

2023

Voting Rights Federalism

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Recommended Citation

Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 Emory L. J. 299 (2023).
Available at: <https://scholarlycommons.law.emory.edu/elj/vol73/iss2/2>

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VOTING RIGHTS FEDERALISM

*Ruth M. Greenwood**

*Nicholas O. Stephanopoulos***

ABSTRACT

It's well-known that the federal Voting Rights Act is reeling. The Supreme Court nullified one of its two central provisions in 2013. The Court has also repeatedly weakened the bite of the statute's other key section. Less familiar, though, is the recent rise of state voting rights acts (SVRAs): state-level enactments that provide more protection against racial discrimination in voting than does federal law. Eight states have passed SVRAs so far—five since 2018. Several more states are currently drafting SVRAs. Yet even though these measures are the most promising development in the voting rights field in decades, they have attracted little scholarly attention. They have been the subject of only a handful of political science studies and no sustained legal analysis at all.

In this Article, then, we provide the first descriptive, constitutional, and policy assessment of SVRAs. We first taxonomize SVRAs. That is, we catalogue how they diverge from, and build on, federal protections against racial vote denial, racial vote dilution, and retrogression. Second, we show that SVRAs are constitutional in that they don't violate any branch of equal protection doctrine. They don't constitute (or compel) racial gerrymandering, nor do they classify individuals on the basis of race, nor are they motivated by invidious racial purposes. Finally, while existing SVRAs are quite potent, we present an array of proposals that would make them even sharper swords against racial discrimination in voting. One suggestion is for SVRAs simply to mandate that localities switch to less discriminatory electoral laws—not to rely on costly, time-consuming, piecemeal litigation. Another idea is for SVRAs to allow each

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The authors would like to thank the following students in the Election Law Clinic at Harvard Law School whose research and work on state voting rights acts informed this article: Aidan Calvelli, Kunal Dixit, Delaney Herndon, Michaela LeDoux, Lucas Rodriguez, and Micah Rosen. The authors are also grateful to Chris Elmendorf, Adam Lioz, Mike Parsons, and workshop participants at the Emory University School of Law, Harvard Law School, Princeton University, and the University of Wisconsin Law School.

plaintiff to specify the benchmark relative to which racial vote dilution should be measured—not to stay mute on the critical issue of baselines.

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INTRODUCTION

For many years, American voting rights law was federal voting rights law. Between 1965 and 2002, the federal Voting Rights Act (FVRA) stood alone as the country's only statute shielding minority voters from racial discrimination in voting. This situation began to change in 2002 with the enactment of the California Voting Rights Act (CAVRA), the first state voting rights act (SVRA) extending additional protections to minority voters.¹ But it's only more recently that voting rights federalism—the adoption of SVRAs diverging from the baseline of the FVRA—has come into its own. Washington passed a SVRA in 2018.² Oregon followed suit in 2019.³ In 2021, Virginia became the first southern state voluntarily to do more than federal law requires to prevent racial discrimination in voting.⁴ In 2022, New York enacted what was then the most ambitious SVRA.⁵ The New York model was the basis for Connecticut's even more sweeping SVRA in 2023.⁶ The New York model is also the template for pending bills in Maryland,⁷ Michigan,⁸ and New Jersey.⁹

SVRAs can be far more impactful than the FVRA, whose limitations they seek to transcend. Consider the CAVRA, the oldest and by far the most litigated of the SVRAs.¹⁰ Over the last forty years, only one FVRA suit alleging racial vote dilution has led to a reported decision in favor of a plaintiff in California.¹¹ In contrast, “[n]o defendant has ever prevailed in a [CAVRA] case.”¹² Claims of racial vote dilution under the CAVRA—as well as credible threats of such

¹ See CAL. ELEC. CODE §§ 14025–14032 (West 2002).

² See WASH. REV. CODE §§ 29A.92.005–.900 (2023).

³ See OR. REV. STAT. §§ 255.400–.424 (2021).

⁴ See VA. CODE ANN. §§ 24.2-125–131 (2021).

⁵ See N.Y. ELEC. LAW §§ 17-200–222 (McKinney 2023).

⁶ See LEGAL DEF. FUND, LDF APPLAUDS HISTORIC ENACTMENT OF CONNECTICUT VOTING RIGHTS ACT: STRONGEST STATE VRA YET PART OF A GROWING TREND (June 12, 2023), <https://www.naacpldf.org/wp-content/uploads/CTVRA-Signed-Release-In-060623-1.pdf>; An Act Concerning the State Budget for the Biennium Ending June 30, 2025, and Making Appropriations Therefor, and Provisions Related to Revenue and Other Items Implementing the State Budget, Pub. Act. No. 23-204, 2023 Conn. Acts 1 (Reg. Sess.) [hereinafter CTVRA].

