3. See Transcript of Oral Argument at 39, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), http://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1161_bpm1.pdf [<https://perma.cc/5QTR-2JYQ>] (“[A]s gerrymandering becomes more sophisticated with computers and data analytics . . . and an electorate that’s very polarized and more predictable than it’s ever been before[,] . . . you’re going to have a festival of copycat gerrymandering the likes of which this country has never seen.” (quoting Paul Smith, an attorney for appellees challenging Wisconsin’s State Assembly district map)); Olga Pierce, Jeff Larson & Lois Beckett, *The Hidden Hands in Redistricting: Corporations and Other Powerful Interests*, ProPublica (Sept. 23, 2011), <https://www.propublica.org/article/hidden-hands-in-redistricting-corporations-special-interests> [<https://perma.cc/BJ8-7YFN>] (“[Special interests] are turning to increasingly sophisticated tools and techniques to game the redistricting process [C]orporations and other outside interests . . . provide the cash for voter data, mapping consultants and lobbyists to influence state legislators . . .”).

4. See Ed Kilgore, *The Debate over Gerrymandering Is Changing in a Fundamental Way*, N.Y. Mag.: Daily Intelligencer (Feb. 20, 2018), <http://nymag.com/daily/intelligencer/2018/02/the-debate-over-gerrymandering-is-fundamentally-changing.html> [<https://perma.cc/33NT-TYT5>] (“It’s . . . increasingly clear that the finely grained data available to map-drawers, which they can manipulate via sophisticated software, has made ‘traditional redistricting principles’ less effective in combating gerrymanders.”); see also *infra* Part III for further discussion.

5. Bertrall Ross, *Partisan Gerrymandering, the First Amendment, and the Political Outsider*, 118 Colum. L. Rev. 2187 (2018) [hereinafter Ross, *Partisan Gerrymandering*].

6. While the primary focus is on the First Amendment here, it is worth remembering constitutional scholar John Hart Ely’s theorizing about *Carolene Products’* “discrete and insular minorities” as an earlier influential theoretical model that grounded equal protection in a conception of the political process and associational activities. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 151 (1980) (referencing *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)).

7. See Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351, 355 (2017) (“[C]ourts addressing the hyperpolarized party politics of today, with its aggressive tribal partisanship, lack a clearly declared constitutional principle from which to draw doctrinal support.”); see also Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 Ind. L.J. 299, 322 (2016) (“[C]ourts are left in the bizarre world of trying to define the consequences of too much partisanship without an ability to condemn partisanship as such.”).

on the question of who can sue.⁸ Despite strong evidence of a partisan-motivated gerrymander in the creation of electoral districts in Wisconsin favoring the Republican majority, the Court ruled that minority-party voters challenging their dilution of political power under the majority party's districting plan lacked standing in the absence of proof that an individual voter was harmed by the gerrymander of her district.⁹ On the majority's view, disproportionality cannot be demonstrated through the configuration of a single district;¹⁰ instead, one has to show a pattern of concrete and particularized injuries to individual voters across the map, district by district.¹¹ Nor can individuals assert a protected constitutional right to elect a particular candidate.¹² Given these constraints, Ross assesses that, for all practical purposes, the Court's standing requirement has closed the door on this version of the partisan gerrymandering claim.¹³

As Ross explains, the long quest to articulate a constitutionally cognizable injury and effective remedy for partisan gerrymandering has been

8. 138 S. Ct. 1916.

9. *Id.* at 1931–34 (“We therefore remand the case . . . so that the plaintiffs may have an opportunity to prove concrete and particularized injuries using evidence—unlike the bulk of the evidence presented thus far—that would tend to demonstrate a burden on their individual votes.”).

10. *Id.* at 1933 (noting that metrics from partisan-asymmetry studies “are an average measure . . . [that] do not address the effect that a gerrymander has on the votes of particular citizens” and are therefore insufficient to demonstrate standing).

11. *Id.* at 1933–34.

12. See Ross, *Partisan Gerrymandering*, *supra* note 5, at 2189 (“[I]ndividuals do not have a right to elect their preferred representatives in a district . . .”).

13. See *id.* at 2189–90. Ross contends that the standing issue is not resolved by Justice Kagan's concurrence, which proposed an alternative theory that locates the injury of partisan gerrymandering in the burden imposed on the First Amendment associational rights of minority-party voters by configuring districts to penalize political affiliation. See *id.* While Kagan's opinion proffers that under this claim standing requirements would be met, as both the associational interests and the injury are statewide, *Gill*, 138 S. Ct. at 1934 (Kagan, J., concurring), Ross argues that this framework “miss[es] 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 [have standing].” Ross, *Partisan Gerrymandering*, *supra* note 5, at 2190. Others are less certain than Ross that the standing requirement sets an impossibly high bar, positing that statewide partisan gerrymandering claims could be advanced by political parties. See, e.g., Andrew Prokop, *The Supreme Court Still Won't Crack Down on Partisan Gerrymandering—Yet, at Least*, *Vox* (June 18, 2018), <https://www.vox.com/2018/6/18/17474912/supreme-court-gerrymandering-gill-whitford-wisconsin> [https://perma.cc/YB4T-NSNS] (“In light of today's SCOTUS decision in *Gill*, it seems that the most logical (and perhaps the only) plaintiffs with standing to bring a statewide partisan gerrymandering claim are the political parties (or quasi-parties, like certain partisan superpacs).” (quoting Marc E. Elias (@marceelias), *Twitter* (June 18, 2018), <https://twitter.com/marceelias/status/1008720179545731072> [https://perma.cc/EGT8-26VM])). Even assuming that litigants could meet the evidentiary requirement, resting the claim on political parties' associational interests reinforces the very problem of looking past political outsiders that Ross seeks to address. See Ross, *Partisan Gerrymandering*, *supra* note 5, at 2191–92 (noting that “[l]itigants challenging partisan gerrymandering focus exclusively on the rights of political insiders”).

fruitless not simply because of doctrinal confusion. Rather, the conceptual impasse follows from a myopic analysis of the injury that focuses primarily on the two dominant political parties and the voters affiliated with them—classic political insiders.¹⁴ Under what Ross terms “fair representation” claims, partisan gerrymandering is said to impermissibly burden an opposing partisan affiliation and, by extension, voters who embrace those political views.¹⁵ First Amendment associational values require that one not be disadvantaged because of party affiliation and that there be (roughly) symmetrical treatment of political parties in drawing districts as entities that express the views of the voters who support the parties’ candidates.¹⁶ On this account, remediation requires the creation of more safe districts for the minority party to cure the injury—the dilution of minority-party power. Put another way, the standard remedy is “one for you / one for me” to offset the “one for you / three (or more) for me” that characterizes partisan gerrymandering. Consequently, where partisan gerrymandering is ruled legally unacceptable, court-imposed remedies redistribute some measure of political opportunity by increasing the number of districts under the control of the party out of power.

But, as Ross argues, this remedial formula does little to improve the position of marginalized political outsiders who have not voted for any party.¹⁷ However important it may be to check the dominant political party’s use of a governmental apparatus to construct political hegemony, the current doctrinal regime does not speak to the *de facto* (if not *de jure*) lock-out of “political outsiders,” “nonvoters or those who generally do not affiliate or vote for candidates of either of the two parties.”¹⁸ Sidelined in the contestation between the established political parties are “under-educated and low-income individuals [who] tend not to vote due to resource constraints.”¹⁹ As a consequence, the preferences of these potential voters remain politically marginalized.

Ross is rightly deeply concerned that the doctrine is preoccupied with the dominant political parties and the voters committed to them, while nonvoters are relatively invisible.²⁰ There is disadvantage, and then there are the truly disadvantaged. Rather than focusing exclusively on competition for the votes of the fifty-five percent of the electorate who align with a particular party, Ross wants to redirect attention to, roughly, the other half—the nonvoters—whose needs are not part of the prevailing political calculus.²¹ Ross seeks to realign the doctrine with core values in democratic theory and return to the origins of First Amendment

14. See Ross, *Partisan Gerrymandering*, *supra* note 5, at 2190–92.

15. *Id.* at 2207–08.

16. *Id.*

17. See *id.* at 2210–11, 2214–15.

18. *Id.* at 2190.

19. *Id.* at 2213.

20. See *id.* at 2190–92.

21. See *id.* at 2190–91.

associational rights.²² In examining the early cases, he identifies a critique of partisan gerrymandering as an infringement of voters' associational rights because the creation of safe, noncompetitive districts denies voters the right to cast an effective ballot.²³ On this view, remediation requires not only constructing a district in which the minority party has a voice and a meaningful opportunity to win, but the creation of districts that are actually competitive. Competitive districts are more likely to be inclusive as competition can incentivize resource expenditures to secure the votes of political outsiders whose voices then become relevant.²⁴ In recovering this alternative understanding of associational rights that recenters the political outsider, Ross expands on Professor Lani Guinier's critique of single-member, majority-minority districts as the remedy for racial gerrymanders and vote dilution. As she notes:

[Such districts] do[] not sustain the electoral participation of blacks, particularly those who are indigent. . . . [T]his, in turn, reduces the substantive accountability of black representatives to the policy concerns of the black community. . . . [and] dilute[s] the voting strength of black voters outside the district, as well as the voting strength of other minorities in the district. . . . [Such districts] stifle[] electoral competition, which further exacerbates the problem of declining voter involvement.²⁵

Ross persuasively argues that the concept of freedom of association articulated in the current partisan gerrymandering cases represents a departure from the doctrine's origins, which were rooted in concerns over the associational interests of those who lacked access to political power.²⁶ Deploying a kind of "Back to the Future" strategy,²⁷ Ross seeks to shift the focus from the injury suffered by political parties to the injury suffered by political outsiders and to rescue the doctrine from its current

22. See *id.* at 2192–94.

23. See *id.* at 2193 ("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." (emphasis added)).

24. See *id.* at 2215 (arguing that competitive districts are more likely to be inclusive of political outsiders insofar as they encourage increased campaign expenditures, mobilization, and turnout, which in turn leads to greater responsiveness by elected officials towards the needs of political outsiders).

25. Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* 75 (1994).

26. See Ross, *Partisan Gerrymandering*, *supra* note 5, at 2201 ("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.").

27. *Back to the Future*, a hugely popular science-fiction film from 1985, follows the protagonist's accidental travel back in time to the year before his parents met and what ensues when his actions threaten to, and do in fact, alter outcomes in the future. *Back to the Future* (Universal Pictures 1985).

containment in established political circuits.²⁸ Ross provides a roadmap for how an “electoral competition” model of associational freedom would operate: In order to increase the visibility of the eligible, but non-voting, constituency of the disadvantaged, courts would be required to consider whether and to what extent competitiveness is preserved or promoted.²⁹ In this regard, his essay, the first draft of which preceded the upset election of progressive candidate Alexandria Ocasio-Cortez in the Democratic primary for New York’s Fourteenth Congressional District over a powerful incumbent,³⁰ can be viewed as a prescient articulation of her electoral strategy. As Ocasio-Cortez put it, “Our swing voter is not red to blue’ ‘It’s nonvoter to voter.’”³¹

Ross offers a convincing and well-argued critique of the crabbed nature of the current jurisprudence that largely ignores political outsiders. His observations that this doctrinal tunnel vision is antithetical to the doctrine’s origins are also persuasive. Like all compelling interventions, Ross’s reframing invites several lines of inquiry, three of which I consider here. First, Ross offers a rereading of the doctrinal history to show what got lost along the way: the interests of political outsiders.³² At the same time, he correctly notes that the doctrine appeared to offer more expansive protections to some political outsiders than to others.³³ Part I explores why. How might attending to the reasons for, and consequences of, that difference provide greater insight into the possibilities and limits of the doctrinal intervention? Is there a critical history that can incite further scrutiny and agitation around the interests and objectives of political outsiders? Part II considers how we should understand the category of political outsiders. Accepting that political outsiders are more economically disadvantaged, what might an intersectional analysis focusing on race and gender disclose about perceived political interests? What are some of the internal tensions? Part III concludes with some thoughts

28. See Ross, *Partisan Gerrymandering*, supra note 5, at 2194.

29. See *id.* at 2211 (“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.”).

30. See Shane Goldmacher & Jonathan Martin, *Alexandria Ocasio-Cortez Defeats Joseph Crowley in Major House Democratic Upset*, N.Y. Times (June 26, 2018), <https://www.nytimes.com/2018/06/26/nyregion/joseph-crowley-ocasio-cortez-democratic-primary.html> (on file with the *Columbia Law Review*).

31. Elaine Godfrey, *The Progressives’ Plan to Win in 2018*, Atlantic (Aug. 5, 2018), <https://www.theatlantic.com/politics/archive/2018/08/the-progressives-plan-to-win-in-2018/566825/> [https://perma.cc/YW9C-JKTL] (quoting Ocasio-Cortez).

32. See Ross, *Partisan Gerrymandering*, supra note 5, at 2192.

33. *Id.* at 2196–97 (describing how the Court was more responsive in the 1950s to chilling effects on associational rights for the political activities of the NAACP than to chilling effects for the political activities of the Communist Party).

on how political outsiders might be conceptualized to further expand democratic participation.

I. OUTSIDERS' HISTORY

As Ross seeks to reclaim the associational rights of effective electoral competition embedded in earlier doctrine, it is important to revisit, as he does, that earlier line of cases, both as a genealogy and as a bridge-building exercise between the past and the future. Ross embraces an earlier vision of First Amendment associational rights as a tool used by political outsiders to advance the interests of disfavored minorities and to intervene in the entrenched two-party system under which they were locked out. As Ross notes, both the Communist Party and civil rights organizations like the NAACP were key in this story, as these groups mounted crucial challenges to the whole range of practices by both state and private actors that were designed to stifle or still the critiques they offered.³⁴ Thus the Communist Party challenged the constitutionality of loyalty oaths and resisted state efforts to compel the disclosure of their membership lists, denouncing these state practices, as the NAACP had done, as impermissible burdens on the associational rights of dissident voices.³⁵ In a series of cases, the Supreme Court expressed concern about the chilling effect of such laws on speech, as well as about private pressure on political expression and advocacy against groups that are political outsiders and that may be regarded as political pariahs.³⁶

However, as Ross discusses, the Court appeared only weakly responsive to the arguments advanced by the Communist Party and was more receptive to freedom of association concerns raised by the NAACP.³⁷ One important question is why that is so. In taking up this question, I juxtapose Ross's project of doctrinal excavation with Professor Kendall Thomas's classic critical cultural history of the Angelo Herndon case decided by the Court in 1937.³⁸ *Herndon v. Lowry*³⁹ is typically presented in constitutional history as a signature civil liberties victory that proscribed the use of state action—here a sedition statute—to punish Herndon, a young,

34. See *id.* at 2194–98 (detailing state efforts to chill speech by the NAACP and Communist Party and the litigation campaigns initiated by those groups in response).

35. See *id.*

36. See *id.* at 2196–98 (“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.”).

37. See *id.* at 2191 (“The Supreme Court initially proved reluctant to provide constitutional protection to Communist Party members 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”).

38. Kendall Thomas, *Rouge et Noir* Reread: A Popular Constitutional History of the Angelo Herndon Case, in *Critical Race Theory: The Key Writings that Formed the Movement* 465 (Kimberlé Williams Crenshaw et al. eds., 1995).

39. 301 U.S. 242 (1937).

black Communist, for expressing his views.⁴⁰ Yet Thomas notes that this dominant narrative omits both Herndon's voice and perspective as well as two prior cases in which Herndon lost.⁴¹ Thomas called for (and executed) a constitutional history "from the bottom up," in which he took up the task of "identify[ing] and interpret[ing] the records left by those who have experienced the American constitutional order from its underside."⁴² The object is not only to acknowledge the "right of 'un- or misrepresented human groups to speak for and represent themselves' . . . [but also] 'to broaden the basis of history, to enlarge its subject matter, make use of new raw materials and offer new maps of knowledge.'"⁴³ In this spirit then, it is worthwhile to probe the difference in outsider protection both to provide a more robust historical account as well as to consider the possibilities and limitations of the associational-rights framework that underpinned the Court's jurisprudence.

Ross's observation that the Court was more responsive to the NAACP's claims than those of the Communist Party invites inquiry: Why was it easier for the Court to affirm certain kinds of associational activity than others? Of course, the common perception of Communism as a national security threat suggests that the Court would be less sympathetic to the Communist Party's claims. Nevertheless, that understanding may not fully exhaust the inquiry. The Court's relative receptivity to the arguments advanced by Communist political outsiders as distinct from other political outsiders like the NAACP relates to more than perceived differences

40. See Thomas, *supra* note 38, at 465–67.

41. See *id.*

42. *Id.* at 467.

43. *Id.* (first quoting Edward W. Said, *Orientalism Reconsidered*, in *Literature, Politics and Theory* 210, 212 (Francis Barker et al. eds., 1986); then quoting Raphael Samuel, *People's History*, in *People's History and Socialist Theory*, at xv, xvi (Raphael Samuel ed., 1981)). As Thomas later described, one of the important points was to attend to what was erased in the process of remembering:

The Herndon case was the second-most famous political controversy concerning African Americans in the 1930s, after the Scottsboro cases. Herndon really represents or contains, in a compressed form, all the old intractable themes of racial politics in the U.S. What interested me was the way in which it was remembered, and the ways in which the memorialization of this decision, which led ultimately to the release of this young African American Communist Party organizer, depended on the erasure, the forgetting, of very important aspects of the case. I've always been interested in the ways law tells stories about its past that delete, in an obviously ideologically interested way, those parts of the story that don't fit into the grand narrative of law in America, which is the story of the protection of human dignity and freedom. Since there are few issues over which the country as a whole has stumbled as much as race—the legal system in particular—I wanted to try to offer a genealogy of how in legal history the story of a case like Herndon could be both remembered and forgotten at the same time.