⁷ See Voting Rights Act of 2023 – Counties and Municipalities, S.B. 878, Reg. Sess. (Md. 2023).

⁸ See S. 401, 102d Leg. (Mich. 2023); S. 402, 102d Leg. (Mich. 2023); S. 403, 102d Leg. (Mich. 2023).

⁹ See John R. Lewis Voting Rights Act of New Jersey, S. 2997, 220th Leg. (N.J. 2023).

¹⁰ See Perry Grossman, *The Case for State Attorney General Enforcement of the Voting Rights Act Against Local Governments*, 50 U. MICH. J.L. REFORM 565 (2017).

¹¹ *Id.* at 590.

¹² David C. Powell, *The California Voting Rights Act and Local Governments*, 10 CAL. J. POL. & POL'Y 1, 2 (2018).

actions—have caused almost 150 school districts¹³ and almost 100 cities¹⁴ in California to switch from at-large to districted elections. This level of success under the CAVRA vastly exceeds that under the FVRA in modern California history.

Despite their potentially far-reaching effects, SVRAs have attracted little attention from scholars. In the legal literature, a handful of law review articles have briefly discussed SVRAs.¹⁵ No published law review article has previously treated SVRAs as a distinct subject worthy of sustained examination.¹⁶ In the political science literature, a few studies have documented some of the consequences of the CAVRA. Jurisdictions that switched from at-large to districted elections because of the CAVRA saw increases in minority representation, especially if jurisdictions had larger minority populations and more geographic clustering of minority residents.¹⁷ Jurisdictions that switched their electoral systems also experienced reductions in the racial disparities of their turnout rates, such that eligible white, Hispanic, and Asian voters cast ballots in more similar proportions.¹⁸ In the housing context, however, the CAVRA contributed to a supply-equity tradeoff. Jurisdictions that changed electoral systems because of the CAVRA approved less multifamily housing (a fall in supply) but stopped disproportionately steering multifamily housing into minority neighborhoods (a rise in equity).¹⁹

¹³ Carolyn Abott & Asya Magazinnik, *At-Large Elections and Minority Representation in Local Government*, 64 AM. J. POL. SCI. 717, 721 (2020).

¹⁴ Zachary L. Hertz, *Analyzing the Effects of a Switch to By-District Elections in California*, 22 ELECTION L.J. 213, 214 (2023).

¹⁵ See, e.g., Joaquin G. Avila et al., *Voting Rights in California: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 131, 152–53 (2007) (discussing the CAVRA); Kareem U. Crayton, *Reinventing Voting Rights Preclearance*, 44 IND. L. REV. 201, 239–40 (2010) (same); Grossman, *supra* note 10, at 588–90, 606–08 (same); Michael Li & Yuriy Rudensky, *Rethinking the Redistricting Toolbox*, 62 HOW. L.J. 713, 730–32 (2019) (discussing state legislation in California, Florida, Illinois, Iowa, Missouri, Oregon, and Washington).

¹⁶ One unpublished student paper (supervised by one of us) has done so. See Paige Epstein, *Addressing Minority Vote Dilution Through State Voting Rights Acts* (Univ. of Chi. Pub. L. & Legal Theory, Working Paper No. 474, 2014), https://chicagounbound.uchicago.edu/public_law_and_legal_theory/468/.

¹⁷ See Abott & Magazinnik, *supra* note 13, at 725–28; Loren Collingwood & Sean Long, *Can States Promote Minority Representation? Assessing the Effects of the California Voting Rights Act*, 57 URB. AFFS. REV. 731, 748–56 (2021).

¹⁸ See Hertz, *supra* note 14, at 221–23.

¹⁹ Michael Hankinson & Asya Magazinnik, *The Supply-Equity Tradeoff: The Effect of Spatial Representation on the Local Housing Supply*, 85 J. POL. 1033, 1041–42 (2023). For similar findings outside the SVRA context, see Richard T. Boylan & Dru Stevenson, *The Impact of District Elections on Municipal Pensions and Investment*, 14 J.L. ECON. & POL'Y 127 (2017) (discussing the effect of switching to single-member districts on municipality spending); and Evan Mast, *Warding Off Development: Local Control, Housing Supply, and NIMBYs*, 106 REV. ECON. & STAT. (forthcoming 2024) (same on local housing supply).

Because of the sparsity of the existing scholarship on SVRAs, we write on a mostly blank slate here. Our initial objective in Part I is to taxonomize these policies—in particular, to identify the axes along which they diverge from, and add to, the FVRA. Simplifying somewhat, the FVRA’s protections can be grouped into three categories, guarding against (1) racial vote denial, the disproportionate suppression of minority members’ votes; (2) racial vote dilution, the diminution of minority voters’ representation by their preferred candidates; and (3) retrogression, the worsening of the electoral position of minority members relative to the status quo ante. With respect to racial vote denial, certain SVRAs go beyond the federal floor by specifying probative factors that are easier for plaintiffs to satisfy than the FVRA’s standard.²⁰ Certain SVRAs also broaden the FVRA’s prohibition of voter intimidation by applying it to more acts, enabling more victims to sue, and authorizing more remedies.²¹

With respect to racial vote dilution, SVRAs waive several of the requirements of the FVRA. These waived conditions include establishing the geographic compactness of the minority population, proving that an additional majority-minority district could be created, and showing that the minority population is currently underrepresented.²² Certain SVRAs further permit claims by minority groups too small to elect their candidates of choice and contemplate remedies other than single-member districts.²³ With respect to retrogression, lastly, it’s no longer barred anywhere by the FVRA thanks to a 2013 Supreme Court decision.²⁴ Certain SVRAs revive a prohibition of retrogression for particular practices²⁵ or jurisdictions.²⁶ Where jurisdictions are covered by an anti-retrogression rule, SVRAs innovate by basing coverage partly on factors such as racial disparities in arrest rates and levels of residential segregation.²⁷

After classifying SVRAs, we turn in Part II to defending their constitutionality. Ever since the CAVRA was enacted in 2002, SVRAs have been attacked on the ground that they violate the Equal Protection Clause. One such challenge against the CAVRA succeeded at the trial court stage, enjoining

²⁰ See, e.g., N.Y. ELEC. LAW § 17-206(3) (McKinney 2023).

²¹ See, e.g., *id.* § 17-212.

²² See, e.g., OR. REV. STAT. §§ 255.405–.416 (2021).

²³ See, e.g., *id.* §§ 255.405(1)(a), 411(8)(a).

²⁴ See *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (striking down the formula determining coverage under Section 4 of the FVRA).

²⁵ See, e.g., VA. CODE ANN. § 24.2-129 (2021).

²⁶ See, e.g., N.Y. ELEC. LAW § 17-210(3)(c) (McKinney 2023).

²⁷ See, e.g., *id.* § 17-210(3).

the statute for almost two years, before being reversed on appeal.²⁸ But SVRAs plainly aren't racial gerrymanders (the charge that has most frequently been leveled against them). Under Supreme Court precedent, only individual districts can be racial gerrymanders, if they're designed predominantly and unjustifiably on the basis of race.²⁹ Policies about how districts are drawn, like those contained by some SVRAs, can never themselves constitute racial gerrymandering. At most, these policies can result in the adoption of racially gerrymandered districts, either by a court after, or by a jurisdiction to avoid, litigation. In that case, those districts should be struck down, but the antecedent policies should be safe.

Nor do SVRAs trigger heightened scrutiny under conventional equal protection doctrine. They would do so if they used racial classifications or if their purposes were racially discriminatory. But while SVRAs *refer* to race, they don't distribute benefits or burdens to individuals on racial grounds. Instead, when liability is established, they cause unlawful electoral regulations to be replaced by other ones. These rules about how elections are conducted affect thousands to millions of people, regardless of their race. They're nothing like the concrete assets that racial classifications typically distribute to some individuals but not others. As for the motives of SVRAs, they're race-conscious but not racially discriminatory. In fact, SVRAs aim to *prevent* racial discrimination in voting by *stopping* racial vote denial, racial vote dilution, and retrogression. If laws of this kind were subject to heightened scrutiny, then all antidiscrimination policies would be suspect. That outcome would turn the Equal Protection Clause—itsself an antidiscrimination policy—on its head.

Our last goal in this article is to consider how SVRAs could be strengthened in the future. Numerous states are currently drafting (or thinking about drafting) SVRAs, so there's clear interest in the elements that could be included in these statutes.³⁰ We flag two ideas here and discuss several more in Part III. One potential step is simply to dictate the electoral regulations that jurisdictions must use. Existing SVRAs rely on the same enforcement methods as the FVRA, especially case-by-case litigation against practices alleged to suppress or dilute minority votes. However, such litigation is costly and time-consuming and leads to a patchwork of different jurisdictions employing different rules. When a state is confident that it knows the right approach, the strategy that's most likely to

²⁸ See *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 825–26 (Cal. Ct. App. 2006).

²⁹ See, e.g., *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015) (“A racial gerrymandering claim . . . applies to the boundaries of individual districts.”).

³⁰ See *supra* notes 7–9.

thwart racial discrimination in voting, the state can simply mandate that approach. The state need not settle for incremental progress over an extended period through one lawsuit after another.