Lynne Tillman, Kendall Thomas, *BOMB* (Apr. 1, 1997), <https://bombmagazine.org/articles/kendall-thomas/> [<https://perma.cc/DY2Y-FLLF>] (quoting Thomas).

in organizational agendas. Part of that difference may lie in Professor Derrick Bell's materialist analysis of *Brown v. Board of Education*⁴⁴ as the product of a convergence of interests between racial justice advocates and U.S. foreign policy elites during the Cold War that resulted in the elimination of de jure segregation.⁴⁵ Drawing on the amicus brief filed by the U.S. State Department in *Brown*, Bell points out that competition with the Soviet Union for influence in the emerging nations of Africa, Asia, and Latin America drove the U.S. government to argue against Jim Crow segregation as injurious to national interests.⁴⁶ Understanding what Professor Mary Dudziak later richly explored in her book *Cold War Civil Rights*⁴⁷ helps explain why the Court might have been more persuaded by the claims of domestic-based, civil rights organizations like the NAACP. The Black Left's organizations and leaders such as Paul Robeson and William Patterson—who filed the historic petition “We Charge Genocide” in the newly formed United Nations, charging U.S. racial oppression as a human rights violation—did not fare as well.⁴⁸ Indeed, as the McCarthy

44. 347 U.S. 483 (1954).

45. See Derrick A. Bell, Jr., *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 524 (1980) [hereinafter Bell, Interest-Convergence Dilemma] (“[T]he decision in *Brown* to break with the Court’s long-held position on these issues cannot be understood without some consideration of the decision’s value to whites . . . in policymaking positions able to see the economic and political advances at home and abroad that would follow the abandonment of segregation.”).

46. *Id.* at 524–25.

47. Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* 6 (2000) (“Domestic civil rights crises would quickly become international crises [during the Cold War]. As presidents and secretaries of state from 1946 to the mid-1960s worried about the impact of race discrimination on U.S. prestige abroad, civil rights reform came to be seen as crucial to U.S. foreign relations.”).

48. In 1951, the William Patterson–led Civil Rights Congress, with the support of Paul Robeson and other leading black leftists, filed a petition with the United Nations charging the United States with genocide against blacks. Civil Rights Cong., *We Charge Genocide: The Historic Petition to the United Nations for Relief from a Crime of the United States Government Against the Negro People* (William L. Patterson ed., Int’l Publishers Co. 1970) (1951) [hereinafter Civil Rights Cong., *We Charge Genocide*]; see also Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. Rev. 1747, 1795–800 (2000) (describing the petition’s origins). The petition specified the evidence in support of the charge of genocide and specifically invoked an analogy to the crimes committed by Hitler to illustrate the connection between racism in the United States and racism in the international arena. Civil Rights Cong., *We Charge Genocide*, *supra*, at 8 (“The whole institution of segregation, which is training for killing, education for genocide, is based on the Hitler-like theory of the ‘inherent inferiority of the Negro.’”); see also *id.* at 7 (“White supremacy at home makes for colored massacres abroad. Both reveal contempt for human life in a colored skin.”). The petition was neither officially heard nor decided upon. See *id.* at vii (“The UN did not respond to the Petition.”); cf. Hom & Yamamoto, *supra*, at 1799–800 (“Patterson and his drafting group had no illusions about the role of the United Nations and clearly recognized the limits of that body in effecting fundamental change in the behavior or laws of the member states. Instead, the strategy was to take center stage [before a global audience]”); Elizabeth M. Schneider, *Transnational Law as a Domestic Resource: Thoughts on the Case of Women’s Rights*, 38 New Eng. L. Rev. 689, 697 (2004) (“[‘We Charge Genocide’] had no legal effect . . .”).

era progressed, they and the organizations with which they were affiliated were targeted with repeated harassment, both private and state sponsored. Noted historian Carol Anderson documents that although by the end of World War II the NAACP framed the struggle for equality in terms of human rights, the organization made strategic concessions in the face of Cold War, anti-Communist hysteria.⁴⁹ It shifted to argue under the banner of civil rights articulations of the “symbolic equality” advanced by powerful white allies who were hostile to, and actively resisted, the human rights framework.⁵⁰ This history reveals that the demarcation between the

Its proponents were denounced as ridiculous, un-American, and Communist. See Gerald Horne, *Black Revolutionary: William Patterson and the Globalization of the African American Freedom Struggle* 133–35 (2013) [hereinafter Horne, *Black Revolutionary*]; Hom & Yamamoto, *supra*, at 1799. The organization itself was denounced as “one of the worst frauds and most mischievous fronts, the Reds ever palmed off on the American public.” Gerald Horne, *Communist Front? The Civil Rights Congress, 1946–1956*, at 17 (1988) (citing newspaper characterizations of the group). Many, like Paul Robeson and William Patterson, were blackballed and targeted by government prosecutions. See Horne, *Black Revolutionary*, *supra*, at 135, 138–40 (explaining that Patterson’s and Robeson’s passports were “snatched,” thereby effectively placing both under domestic house arrest by preventing them from international travel, and describing Patterson’s later trial for contempt of Congress). These attacks had profound consequences for the freedom struggle, which was forced both to cleave from its ranks those deemed its too-radical internationalist fringe and to put the fight for racial justice into its domestic closet. See Carol Anderson, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–1955*, at 5–7 (describing how McCarthyism’s rabid anti-Communism conflated human rights with Communism, subversion, and treason, so that the NAACP was forced to retreat from its prior commitments to a human rights agenda); see also Neil A. Lewis, *Files Say Justice Marshall Aided F.B.I. in 50’s*, *N.Y. Times* (Dec. 4, 1996), <https://www.nytimes.com/1996/12/04/us/files-say-justice-marshall-aided-fbi-in-50-s.html> (on file with the *Columbia Law Review*) (reporting that Thurgood Marshall informed the FBI about perceived Communist Party efforts to influence the NAACP, suggesting an effort “to inoculate the N.A.A.C.P. from charges that it was being influenced by communists at a time . . . when the hint of that, even if false, could discredit an individual or group”); cf. Horne, *Black Revolutionary*, *supra*, at 134 (describing how the NAACP “[r]ather deftly . . . sought to leverage Patterson’s initiative to [its] benefit” by hailing the petition as “[a] ‘most damning indictment’” while simultaneously “warning darkly about the influence the [Civil Rights Congress] was now wielding internationally” (quoting then-NAACP executive secretary Walter White)).

Three years after the petition was filed, the efforts to keep the issue of black freedom entirely a matter of domestic politics proved impossible, as the State Department’s amicus brief in *Brown* argued against de jure segregation because of its negative foreign policy implications. See Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 *Notre Dame Law. J.* 5, 12 & n.30 (1976). The concern was that the United States would fail in the competition with the Soviet Union for hearts and minds in the emerging nations of Africa and Asia if it could not jettison at least its more blatant exclusionary policies. See Bell, *Interest-Convergence Dilemma*, *supra* note 45, at 524.

49. Anderson, *supra* note 48, at 2, 5.

50. Anderson describes the tragic dilemma facing the NAACP and the consequences of its decisions as follows:

The NAACP, therefore, forged important, but ultimately flawed, alliances with Eleanor Roosevelt and Harry S Truman to aid in the struggle for African Americans’ human rights. Yet, whereas Roosevelt and Truman were clearly committed to some measure of civil rights, they

NAACP and the Communist Party in the Court's decisions was in part the product of a strategic retreat—a price paid for the federal government's concessions to the Civil Rights Movement to blunt the trenchant critique of the United States in the international arena.⁵¹

Over time, the extent of the protection accorded even organizations like the NAACP and figures like Dr. Martin Luther King, Jr. himself also shrank. NAACP activists and lawyers advanced civil rights and civil liberties arguments that the Court seemed to endorse in cases such as *NAACP v. Alabama ex rel. Patterson*,⁵² *NAACP v. Button*,⁵³ and *Edwards v. South Carolina*,⁵⁴ in which the Court protected the organizational privacy of civil rights groups and overturned efforts to convict protestors for exercising First Amendment rights. However, these victories were accompanied by increasing constraints. This dynamic became particularly evident in the 1963 campaign against the apartheid structure relentlessly imposed by the City of Birmingham, Alabama. From the start, the movement activists faced extraordinary legal and extralegal strategies to derail their campaign. In anticipation of the planned protests, the City petitioned the state court to enjoin King and over 130 others—as well as two civil

were both unable and unprepared to fight for a world that embraced full equality for African Americans.

... Instead, ... [they] engaged in the politics of symbolic equality . . .

....

... The struggle [for African Americans' human rights] was ultimately destroyed . . . [by] anti-Communist witch hunts, which compromised the integrity of the black leadership, twisted the definition of human rights into the hammer and sickle, and forced the NAACP to take its eyes off the prize of human rights.

....

The Cold War also systematically eliminated human rights as a viable option for the mainstream African American leadership. During the McCarthy era, human rights and the United Nations became synonymous with the Kremlin and the Soviet-led subversion of American democracy.

Id. at 2–5.

51. See id. at 3 (explaining, for example, how Eleanor Roosevelt, a “master[] of symbolic equality[,] . . . sympathized with the plight of African Americans, . . . [but] was even more responsive to the public relations exigencies of the Cold War, which called for sanitizing and camouflaging the reality of America’s Jim Crow democracy”); see also Mary L. Dudziak, *Brown as a Cold War Case*, 91 J. Am. Hist. 32, 33–35 (2004) (“Cold War concerns provided a motive beyond equality itself for the federal government, including . . . the courts, to act on civil rights when it did.”).

52. 357 U.S. 449, 466 (1958) (holding that the Fourteenth Amendment protects the NAACP from a state fine and civil contempt order for failing to produce its membership list).