The other suggestion we note at the outset pertains to racial vote dilution claims. Existing SVRAs are ambiguous about the benchmark relative to which dilution should be evaluated. Future SVRAs could resolve this ambiguity by simultaneously requiring the plaintiff to recommend a benchmark and giving the plaintiff the discretion to advocate for any benchmark. As under the FVRA, the standard relative to which the status quo should be judged could be a single-member district plan. That standard could also be a form of proportional representation, a larger legislative body, an election held at a different time, or some other policy selected by the plaintiff. Racial vote dilution can occur in many ways, minority voters have learned over the years. SVRAs would reflect this reality if they allowed the benchmark to shift from case to case—while always insisting on the identification of a benchmark for comparison, without which dilution can't be assessed.

I. TAXONOMIZING SVRAS

Our definition of a state voting rights act is straightforward. A SVRA is a state-level provision (a state constitutional amendment or, more commonly, a state statute) that (1) addresses racial discrimination in voting and (2) provides protections beyond those offered by the federal Voting Rights Act. However, this definition elides one of the most interesting and important issues about SVRAs: *how* exactly they diverge from the FVRA. Highlighting the differences between SVRAs and the FVRA is our aim in this Part. This work is partly descriptive—what do SVRAs do?—and partly taxonomic—how can we classify SVRAs?

We consider all the SVRAs we mentioned above: the statutes enacted by California, Connecticut, New York, Oregon, Virginia, and Washington.³¹ We also include in our SVRA universe a Florida constitutional amendment ratified in 2010³² and the Illinois Voting Rights Act of 2011.³³ But we don't cover state statutes that are labeled as voting rights acts but fail to satisfy our definition of

³¹ See *supra* notes 1–5.

³² See FLA. CONST. art. 3, §§ 20–21.

³³ See 10 ILL. COMP. STAT. 120/5-1 to -5 (2011).

a SVRA.³⁴ And we comment on unenacted bills only in footnotes.³⁵ Additionally, we organize our discussion by substantive area, proceeding in order through racial vote denial, racial vote dilution, and retrogression. Again, these are the three principal harms the FVRA seeks to prevent.³⁶ Lastly, because we focus on these substantive harms, we note procedural differences between SVRAs and the FVRA only in passing and without any claim to comprehensiveness.

A. *Racial Vote Denial*

Racial vote denial refers to the disproportionate suppression of minority voters through voting restrictions that disparately impede minority members from casting ballots. Despite the plain text of the FVRA prohibiting racial vote denial, it wasn't until the 2021 case of *Brnovich v. Democratic National Committee*³⁷ that the Supreme Court considered this type of racial discrimination in voting. In *Brnovich*, the Court identified a series of factors that are relevant to the disposition of a racial vote denial claim under Section 2 of the FVRA. The most intuitive of these factors is the size of the racial disparity caused by the challenged practice.³⁸ The other factors are the magnitude of the voting burden imposed by the challenged practice, the prevalence of the challenged practice when Section 2 took its current form in 1982, the strength of the state interests served by the challenged practice, and the overall ease of voting under the jurisdiction's electoral system.³⁹ *Brnovich* is a recent decision so its full implications aren't yet clear. But there's widespread agreement that it's harder for a racial vote denial plaintiff to prevail under *Brnovich*'s factors than under the test the lower courts used prior to *Brnovich*,⁴⁰ which primarily asked if a voting restriction caused a disparate racial impact.⁴¹

³⁴ See 2023 N.M. Laws Ch. 84 (H.B. 4) (enacting reforms such as the enfranchisement of ex-felons, the extension of the period for early voting, and the creation of a permanent absentee voter list).

³⁵ See *supra* notes 7–9.

³⁶ We therefore don't address substantive aspects of SVRAs that can't be slotted into the categories of combatting racial vote denial, racial vote dilution, or retrogression. See, e.g., CTVRA, Pub. Act No. 23-204, § 416, 2023 Conn. Acts at 847 (Reg. Sess.) (codifying a “democracy canon” that electoral laws should be construed liberally in favor of protecting the franchise); N.Y. ELEC. LAW § 17-202 (McKinney 2023) (same).

³⁷ 141 S. Ct. 2321 (2021).

³⁸ See *id.* at 2339.

³⁹ *Id.* at 2338–40.

⁴⁰ See, e.g., *id.* at 2351 (Kagan, J., dissenting) (criticizing the majority for “limiting Section 2 from multiple directions,” “giv[ing] a cramped reading to broad language,” and “rewrit[ing]—in order to weaken—a statute that stands as a monument to America's greatness”).

⁴¹ See generally Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566 (2019) (discussing racial vote denial law before *Brnovich*).

Section 2 is the FVRA's main weapon against racial vote denial. Section 2 is complemented by Section 11(b), the FVRA's prohibition of voter intimidation. Under Section 11(b), no public or private actor may "intimidate, threaten, or coerce" any person for voting, attempting to vote, or helping anyone else to vote.⁴² Unlawful intimidation may target members of a particular racial group, of course. But it need not do so—unlike under a predecessor statute that reached only racially discriminatory voter intimidation.⁴³

Among SVRAs, only the New York Voting Rights Act (NYVRA) and the Connecticut Voting Rights Act (CTVRA) address racial vote denial (let alone exceed the FVRA's floor in this area). With respect to the NYVRA, it first identifies a series of relevant factors that are distinct from—and more favorable to plaintiffs than—the list of considerations in *Brnovich*.⁴⁴ For example, the NYVRA omits *Brnovich*'s factors about the magnitude of the voting burden imposed by the challenged practice, the prevalence of the challenged practice in 1982, and the overall ease of voting under the jurisdiction's electoral system.⁴⁵ Similarly, while *Brnovich* deferred to dubious state interests, the NYVRA asks whether the jurisdiction "has a *compelling* policy justification that is *substantiated and supported by evidence*."⁴⁶ And while *Brnovich*'s factors placed no weight on the racial discrimination experienced by a minority group, the NYVRA spotlights this issue. The statute's factors include "the history of discrimination in or affecting the [jurisdiction]," "the extent to which members of the protected class are disadvantaged in areas including . . . education, employment, health, criminal justice, housing, land use, or environmental protection," and "the extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process."⁴⁷

Second, the NYVRA specifies some of the remedies that courts may grant in racial vote denial cases. Among these remedies are "additional voting hours or days," "additional polling locations," "additional means of voting such as

⁴² 52 U.S.C. § 10307(b).

⁴³ See *id.* § 10101(b); see also Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 192 (2015) (noting that this earlier ban of voter intimidation "contain[ed] a more stringent intent requirement including that the defendant's conduct be racially motivated").

⁴⁴ N.Y. ELEC. LAW § 17-206(3) (McKinney 2023).

⁴⁵ See *id.*

⁴⁶ *Id.* (emphasis added).

⁴⁷ *Id.* The NYVRA thus emphasizes racial discrimination even more heavily than the factors in the important Senate report that accompanied Section 2's revision in 1982. See S. REP. NO. 97-417, at 28–29 (1982).

voting by mail,” “expanded opportunities for voter registration,” “additional voter education,” and “the restoration or addition of persons to registration lists.”⁴⁸ By providing this list of remedial options, the NYVRA indicates some of the practices that may be found unlawful under the statute. Limits on when voters can cast ballots, for instance, may plainly violate the NYVRA since the statute contemplates more time to vote as a form of relief. The same point holds for establishing too few polling locations, restricting the modes through which people may vote, supplying insufficient or inaccurate information to voters, and hampering voter registration. All these acts may infringe the NYVRA since the statute anticipates a remedy for each of them.

And third, the NYVRA builds on the FVRA’s prohibition of voter intimidation in several ways. Most importantly, the FVRA bars only voter intimidation while the NYVRA also reaches voter deception and voter obstruction.⁴⁹ These concepts are helpfully defined, respectively, as “us[ing] any deceptive or fraudulent device, contrivance[,] or communication” to hinder voting, and “obstruct[ing], imped[ing], or otherwise interfer[ing] with” voting or the tallying of votes.⁵⁰ Additionally, while the FVRA is silent as to who may allege voter intimidation, the NYVRA confers standing to any aggrieved person or organization, including any group that aims to facilitate voting.⁵¹ And in contrast to the FVRA’s muteness about remedies, the NYVRA identifies “additional time to cast a ballot” as a salient form of relief.⁵² The NYVRA adds that anyone found liable for voter intimidation may be ordered to pay punitive damages for intentional violations.⁵³

For its part, the CTVRA adopts all of the NYVRA’s novel safeguards against racial vote denial. Like the NYVRA, the CTVRA lists probative factors that are more advantageous for plaintiffs than *Brnovich*’s list of considerations,⁵⁴ names remedies that courts may grant in racial vote denial cases,⁵⁵ and adds to the

⁴⁸ N.Y. ELEC. LAW § 17-206(5)(a). For similar non-exhaustive lists of potential remedies in proposed SVRAs, see Voting Rights Act of 2023 – Counties and Municipalities, S.B. 878, § 15.5-204(b)(1), Reg. Sess. (Md. 2023); S. 401, § 23(1), 102d Leg. (Mich. 2023); and John R. Lewis Voting Rights Act of New Jersey, S. 2997, § 7(a), 220th Leg. (N.J. 2023).

⁴⁹ See N.Y. ELEC. LAW § 17-212(1).

⁵⁰ *Id.* § 17-212(1)(b)(ii)–(iii).

⁵¹ *Id.* § 17-212(2).

⁵² *Id.* § 17-212(3).

⁵³ *Id.* For similar prohibitions of voter intimidation in proposed SVRAs, see S.B. 878, § 15.5-601(d)(2) (Md. 2023); and S. 2997, § 13(2)(a) (N.J. 2023).