53. 371 U.S. 415, 428–29 (1963) (holding that state laws intended to bar NAACP-sponsored litigation ran afoul of the First and Fourteenth Amendments).

54. 372 U.S. 229, 235 (1963) (“[I]t is clear to us that in arresting, convicting, and punishing the petitioners under the circumstances disclosed by this record, South Carolina infringed the petitioners’ constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances.”).

rights organizations, including the Southern Christian Leadership Council—from any protest activity unless the activists first obtained a permit from the Board of Commissioners, a body implacably opposed to granting it.⁵⁵ When King and others marched despite the injunction, they were arrested and later charged with contempt.⁵⁶ Although the injunction was patently unconstitutional, a closely divided Supreme Court in *Walker v. City of Birmingham* decided against the protesters, holding that the collateral bar rule foreclosed a challenge to the order's legality as a defense to a contempt charge.⁵⁷ *Walker* and other cases⁵⁸ are a reminder that the doctrinal foundations of associational rights have been unstable.⁵⁹

55. See David Luban, *Difference Made Legal: The Court and Dr. King*, 87 Mich. L. Rev. 2152, 2161–63 (1989); Leonard S. Rubinowitz et al., *A “Notorious Litigant” and “Frequent of Jails”: Martin Luther King, Jr., His Lawyers, and the Legal System*, 10 Nw. J.L. & Soc. Pol’y 494, 598–600 (2016).

56. See Luban, *supra* note 55, at 2163; Rubinowitz et al., *supra* note 55, at 601–02.

57. 388 U.S. 307, 320–21 (1967).

58. See, e.g., *Boynton v. Virginia*, 364 U.S. 454, 462–63 (1960). A black law student, William Boynton, traveled by bus at Christmastime from Washington, D.C., to Montgomery, Alabama. See *id.* at 455. When the bus stopped in Richmond, Virginia, for a rest stop, Boynton entered the terminal and seated himself in the whites-only area of the adjacent restaurant. See *id.* When he was asked to move, he refused, showing that his ticket authorized him to travel interstate. See *id.* He was arrested, convicted, and fined for unlawfully remaining on the premises. See *id.* at 455–56. Boynton contended that his arrest and conviction were unconstitutional, violating the Fourteenth Amendment’s Due Process and Equal Protection Clauses, as well as the Commerce Clause, which grants exclusive power to the national government to control the movement of goods and people between the states. See *id.* at 456–57. Boynton won his case, but not based on the constitutional claim. Instead, the Court relied on the Interstate Commerce Act to find that the conviction was unlawful. See *id.* at 457, 463–64 (“[W]e think it appropriate not to reach the constitutional questions but to proceed at once to the statutory issue.”). This decision finding for Boynton was a victory, but it also signaled how the courts sought to constrain protest. In later cases, the courts made the protection of order more important and ruled against the demonstrators. In time, the Court came to focus on not only whether the protests were peaceful but whether they were disrupting business as usual or invading what they called “hallowed places.” See, e.g., *Mayberry v. Pennsylvania*, 400 U.S. 455, 456 (1971) (describing a courtroom as a hallowed place while considering criminal contempt charges); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (describing a public library as a hallowed place while considering breach-of-peace charges). This shift reflected and reinforced the dynamic that Lewis Steel, an NAACP lawyer, described in a 1968 article in the *New York Times Magazine*: “White America . . . decided that demonstrations and riots were synonymous.” Lewis M. Steel, *A Critic’s View of the Warren Court—Nine Men in Black Who Think White*, *N.Y. Times Mag.*, Oct. 13, 1968, at 56, 115. Steel was terminated as a result of the article. See Kimberlé Williams Crenshaw, *Race Liberalism and the Deradicalization of Racial Reform*, 130 Harv. L. Rev. 2298, 2301–02 (2017).

59. As Bell argues:

Even as the Court overturned the convictions of sit-in demonstrators, it demonstrated qualified endorsement of the protest activity but refused to create a consistent and generally applicable right to relief for the activists. The Court both declined to extend the rationale of its restrictive covenant cases to bar the prosecution of those who challenged discriminatory customs or to declare their activity protected First Amendment speech. In addition, the Supreme Court reversed protestors’ convictions on only

The Court's unease with more radical critiques and direct-action tactics is unsurprising in many respects. Nevertheless, the struggles of the Communist Party and the NAACP are entwined in complex ways that illuminate the crucial relationships between law reform, politics, and social movements. It is a reminder that the project of doctrinal reform is inherently a social movement project, even as law will always imperfectly reflect transformative visions. Ross's essay points a way toward excavating critical histories as part of pushing for change.

II. WHO ARE POLITICAL OUTSIDERS?

Ross argues for greater focus on the harm suffered by political outsiders as a result of partisan gerrymandering. In this Part, I consider how one might define a political outsider, and the implications such definitional choices have for the arguments he raises and the goals of the doctrinal shift he advocates.

Ross defines political outsiders as the silent victims of partisan gerrymandering.⁶⁰ They are groups of persistent nonvoters whose participation is not valued; although they are eligible to vote, they do not, and thus they are of little concern to the political insiders who drive the rules of the electoral process.⁶¹ Political outsiders tend to be poorer and less well educated.⁶² Ross correctly points out that the current treatment of partisan gerrymandering as viewpoint discrimination—what he labels the “fair representation claim”—limits the focus to political insiders to the detriment of poor and working-class people whose needs are ignored in shaping state policy.⁶³ He thus seeks to chart a doctrinal path toward inclusion of those neglected constituencies and their effective participation as political agents.⁶⁴

Presumably, however, while inclusion is itself a democratic value, it is not the exclusive normative commitment underlying Ross's project. Creating more competitive districts to incentivize greater political participation by those previously excluded advances the goal of shifting policymaking toward positions that improve conditions for marginalized communities. Thus, as Ross contends, the relationship between nonvoting and marginalization is mutually reinforcing:

A vicious cycle of marginalization has emerged in which undereducated and low-income individuals tend not to vote due

the narrowest grounds. By refusing to articulate general principles to protect civil rights activists, the Court limited the tactics available to protestors, avoided the full-scale wrath of many opposed to the protests' aims, and left itself an avenue of retreat.

Derrick Bell, *Race, Racism, and American Law* § 10.4, at 603 (6th ed. 2008).

60. See Ross, *Partisan Gerrymandering*, *supra* note 5, at 2190–92.

61. See *id.*

62. See *id.* at 2212.

63. See *id.* at 2191–92.

64. See *id.* at 2192–94.

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. Then, once in office, *candidates who do not owe any of their electoral success to nonvoters tend to support policy programs that are not responsive to the needs and interests of those individuals.*⁶⁵

Ross's assertion of a link between who votes and what policies are (not) enacted is well supported. The literature demonstrates that the class bias in voting—that wealthier voters have significantly higher levels of participation—is correlated with differences in policy preferences, with economically disadvantaged nonvoters favoring more redistributive policies.⁶⁶

That said, inclusion of political outsiders standing alone will not lead to policy outcomes, or even policy proposals, that raise all boats. It is certainly not the case that Ross's conception of inclusion is so linear; he is well aware, and acknowledges, that policy preferences and partisan politics are complex.⁶⁷ My point is simply to underscore that while relative economic disadvantage shared by political outsiders collectively positions them outside the realm of political power—particularly as measured by hostility to policies that redistribute power and resources—political outsiders are not a monolithic group with perceived common interests. One of the challenges is that the material disadvantage that characterizes political outsiders is articulated and experienced differently within the group.

65. *Id.* at 2213–14 (emphasis added) (footnote omitted).

66. See Sean McElwee, *The Income Gap at the Polls*, Politico Mag. (Jan. 7, 2015), <https://www.politico.com/magazine/story/2015/01/income-gap-at-the-polls-113997> [<https://perma.cc/BV8W-EG3H>] (collecting and summarizing several studies and concluding that “[v]oters . . . are more economically conservative; whereas non-voters favor more robust unions and more government spending on things like health insurance and public schools”); see also Jan E. Lieghley & Jonathan Nagler, *Who Votes Now? Demographics, Issues, Inequality, and Turnout in the United States* 5 (2013) (“[E]lected officials respond more to the preferences of the wealthy than to the preferences of the poor”); William W. Franko, *Political Inequality and State Policy Adoption: Predatory Lending, Children’s Health Care, and Minimum Wage*, 5 *Poverty & Pub. Pol’y* 88, 110 (2013) (“States with wide gaps between the participation rates of the rich and poor are less likely to adopt policies that are beneficial to the disadvantaged.”).

67. See, e.g., Bertrall L. Ross II, *The Costs and Elusive Gains of Creating Complementarities Between Party and Popular Democracy: A Response to Ethan J. Leib & Christopher S. Elmendorf*, 3 *Calif. L. Rev. Cir.* 146, 146–47 (2012), <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1000&context=clrcircuit> (on file with the *Columbia Law Review*) (noting that opaque lawmaking structures and procedures make it difficult for potential voters to hold individual officials accountable); Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 *Calif. L. Rev.* 1565, 1567–68 (2013) [hereinafter Ross, *Democracy and Renewed Distrust*] (emphasizing that changes in the Supreme Court’s equal protection jurisprudence and concomitant decline in minority representation in the political process are attributable to fundamental shifts in the Court’s conception of politics and political theory).

Bringing an intersectional lens to the discussion illuminates important trends and tensions that complicate the trajectory of inclusion.⁶⁸

It is axiomatic that because districting is a political process built on where people reside, racial stratification and segregation ensure that race will be salient where the lines are drawn. Moreover, the divide between the two major political parties itself is increasingly a racial fissure.⁶⁹ Notwithstanding the voices of a few quixotic souls who assert big-tent metaphors and possibilities, the Republican Party is overwhelmingly a white party in terms of its membership, representatives, and agenda.⁷⁰ In this sense, presently partisan gerrymandering is a racial project, designed to dilute the political power of black and Latinx voters who tend to vote Democratic.⁷¹ This is not to say that the Democratic Party has not also used districting to dilute minority voting power in some instances.⁷² Nor is this an argument that whites are not affected by partisan gerrymandering.

68. See generally Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241 (1991) (providing an overview of intersectional analysis).

69. See Pew Research Ctr., *Wide Gender Gap, Growing Education Divide in Voters' Party Identification* 7 (2018), <http://www.people-press.org/wp-content/uploads/sites/4/2018/03/03-20-18-Party-Identification.pdf> [<https://perma.cc/RK7V-CH6X>] (providing data which show that black, Hispanic, and Asian American voters remain overwhelmingly Democratic, slightly more so than in 1994); Perry Bacon Jr., *How the 2016 Election Exposed America's Racial and Cultural Divides*, *NBC News* (Nov. 11, 2016), <https://www.nbcnews.com/politics/white-house/how-2016-election-exposed-americas-racial-cultural-divides-n682306> [<https://perma.cc/G23B-HB4W>] (describing how the racial divide among voters increased from the 2012 presidential election to the 2016 election).

70. As of 2016, eighty-six percent of Republican and Republican-leaning registered voters were non-Hispanic whites, contrasted with fifty-seven percent of all Democratic and Democratic-leaning registered voters. Pew Research Ctr., *The Parties on the Eve of the 2016 Election: Two Coalitions, Moving Further Apart I* (2016), <http://www.people-press.org/wp-content/uploads/sites/4/2016/09/09-13-2016-Party-ID-release-final.pdf> [<https://perma.cc/MXJ2-62PH>]. Furthermore, ninety-seven percent of all Republican elected officials (and seventy-nine percent of all Democratic elected officials) are white. Alexa Lardieri, *Despite Diverse Demographics, Most Politicians Are Still White Men*, *U.S. News & World Rep.* (Oct. 24, 2017), <https://www.usnews.com/news/politics/articles/2017-10-24/despite-diverse-demographics-most-politicians-are-still-white-men> (on file with the *Columbia Law Review*) (citing a study released by the Reflective Democracy Campaign).

71. See Royden & Li, *supra* note 1, at 1–2 (noting the impact of partisan gerrymandering in Republican-controlled states in recent years); Richard L. Hasen, *Race or Party? How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 *Harv. L. Rev. Forum* 58, 67–70 (2014), https://harvardlawreview.org/wp-content/uploads/pdfs/forvol127_hasen.pdf [<https://perma.cc/69M4-BZZJ>] (discussing how racial and partisan motivations in the gerrymandering context have become intertwined); Olga Pierce & Kate Rabinowitz, *'Partisan' Gerrymandering Is Still About Race*, *ProPublica* (Oct. 9, 2017), <https://www.propublica.org/article/partisan-gerrymandering-is-still-about-race> [<https://perma.cc/B3D8-MRZ6>] (“[R]ace remains an integral element of redistricting disputes, even when the intent of those involved was to give one party an advantage.”).

72. See Pierce & Rabinowitz, *supra* note 71 (noting that the Democratic Party has occasionally spread minority votes over several districts to increase Democratic representation).

Clearly, they are. However, racial segregation virtually guarantees that the geographic distribution of political outsiders will follow racial lines, with economically disadvantaged whites residing in areas separate from their black and brown counterparts. The creation of competitive electoral districts will then challenge the traditional metrics of districting, contiguity, and compactness.⁷³

Even beyond these questions, substantively, the situation of white political outsiders—the white poor and working class—is complex. Certainly, the group has been caricatured as consisting of backwards racists,⁷⁴ which is not only a poorly supported stereotype but one that exonerates white middle- and upper-class voters, whose support for nativist and racially subordinating policies has been essential.⁷⁵ Not all economically disadvantaged whites are politically conservative.⁷⁶ However, racist populism’s appeal to whites of all classes cannot be denied. Indeed, the critique of global elites and increasing inequality under neoliberal policies is a common feature of white nationalist discourse targeted toward working-class whites.⁷⁷ The effort to mobilize a sense of grievance and betrayal by a government that was supposed to protect them as whites reveals how the cause of economic decline and disadvantage is narrated through a racial rhetoric that ties reform to a project of racial and nativist exclusion.⁷⁸

73. See Ross, *Partisan Gerrymandering*, *supra* note 5, at 2211 (describing how state districting practices would differ under an electoral competition model of associational freedom rather than the traditional fair representation model).

74. See Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. Cal. L. Rev. 799, 835–36 & nn.137–139 (2003) (noting that low-income whites are often scapegoated for racism, even though the benefits of racial inequality mostly accrue to upper- and middle-income whites); Lisa R. Pruitt, *The False Choice Between Race and Class and Other Affirmative Action Myths*, 63 Buff. L. Rev. 981, 1007–08 (2015) (noting the “association of working class whites with bad taste, conservative politics, and racism” (footnotes omitted)).

75. See Jesse A. Myerson, *Trumpism: It’s Coming from the Suburbs, Nation* (May 8, 2017), <https://www.thenation.com/article/trumpism-its-coming-from-the-suburbs/> [<https://perma.cc/8689-FTDQ>] (arguing that middle-class and affluent whites, especially suburban homeowners, are the strongest supporters of racial segregation and subordination and have been for decades).

76. See Daniel Cox, Rachel Lienesch & Robert P. Jones, *Beyond Economics: Fears of Cultural Displacement Pushed the White Working Class to Trump*, Pub. Religion Research Inst. (May 9, 2017), <https://www.prii.org/research/white-working-class-attitudes-economy-trade-immigration-election-donald-trump/> [<https://perma.cc/6CFS-NS5F>] (“[B]eing in fair or poor financial shape actually predicted support for Hillary Clinton among white working-class Americans, rather than support for Donald Trump.”).

77. See Donna Minkowitz, *The Racist Right Looks Left*, *Nation* (Dec. 8, 2017), <https://www.thenation.com/article/the-racist-right-looks-left/> [<https://perma.cc/GJK5-RJ5W>] (reporting on a white supremacist conference led by Richard Spencer denouncing corporate capitalism).

78. See Arlie Russell Hochschild, *Strangers in Their Own Land: Anger and Mourning on the American Right* 221–30 (2016) (describing the cultural and racial grievances becoming more apparent on the right throughout the 2016 election); Robert Wuthnow, *The Left Behind: Decline and Rage in Rural America* 9–11 (2018) (“[R]acism and misogyny are built into the patterns of life that nearly all-white [rural] communities have come to

Given the (mal)distribution of material resources and educational opportunity, the category of “political outsiders” implicates race and is further complicated by gender. According to the Center for American Women and Politics, in every presidential election since 1980, the proportion of eligible women who voted has exceeded the proportion of eligible men who voted, while the total number of female voters has exceeded the number of male voters since 1964.⁷⁹ Although significant numbers of women of all races do not vote, women have outpaced men in voting across all racial groups, except Asians/Pacific Islanders.⁸⁰

While much has been made of white women’s support for Donald Trump in the 2016 election, recent research by political scientist Lorrie Frasure-Yokley exposes how the partisan gender gap favoring Democrats is largely a myth that obscures the greater significance of race.⁸¹ Disaggregating women’s voting patterns by race makes clear that white women have been faithful supporters of the Republican Party. Indeed, as Frasure-Yokley reports, “[w]hite women, with few exceptions including 1964 and 1996, have been consistent supporters of Republican Party presidential candidates since the American National Election Study (ANES) began collecting data about U.S. voters and their preferences in 1948.”⁸² Put

accept. And a part of their anger [at Washington] is assuredly the view that the promotion of diversity is a further intrusion of big government.”); Sean Illing, *A Princeton Sociologist Spent 8 Years Asking Rural Americans Why They Are So Pissed Off*, *Vox* (June 30, 2018), <https://www.vox.com/2018/3/13/17053886/trump-rural-america-populism-racial-resentment> [<https://perma.cc/X65K-Y3JX>] (interviewing Professor Robert Wuthnow, who notes that rural Americans express more concern about how Washington threatens their world with moral decline than they do about economic policy, and that they blame and scapegoat racial “others” for their condition); Terrence McCoy, *White, and in the Minority*, *Wash. Post* (July 30, 2018), <https://www.washingtonpost.com/news/local/wp/2018/07/30/feature/majority-minority-white-workers-at-this-pennsylvania-chicken-plant-now-struggle-to-fit-in/> [<https://perma.cc/LLV3-6E6T>] (describing the experiences of rural, working-class, white individuals who feel disadvantaged and isolated at factory jobs, where the majority of their coworkers are Latino, and their increasing support for conservative and exclusionist policies).