⁵⁴ CTVRA, Pub. Act No. 23-204, § 411(c)(1), 2023 Conn. Acts at 823–24 (Reg. Sess.).

⁵⁵ See *id.* § 411(e)(1).

FVRA's prohibition of voter intimidation.⁵⁶ Diverging even further from federal law, the CTVRA forbids any electoral practice that “[r]esults . . . in a disparity between . . . protected class members and the other members . . . in electoral participation, access to voting opportunities or ability to participate in the political process.”⁵⁷ This is a pure disparate impact provision. It renders unlawful any electoral policy that produces a racial disparity in political participation, whether the totality of circumstances supports maintaining or scrapping the policy.

The CTVRA features one more innovation that we note here but that applies to racial vote denial, racial vote dilution, and retrogression alike. This is the establishment of a statewide database of relevant electoral information.⁵⁸ This database includes, among other categories, population estimates (total and by race and ethnicity), election results, voter registration lists, district maps, and polling place locations.⁵⁹ Local election officials are also required to transmit information under their control to the Secretary of State, who is responsible for the database.⁶⁰ As the CTVRA points out, this data is useful for identifying, litigating, and remedying all kinds of racial discrimination in voting. The data helps with “(1) evaluating whether and to what extent current laws and practices related to election administration are consistent with the [the CTVRA], (2) implementing best practices in election administration to further the purposes of [the CTVRA], and (3) investigating any potential infringement upon the right to vote.”⁶¹

B. Racial Vote Dilution

If most SVRAs don't address racial vote denial, what *do* these laws do? The answer is that they try to prevent racial vote dilution. *Every* SVRA extends protections against racial vote dilution beyond those offered by the FVRA. Racial vote dilution is a term of art for an electoral practice that doesn't stop anyone from voting but that nevertheless diminishes the electoral influence of a minority group.⁶² The classic example of a dilutive practice is an at-large

⁵⁶ See *id.* § 415.

⁵⁷ *Id.* § 411(a)(2)(A). For pure disparate impact provisions targeting racial vote denial in proposed SVRAs, see S.B. 878, § 15.5-201(b)(1)(i) (Md. 2023); and S. 401, § 7(1)(a), 102d Leg. (Mich. 2023).

⁵⁸ See CTVRA § 412(a).

⁵⁹ See *id.* § 412(c).

⁶⁰ See *id.* § 412(g).

⁶¹ *Id.* § 412(a). For similar provisions in proposed SVRAs, see S.B. 878, § 15.5-505 (Md. 2023); S. 402, § 5 (Mich. 2023); and S. 657, 205th Leg., § 2 (N.Y. 2023).

⁶² See Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1332–42 (2016).

election for multiple legislators. If members of the white majority vote cohesively, they can sweep every seat and thus consign the minority group to no representation whatsoever. Single-member districts can also be dilutive if they “crack” (disperse) and/or “pack” (overconcentrate) minority voters. In this case, the district map yields less minority representation than would arise if the lines were drawn another way.

To prevail in a racial vote dilution claim under Section 2 of the FVRA, a plaintiff must initially satisfy the three preconditions set forth by the Supreme Court in the 1986 case of *Thornburg v. Gingles*.⁶³ The first and most onerous of these *Gingles* prongs is that a minority group be large and geographically compact enough to constitute a numerical majority in at least one additional single-member district.⁶⁴ The second *Gingles* prong is that a minority group be politically cohesive (in that its members generally support the same candidates).⁶⁵ And the third *Gingles* prong requires the white majority also to vote mostly as a bloc—only against the candidates of choice of the minority community.⁶⁶ If all three of these preconditions are met, a court proceeds to analyze the totality of the circumstances. These include an array of factors specified by the Senate report that accompanied the 1982 revision of Section 2, focusing on historical and ongoing racial discrimination as well as the jurisdiction’s electoral system in its entirety.⁶⁷ It’s also probative at this stage if existing minority representation falls short of, hits, or exceeds proportional representation.⁶⁸

The most notable way in which certain SVRAs diverge from this framework is by abandoning *Gingles*’s first prong. The CAVRA pioneered this strategy, which has since been imitated by the SVRAs of Connecticut, New York, Oregon, Virginia, and Washington. The CAVRA (and these subsequent SVRAs) abandon *Gingles*’s first prong both by omission and by commission. By omission, these statutes state that *Gingles*’s *second and third* prongs, combined into a single requirement of racial polarization in voting, must be satisfied for

⁶³ 478 U.S. 30, 50–51 (1986).

⁶⁴ *See id.* at 50; *see also* Bartlett v. Strickland, 556 U.S. 1, 26 (2009) (plurality opinion) (“Only when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met.”).

⁶⁵ *See Gingles*, 478 U.S. at 51.