79. Ctr. for Am. Women & Politics, *Gender Differences in Voter Turnout 1–3* (2017), <http://www.cawp.rutgers.edu/sites/default/files/resources/genderdiff.pdf> [<https://perma.cc/MKR9-RZ4Y>].

80. *Id.* at 2. Although total female Asian/Pacific Islander voters have outnumbered male Asian/Pacific Islander voters in each election since 2000, they have occasionally lagged behind in percentage terms. See *id.* at 3.

81. See Lorrie Frasure-Yokley, *Choosing the Velvet Glove: Women Voters, Ambivalent Sexism, and Vote Choice in 2016*, 3 *J. Race Ethnicity & Pol.* 3, 7 (2018) (using a multivariate model to demonstrate that “[a]mong white women, [holding] ambivalent sexist views positively and significantly predicts vote choice for Trump, controlling for all other factors,” but “for women of color, this relationship was negative and posed no statistical[ly] significant relationship to voting for Trump”).

82. *Id.* at 4 (citing Wendy Smooth, *Intersectionality in Electoral Politics: A Mess Worth Making*, 2 *Pol. & Gender* 400, 407 (2006); Charles Tien, *The Racial Gap in Voting Among Women: White Women, Racial Resentment, and Support for Trump*, 39 *New Pol. Sci.* 651, 652 (2017); Jane Junn, *Hiding in Plain Sight: White Women Vote Republican*, *Politics of Color* (Nov. 13, 2016), <http://politicsofcolor.com/white-women-vote-republican/> [<https://perma.cc/ERA6-WNQP>]); see also Richard A. Seltzer et al., *Sex as a Political*

bluntly, the gender gap in voting behavior is a race gap. 2016 then was not exceptional in this respect. This understanding points to a larger, difficult tension: The greater inclusion of white women in electoral politics has not notably shifted, or even ameliorated, the valence of policies that shred the social safety net or otherwise favor the “haves” over the “have-nots,”⁸³ as a majority of white women support the Republican Party, which has generally disfavored redistributive policies.⁸⁴ Indeed, it is significant to note that white women have continued to vote Republican while the party has aggressively pursued voter-suppression policies that have clearly moved to exclude racial minorities from effective participation in the democratic process.⁸⁵ Research illustrates that white women’s support for Trump is not the product of economic class but rather racial resentment.⁸⁶ Just as it is erroneous to analyze gender without attending to race,⁸⁷ the question is not only how class dynamics impact voting behavior—a concern implicated in Ross’s efforts to deepen democratic participation

Variable: Women as Candidates and Voters in U.S. Elections 6 (1997) (“[T]he majority of white women . . . vote[d] Republican [in 1994].”); Jane Junn, *The Trump Majority: White Womanhood and the Making of Female Voters in the U.S.*, 5 *Pol. Groups & Identities* 343, 344–45 (2017) (“The Trump majority among white females in the 2016 election is consistent with voting behavior in U.S. Presidential elections since the mid-twentieth century.”); John Cassidy, *What’s Up with White Women? They Voted for Romney, Too*, *New Yorker* (Nov. 8, 2012), <https://www.newyorker.com/news/john-cassidy/whats-up-with-white-women-they-voted-for-romney-too> [<https://perma.cc/V8LW-67MU>]; Michelle Cottle, *Why White Women Continue to Back the GOP*, *Atlantic* (Nov. 14, 2016), <https://www.theatlantic.com/politics/archive/2016/11/white-women-support-gop/507617/> [<https://perma.cc/5VT7-YNN4>]; Ilyse Hogue, *Reaching White Women*, *Democracy* (Summer 2017), <https://democracyjournal.org/magazine/45/reaching-white-women/> [<https://perma.cc/GE2Y-T93B>]; Julie Kohler, *The Reasons Why White Women Vote Republican—and What to Do About It*, *Nation* (Feb. 1, 2018), <https://www.thenation.com/article/the-reasons-why-white-women-vote-republican-and-what-to-do-about-it/> [<https://perma.cc/S9W2-LUN3>].

83. See, e.g., Sumi Cho, *Understanding White Women’s Ambivalence Towards Affirmative Action: Theorizing Political Accountability in Coalitions*, 71 *UMKC L. Rev.* 399, 399–404 (2002) (noting that a majority of white women in Washington supported a statewide ballot initiative to end affirmative action despite being its major beneficiaries due to what Cho identifies as white women’s identification with the interests of the white family over women’s equality).

84. See *Most See Inequality Growing, but Partisans Differ over Solutions*, *Pew Research Ctr.* (Jan. 23, 2014), <http://www.people-press.org/2014/01/23/most-see-inequality-growing-but-partisans-differ-over-solutions/> [<https://perma.cc/R76H-XQXG>] (reporting that while there is a broad consensus about the prevalence of inequality and poverty, there is substantially less support among Republicans for government intervention).

85. See, e.g., *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (determining that North Carolina’s voter ID law “target[ed] African Americans with almost surgical precision”); *Veasey v. Abbott*, 830 F.3d 216, 264–65 (5th Cir. 2016) (upholding a lower court determination that Texas’s voter ID law was discriminatory toward African Americans and Hispanics); *Bethune-Hill v. Va. State Bd. of Elections*, No. 3:14cv852, 2018 WL 3133819, at *38 (E.D. Va. June 26, 2018) (striking down Virginia’s House of Delegates district map as an unconstitutional racial gerrymander).

86. See Charles Tien, *The Racial Gap in Voting Among Women: White Women, Racial Resentment, and Support for Trump*, 39 *New Pol. Sci.* 651, 661–64 (2017).

87. Or, for that matter, to analyze race without attending to gender.

by poorer and less-well-educated nonvoters⁸⁸—but how race complicates the perception and behavior of political outsiders.

Of course, complicating this analysis is the fact that the phenomenon that Ross describes, persistent nonvoting,⁸⁹ is, in part, the consequence of both benign (or not-so-benign) neglect as well as the active efforts of one political party to exclude those very nonparticipants through voter suppression. As Professor Atiba Ellis points out in his recent analysis of *McCrorry*, political domination can become racial discrimination.⁹⁰ The Fourth Circuit's willingness to so find, however, stands in tension with several Supreme Court decisions that rest on an exceedingly thin conception of democratic participation.⁹¹ To some extent, my question is less grounded in an empirical debate than a conceptual one, as I want to press on the notion of the political outsider in order to ascertain the relationship between the doctrinal shift that Ross advocates and the concept's contemporary contours.

One of the perverse features of the Court's current reasoning is that it conflates participation rates and access to political office with political power. On this account, politically marginalized groups—black voters in general, including black voters in jurisdictions characterized by entrenched patterns of racial exclusion—are reductively cast not as political outsiders but as political insiders. Thus, in *Shelby County v. Holder*, the majority pointed to the level of black political participation and turnout in the 2012 presidential election as the dispositive indicator of black political empowerment.⁹² On this view, President Obama's election obviates the

88. See Ross, Partisan Gerrymandering, *supra* note 5, at 2217–18.

89. See *id.* at 2212–14.

90. See Atiba R. Ellis, When Political Domination Becomes Racial Discrimination: *NAACP v. McCrorry* and the Inextricable Problem of Race in Politics, 68 S.C. L. Rev. 517, 518 (2017) (“The Fourth Circuit’s ruling [in *McCrorry*] stands out as an effort . . . to articulate a standard for understanding where political manipulation translates into racial discrimination—a standard described in this Article as required due care in the analysis of race.”); see also Hasen, *supra* note 71, at 69–71 (describing the increasingly difficult-to-defend bifurcation of racial and partisan gerrymandering jurisprudence).

91. As leading voting rights scholar Spencer Overton has explained, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), treated black voter turnout as sufficient evidence of effective participation and noted the absence of tests or other similar mechanisms to prevent voting while ignoring substantial evidence of persistent manipulation of rules, including districting, to dilute minority voting power so that despite higher turnout, minorities do not have equal access to power. See Spencer Overton, Against a “Post-Racial” Voting Rights Act, in 29 Nat’l Lawyers Guild, Civil Rights Litigation and Attorney Fees Annual Handbook 299, 299–301 (Steven Saltzman & Cheryl I. Harris eds., 2013).

92. See 133 S. Ct. at 2626 (“Census Bureau data from the most recent election indicate that African-American voter turnout exceeded white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent.”). Chief Justice Roberts’s majority opinion disputed congressional findings in support of extending the Voting Rights Act’s preclearance requirements, noting, “Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.’ The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years And voter registration and turnout numbers in the

need for the Voting Rights Act's remedial provisions.⁹³ This rebranding rests upon a formalist account that ignores other evidence of discrimination⁹⁴ and simply counts the number of voting-eligible members of the group, compares that number to turnout, and concludes that shifts upward in percentage demonstrate that the outsiders have now become insiders.⁹⁵ On the *Shelby* majority's account, such a group is no longer

covered States have risen dramatically . . .” *Id.* at 2625–27 (citations omitted) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 202 (2009)). In holding that there was no longer a difference between black and white political participation significant enough to uphold the Voting Rights Act's preclearance formula, the Court pointed to census data showing that black turnout rates in the 2012 election exceeded white turnout. See *Shelby County*, 133 S. Ct. at 2619. Black turnout increased by over thirteen percentage points between 1996 and 2012, see Thom File, U.S. Census Bureau, U.S. Dep't of Commerce, *The Diversifying Electorate—Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections)* 3 fig.1 (2013), <https://www.census.gov/content/dam/Census/library/publications/2013/demo/p20-568.pdf> [<https://perma.cc/93R3-7P9T>], and according to exit polls, ninety-three percent of black voters voted for Barack Obama, *Election 2012: President Exit Polls*, N.Y. Times, <https://www.nytimes.com/elections/2012/results/president/exit-polls.html> (on file with the *Columbia Law Review*) (last visited Sept. 26, 2018).

93. This argument was advanced in a prior voting rights case, *NAMUDNO*, 557 U.S. 193, decided shortly after President Obama's 2008 election, which challenged key provisions of the Voting Rights Act as unnecessary:

In the past 44 years, nearly every facet of voting rights has changed in America. Voter registration, voter turnout, and representation in electoral offices have increased dramatically among African Americans, Hispanics, and other minorities. The country has its first African-American president, who received a larger percentage of the white vote than each of the previous two Democratic presidential nominees.

About the only thing that has not changed is §5 of the Voting Rights Act, which—based on an illegitimate presumption of resolute intransigence and endemic discriminatory animus—continues to impose an unparalleled federal intrusion on the contemporary generation in certain parts of the country.

Appellant's Brief at 1–2, *NAMUDNO*, 557 U.S. 193 (No. 08-322), 2009 WL 453246. The *NAMUDNO* Court adopted appellant's argument on this point, see *NAMUDNO*, 557 U.S. at 202 (“Things have changed in the South.”), a holding which was cited as authoritative just four years later in *Shelby County*, 133 S. Ct. at 2625 (“Nearly 50 years later, things have changed dramatically.” (citing *NAMUDNO*, 557 U.S. at 202)).

94. Overton has noted that notwithstanding improved registration and turnout numbers, the record of ongoing racial discrimination is extensive. See Overton, *supra* note 91, at 302–03. Techniques such as gerrymandering and the use of single-member districts dilute minority voting power; districts still show evidence of severely racially polarized voting; Latinx and Asian communities are increasingly the target of exclusionary tactics; and high minority turnout can itself precipitate discriminatory efforts to suppress it. See *id.* at 302–06.

95. See Ross, *Democracy and Renewed Distrust*, *supra* note 67, at 1589, 1609 (arguing the Warren Court “established a presumption of invalidity for laws . . . harming groups that it viewed as excluded from pluralist bargaining and majority coalition building,” but the Court today “ha[s] come to see . . . laws [enacted by majoritarian institutions that benefit minorities] as giveaways to politically powerful minority interest groups”). Ross argues that “[i]n essence, one form of judicial distrust of democratic politics has replaced another.” *Id.* at 1566.

subordinated in the electoral process. Ross has previously critiqued the conception of politics that underlies this reasoning.⁹⁶ And this critique is highly relevant to the contrasting categories of political insiders and outsiders. Certainly, Ross here alludes to, and affirms, that his proposal is concerned with more than aesthetic participation and seeks to achieve the kind of inclusion in which marginalized voters' political aspirations become part of the overall debate. To that end, the concept of political outsider might be further specified so that certain presumptions and lines of analysis would help distinguish Ross's political outsider from quickly transforming into *Shelby's* black, discrete, and insular political hegemon.⁹⁷

III. OUTSIDE OUTSIDERS

Ross's compelling account of the problem of excluding the effective participation of political outsiders from policymaking bodies inspires interrogation of current rules and logics that operate to exclude those who might be considered outside the outside. While Part II considers how race and gender may further complicate the category of the political outsiders, in Part III, I consider whether the liminal subject of "political outsider" can include those rendered ineligible to vote by virtue of their status, including non-U.S. citizens,⁹⁸ or those with certain criminal convictions⁹⁹ or who are otherwise institutionalized.¹⁰⁰ Obviously, not all of these groups

96. See *id.* at 1622–23 (“Formerly, conservative Justices, seeing the world as optimistic pluralists, presumed that government decisions were animated by the desire to serve the public good. Now, the conservative Justices, seeing through . . . public choice theory[’s] [lens], presumed that similar government decisions . . . [resulted from] a political process that racial minorities had captured.”).

97. In *Democracy and Distrust*, Ely argued that one way to understand the rationale for heightened scrutiny is grounded in the Supreme Court's concern for laws that impact “discrete and insular minorities,” drawing from a footnote in an earlier decision, *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). There the Court declined to apply heightened review of governmental purpose because the law in question did not implicate a discrete and insular group. Ely reasoned that a justification for judicial probing of government action against a discrete and insular minority was warranted because of the possibility that the group lacks equal or meaningful access to the political process and that in that circumstance, the representative governmental process is malfunctioning. See Ely, *supra* note 6, at 75–77. On this view, racial minorities are a paradigmatic “discrete and insular” minority group.

98. See 18 U.S.C. § 611 (2012) (prohibiting non-U.S. citizens from voting in federal elections).

99. “In 14 states . . . , felons lose their voting rights only while incarcerated, and receive automatic restoration upon release. In 21 states, felons lose their voting rights during incarceration, and for a period of time after In 13 states felons lose their voting rights indefinitely for some crimes” Felon Voting Rights, Nat’l Conference of State Legislatures (Apr. 30, 2017), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/3GND-PL47>] [hereinafter Felon Voting Rights].

100. See, e.g., Developments in the Law—The Law of Mental Illness, 121 Harv. L. Rev. 1114, 1181 (2008) (“As of 2000, forty-four states disenfranchised the mentally incompetent, most often through their state constitutions.” (citing Kay Schriener et al., Democratic

are equally situated under current law: Immigrant noncitizens are not eligible to vote in national elections—although this was not always so, as I discuss below¹⁰¹—while people convicted of a crime are actively disenfranchised under various state laws.¹⁰² In thinking about associational rights from the political outsider’s perspective and the values of inclusion that Ross seeks to promote, is there an argument that there should be space in the doctrine for a consideration of these outsiders as well? In fairness, Ross’s project legitimately focuses on the large segment of eligible voters whose interests are underrepresented. The case for pulling them back in is compelling on its face and does not require expanding the category of political outsiders to make a persuasive legal and normative claim. However, a more robust theory of associational rights might be mobilized to include these political outsiders—those outside the outside. For the purposes of this Response, I concentrate on the exclusion of noncitizens from voting. Felon disenfranchisement is no less urgent or problematic. But to date, at least, there has been considerably more attention focused on law-reform efforts to address the exclusion of felons, both through litigation and legislative change,¹⁰³ than to the question of voting rights for noncitizens.

Given the vitriolic rhetoric surrounding the figure of the immigrant in the current political moment, it may be difficult to imagine such a shift. Moreover, the legal question—whether the exclusion of noncitizens from

Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments, 21 Berkeley J. Emp. & Lab. L. 437, 439, 456 tbl.2 (2000)).

101. See *infra* notes 104–117 and accompanying text; see also Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1397 (1993) (“[A]liens—or, more precisely, white male aliens—exercised the right to vote in at least twenty-two states or territories during the nineteenth century.”).

102. Only Maine and Vermont place no restrictions on the voting rights of convicted felons. See *Felon Voting Rights*, *supra* note 99.

103. The case for eliminating felony disenfranchisement has rightly been at the forefront of popular discussion and debate as the explosive growth of those convicted of felony offenses means that extraordinary numbers of people are not only locked up but locked out of the political process—in some instances, permanently. According to recent reports, approximately 6.1 million people are excluded from voting because of disenfranchisement laws, and they are disproportionately black. See The Sentencing Project, *Felony Disenfranchisement: A Primer* 1–2 (2018), <https://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf> [<https://perma.cc/Q2P5-LBYY>]. One in every thirteen black adults is disenfranchised, a rate more than four times greater than the rest of the adult population. *Id.* at 2. The relationship between race and disenfranchisement is not coincidental. The history of felony disenfranchisement laws reflects that, particularly in the South, they were designed to target and exclude black voters. *Id.* at 3. Although litigation challenging disenfranchisement policies has not been successful heretofore, see, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (upholding California’s felony disenfranchisement laws against an equal protection challenge), recent shifts in public opinion have resulted in successful reform efforts at the state level, see The Sentencing Project, *supra*, at 4. Twenty-four states have changed their laws since 1997 to expand eligibility and restoration measures. *Id.* This by no means suggests that the issue is solved. But there is clear movement on felony disenfranchisement, in contrast to the issue of immigrants and voting.

voting is constitutional—is presumed to be resolved in favor of disenfranchisement.¹⁰⁴ But historical precedent for noncitizen voting, current practice, and fundamental normative considerations all argue in favor of change.