⁶⁶ *See id.*

⁶⁷ *See* S. REP. NO. 97-417, at 28–29 (1982).

⁶⁸ *See Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

there to be unlawful racial vote dilution.⁶⁹ In the CAVRA’s terms, “[a] violation . . . is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision.”⁷⁰ The implication of this phrasing is that *Gingles’s first* prong need not be proven. By commission, certain SVRAs explicitly reject the condition that plaintiffs demonstrate that another reasonably-compact, majority-minority district could be drawn. As the CAVRA puts it, “[t]he fact that members of a protected class are not geographically compact or concentrated may not preclude . . . a violation of [the statute].”⁷¹

The reason the renunciation of *Gingles’s first* prong is so significant is that this requirement is often the highest hurdle for plaintiffs under Section 2 of the FVRA. In a series of decisions, the Supreme Court has held that, to satisfy this prong, it must be possible to create another *majority-minority* district (not merely a district that reliably elects the minority-preferred candidate),⁷² the minority population must not be overly geographically dispersed,⁷³ and the minority population must not be overly socioeconomically or culturally heterogeneous either.⁷⁴ Thanks to these decisions, many Section 2 suits have foundered at this initial stage of the analysis. Over the last two redistricting cycles, in particular, *thirteen* of thirty-one Section 2 challenges to congressional or state legislative district plans, or more than *one-third*, failed because plaintiffs couldn’t make the requisite showings under *Gingles’s first* prong.⁷⁵

In contrast, racial polarization in voting is relatively easy to establish because it continues to exist in most areas. In some parts of the South, the candidate

⁶⁹ The CTVRA and the NYVRA also allow liability to be found under the totality of circumstances, even if racial polarization in voting isn’t proven. See CTVRA, Pub. Act No. 23-204, § 411(b)(2)(A), 2023 Conn. Acts at 821–22 (Reg. Sess.); N.Y. ELEC. LAW § 17-206(2)(b) (McKinney 2023).

⁷⁰ CAL. ELEC. CODE § 14028(a) (West 2002); see also CTVRA § 411(b)(2)(A); N.Y. ELEC. LAW § 17-206(2)(b); OR. REV. STAT. § 255.411(1) (2021); VA. CODE ANN. § 24.2-130(B) (2021); WASH. REV. CODE § 29A.92.030(1) (2023). For similar provisions in proposed SVRAs, see Voting Rights Act of 2023 – Counties and Municipalities, S.B. 878, § 15.5-202(b), Reg. Sess. (Md. 2023); S. 401, § 9(2), 102d Leg. (Mich. 2023); and John R. Lewis Voting Rights Act of New Jersey, S. 2997, § 5(b), 220th Leg. (N.J. 2023).

⁷¹ CAL. ELEC. CODE § 14028(c); see ASSEMB. COMM. ON JUDICIARY, 2001–2002 REG. SESS., BILL ANALYSIS OF S.B. 976, at 3 (as amended Apr. 9, 2002) (noting that the CAVRA does not require that a minority community be “sufficiently concentrated geographically . . . to create a district in which the minority community could elect its own candidate”); see also N.Y. ELEC. LAW §§ 17-206(2)(c)(viii); OR. REV. STAT. § § 255.411(4); VA. CODE ANN. § 24.2-130(B); WASH. REV. CODE § 29A.92.030(5). For similar provisions in proposed SVRAs, see S.B. 878, § 15.5-202(c)(2)(iv) (Md. 2023); S. 401, § 9(3)(g) (Mich. 2023); and S. 2997, § 5(c)(8) (N.J. 2023).

⁷² See *Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) (plurality opinion).

⁷³ See, e.g., *Bush v. Vera*, 517 U.S. 952, 979 (1996).

⁷⁴ See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 432–35 (2006).

⁷⁵ See Brief of *Amici Curiae* Professors Jowei Chen et al. at 14–15, *Merrill v. Milligan*, No. 21-1086 (U.S. July 18, 2022) [hereinafter Brief of *Amici Curiae* Professors Jowei Chen et al.].

preferences of white and non-white voters diverge by more than sixty percentage points.⁷⁶ Even in northeastern and western regions where white voters are more liberal, voting is usually racially polarized to some extent.⁷⁷ As a result, the Supreme Court has never ruled against a Section 2 plaintiff because of insufficient racial polarization in voting.⁷⁸ Nor has any suit under the CAVRA been unsuccessful for this reason. To the contrary, even in an atypical case where only five of ten city council elections in Santa Clara exhibited substantial racial polarization, California courts held that the CAVRA's polarization requirement was satisfied.⁷⁹ The view of political scientists Carolyn Abott and Asya Magazinnik that "the [CAVRA's] low 'racially polarized voting' standard almost ensure[s] victory for the plaintiff" is therefore unsurprising.⁸⁰ Because of the prevalence of racially polarized voting, the CAVRA and other similar SVRAs do set a low bar for those alleging racial vote dilution.