First, consider the history. As scholars have long pointed out, the exclusion of noncitizens from voting has not been an established historical tradition.¹⁰⁵ Indeed, in the earlier colonial period, it was property, not nationality, that entitled a man to vote.¹⁰⁶ The result was that for a substantial period before the Civil War, many citizens could not vote, while many noncitizens could.¹⁰⁷ During the nineteenth century, noncitizens exercised the right to vote for local, state, and federal offices in at least twenty-two states and territories.¹⁰⁸ This practice was not uniform, nor was it uncontested. Several states in the early 1800s began to restrict voting to citizens partly out of nativist reactions to increasing immigration; but other states expressly extended suffrage to noncitizens in the same period.¹⁰⁹ While there were many reasons for including noncitizens in the electorate, Congressman Jamie Raskin has argued central among them was that “the practice was seen as conducive to a desired immigration (and assimilation) of foreigners and consistent with basic principles of democratic government.”¹¹⁰ It was not until 1926 that all states barred noncitizens from voting,¹¹¹ and not until 1996 that a federal law made it a crime for noncitizens to vote in national elections.¹¹²

104. See Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 *Mich. L. Rev.* 1092, 1100 (1977) (noting that the Supreme Court refused to consider whether the restriction on noncitizen voting even raised a substantial federal question in *Skaft v. Rorex*, 430 U.S. 961 (1977), dismissing appeal from 553 P.2d 830 (Colo. 1976)).

105. See, e.g., Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 32 (2000) (“[I]n many locales [at the Founding], foreign-born men who had not been naturalized by the federal government but who did meet property, taxpaying, and residence requirements were able to participate in elections.”); Ronald Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the US*, 26 *New Pol. Sci.* 499, 501 (2004) (“[N]oncitizens enjoyed voting rights for most of our country’s history—from the founding until the 1920s—in much of the country.”); Raskin, *supra* note 101, at 1397.

106. See Rosberg, *supra* note 104, at 1094.

107. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 177 (1874) (“[C]itizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. . . . For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage.”).

108. Raskin, *supra* note 101, at 1397.

109. See Rosberg, *supra* note 104, at 1097–98 (“Ironically, at the same time that hostility to the foreignborn was producing strenuous demands in some states for literacy tests and other devices that would effectively exclude even naturalized immigrants from the polls, a significant movement was developing in other states to give aliens the vote.”).

110. Raskin, *supra* note 101, at 1397.

111. See *id.*

112. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 216, 110 Stat. 3009, 3009-572 to -573 (1996) (codified as amended at 18 U.S.C. § 611 (2012)) (enacting a section titled “Criminal Penalty for Voting by Aliens in Federal Elections”).

Presently, there are local jurisdictions where noncitizens can vote, albeit not in federal elections.¹¹³ For example, in Maryland, ten jurisdictions as of 2018 have adopted measures providing for noncitizen voting.¹¹⁴ Cities such as Chicago and San Francisco allow noncitizens to vote in school-board elections.¹¹⁵ And four cities in Massachusetts have granted legal permanent residents the right to vote in local elections, although state legislation is still needed to effectuate the change.¹¹⁶ In such instances, the extension of voting rights to noncitizens resulted from organized campaigns that raised fundamental arguments about the nature of democracy and the social contract.¹¹⁷

The doctrine should be retooled to better reflect democratic values of participation and incentivize the inclusion of those whose interests are directly affected by governmental action (and inaction). Accordingly, noncitizens, and resident noncitizens in particular, ought to be eligible to vote. This is hardly a radical claim. Indeed, mainstream political scientists such as Robert Dahl have endorsed the idea that those who are affected by state policy should have a say in its formulation.¹¹⁸ Moreover, as Professor Sarah Song points out, democratic legitimacy relies on the “coercion principle,” which says “that all those subject to state coercion should have a say in how the state’s coercive power is exercised.”¹¹⁹ And such ideas are expressed in quintessentially American slogans, such as “one person, one vote,” “no taxation without representation,” and that a just “government rests on the consent of the governed.”¹²⁰ While noncitizens are fully subjected to state coercion in all its myriad forms—and in many instances

113. See Ron Hayduk & Kathleen Coll, *Urban Citizenship: Campaigns to Restore Immigrant Voting Rights in the US*, 40 *New Pol. Sci.* 336, 338, 339 tbl.1 (2018) (describing several jurisdictions that allow noncitizen voting in local elections as well as recent campaigns to extend the franchise to noncitizens in local elections in new jurisdictions).

114. *Id.*; see also John Haltiwanger, *Immigrants Are Getting the Right to Vote in Cities Across America*, *Newsweek* (Sept. 13, 2017), <https://www.newsweek.com/immigrants-are-getting-right-vote-cities-across-america-664467> (on file with the *Columbia Law Review*). Maryland allows local governments to decide whether noncitizens can vote in their elections. See Tara Kini, *Comment, Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 *Calif. L. Rev.* 271, 296 (2005).

115. See Hayduk & Coll, *supra* note 113, at 339 tbl.1. New York City also allowed non-citizen parents of schoolchildren to vote in school-board elections during a period of decentralized school governance from 1969 until 2002. See *id.* at 339 tbl.1, 345–46; Kini, *supra* note 114, at 311.

116. See Hayduk & Coll, *supra* note 113, at 339 tbl.1.

117. See *id.* at 338–39.

118. According to Dahl, “The Principle of Affected Interests is very likely the best general principle of inclusion that you are likely to find.” Robert Dahl, *After the Revolution? Authority in a Good Society* 64 (1970). The principle says, “Everyone who is affected by the decisions of a government should have the right to participate in that government.” *Id.*

119. Sarah Song, *Democracy and Noncitizen Voting Rights*, 13 *Citizenship Stud.* 607, 610 (2009).

120. See Hayduk & Coll, *supra* note 113, at 338.

are subject to even more coercion than citizens—they have no voice in how that power is exercised.

This characteristic of political powerlessness makes noncitizens the paradigmatic suspect class under equal protection analysis, and indeed the Supreme Court has so held.¹²¹ At the same time, it has often been taken for granted that with respect to self-government, a state can deny noncitizens the right to vote consistent with equal protection.¹²² Yet the cases cited to support this position assume the exclusion to be legitimate without much in the way of actual justification.¹²³ Indeed, the normative argument runs the other way. As one scholar puts it: “To withhold the right to vote is to withhold the political power that would enable persons and groups to protect themselves in the legislative forum.”¹²⁴

To take the obvious case, what does it mean to say to Deferred Action for Childhood Arrivals recipients that your interests, preferences, and concerns can be invoked only vicariously? In a context in which state policy regarding immigrants and citizenship is articulated through nativist and white-supremacist commitments, can one say that democratic values are adequately safeguarded if noncitizens, even long-term residents, are categorically excluded from participation in elections? To the extent that, demographically, the country is comprised of significant numbers of people who have not—and under the byzantine and exclusionary rules, cannot—become citizens, even when they have complied with immigration law, we may face a future in which the lack of participation could provoke questions of legitimacy.¹²⁵ While we likely will not reach the stage

121. See *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (holding that “classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny” and that aliens are a “prime example” of a minority “for whom such heightened judicial solicitude is appropriate”). The Supreme Court has struck down various discriminatory laws under this analysis. See, e.g., *In re Griffiths*, 413 U.S. 717, 717–18 (1973) (holding unconstitutional a state court rule requiring citizenship to sit for the Connecticut bar); *Sugarman v. Douglass*, 413 U.S. 634, 646 (1973) (invalidating a law banning noncitizens from holding civil-service positions in New York City); *Graham*, 403 U.S. at 376 (striking down state statutes that conditioned welfare benefits on citizenship and length of time in the country).

122. See, e.g., Erwin Chemerinsky, *Constitutional Law* 925 (5th ed. 2016); see also *Skaft v. Rorex*, 430 U.S. 961 (1977) (refusing to consider an appeal from a state court decision that held denying the franchise to noncitizens did not violate the Constitution), dismissing appeal from 553 P.2d 830 (Colo. 1976).

123. For example, the Supreme Court noted in *Sugarman*—which dealt with the exclusion of noncitizens from civil-service employment, rather than voting—that no prior decisions supported the right of noncitizens to vote or hold high public office. 413 U.S. at 648–49. “Indeed, implicit in many of this Court’s voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights.” *Id.* at 649.

124. Rosberg, *supra* note 104, at 1107.

125. See Hayduk, *supra* note 105, at 508 (“It’s problematic for any democratic society to have a large portion of its population outside of political participation. It undermines democracy.” (internal quotation marks omitted) (quoting Professor Michael Jones-Correa)); Song, *supra* note 119, at 608 (“[A] number of political theorists and legal scholars have emphasized [that] the presence of large numbers of noncitizens who reside in a state’s territory but lack rights of participation gives rise to a problem of democratic legitimacy.”).

of Qatar, where the voting citizenry controls a total population of which over eighty percent are foreign workers,¹²⁶ the issue is pressing as the percentage of resident noncitizens increases.¹²⁷ The line between the legally eligible voter and those who are not perhaps should not remain as a border wall defining the limits of our interest in democratic inclusion.

CONCLUSION

Professor Ross has offered a way of rethinking our jurisprudence on partisan gerrymandering that provides a roadmap out of the current morass and better aligns the doctrine with the twin goals of democratic participation and legitimacy. In so doing, he is inviting us to attend to how the boundaries of want, racial subordination, and formal and informal means of exclusion not only harm those left outside, but impoverish democracy's meaning and significance. There are, indeed, other possible futures.

126. See Human Rights Watch, *World Report 2017: Events of 2016*, at 491 (2017), https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf [<https://perma.cc/UL8K-RSMM>] (“Less than 10 percent of Qatar’s population of 2.1 million are Qatari nationals.”).

127. See Hayduk & Coll, *supra* note 113, at 338.