The SVRAs of California, Connecticut, New York, Oregon, Virginia, and Washington are alike in that they waive *Gingles's* first prong. But these statutes differ in whether they impose liability based on racially polarized voting *alone* or racially polarized voting *as well as* minority underrepresentation. The NYVRA takes the first of these approaches, at least with respect to at-large elections. "A violation . . . shall be established upon a showing that a political subdivision . . . use[s] an at-large method of election and . . . voting patterns . . . within the political subdivision are racially polarized."⁸¹ On the other hand, Connecticut's, Oregon's, Virginia's, and Washington's SVRAs endorse the second option. Under the Virginia Voting Rights Act (VAVRA), for example, liability ensues if "racially polarized voting occurs in local elections *and* . . . this . . . dilutes the voting strength of members of a protected class."⁸² And under the

⁷⁶ See, e.g., Shiro Kuriwaki et al., *The Geography of Racially Polarized Voting: Calibrating Surveys at the District Level*, 2023 AM. POL. SCI. REV. 8; Stephanopoulos, *supra* note 62, at 1358; RPV NEAR ME, <https://www.rpvnearme.org/> (last visited Oct. 1, 2023).

⁷⁷ See, e.g., Kuriwaki et al., *supra* note 76, at 8.

⁷⁸ Cf. *League of United Latin Am. Citizens*, 548 U.S. at 427 (finding racial polarization between Latinos and non-Latinos in south and west Texas); *Thornburg v. Gingles*, 478 U.S. 30, 52–54 (1986) (same between Black and white voters in North Carolina).

⁷⁹ See *Yumori-Kaku v. City of Santa Clara*, 273 Cal. Rptr. 3d 437, 443 (Cal. Ct. App. 2020).

⁸⁰ Abott & Magazinnik, *supra* note 13, at 721.

⁸¹ N.Y. ELEC. LAW § 17-206(2)(b) (McKinney 2023). Even though it doesn't have to be shown under the NYVRA, minority underrepresentation in at-large elections does typically arise when voting is racially polarized and the minority group is, in fact, a numerical minority. For similar provisions in proposed SVRAs, see Voting Rights Act of 2023 – Counties and Municipalities, S.B. 878, § 15.5-202(b)(1), Reg. Sess. (Md. 2023); and John R. Lewis Voting Rights Act of New Jersey, S. 2997, § 5(b)(1), 220th Leg. (N.J. 2023).

⁸² VA. CODE ANN. § 24.2-130(B) (2021) (emphasis added); see also CTVRA, Pub. Act No. 23-204, § 411(b)(2)(A), 2023 Conn. Acts 821–22 (Reg. Sess.); OR. REV. STAT. § 255.411(1) (2021); WASH. REV. CODE § 29A.92.030(1) (2023). For a similar provision in a proposed SVRA, see S. 401, § 9(2) (Mich. 2023).

CAVRA, the statutory text suggests that racially polarized voting suffices,⁸³ but the California Supreme Court recently held that liability “requires not only a showing that racially polarized voting exists, but also that the protected class thereby has less ability to elect its preferred candidate.”⁸⁴

To the extent the NYVRA permits liability to be found solely on the basis of racially polarized voting, the statute departs even further from the doctrine of Section 2 of the FVRA. Under this doctrine, as noted above, how close minority representation comes to proportional representation is one of the factors that must be considered at the totality-of-circumstances stage.⁸⁵ To the extent racially polarized voting alone infringes the NYVRA, violations of the statute are also even easier to prove. Again, racial polarization in voting is quite common in modern American elections. If its existence means that plaintiffs necessarily win, then quite few at-large electoral systems can survive challenges under the NYVRA.

An implication of certain SVRAs’ waiver of *Gingles*’s first prong is that a minority group should be able to bring a claim even if it’s not numerous enough to comprise a majority in an additional district. Several SVRAs confirm this inference by stating outright that a minority group can obtain a remedy other than a majority-minority district—such as a crossover, coalition, or influence district. A crossover district is one in which minority voters make up less than a majority of the electorate but are still able to elect their candidate of choice thanks to some support from white voters. Illinois’s and Washington’s SVRAs mention a crossover district as a permissible remedy for racial vote dilution. Under the Washington Voting Rights Act (WAVRA), for instance, “[r]emedies shall . . . be available where the drawing of crossover . . . districts is able to address both vote dilution and racial polarization.”⁸⁶

Next, a coalition district is one where no single minority group can elect its own preferred candidate—but where two or more minority groups voting cohesively can elect their mutual candidate of choice. Connecticut’s, Illinois’s, New York’s, and Washington’s SVRAs authorize multiple minority groups to pursue joint claims of racial vote dilution. Under the NYVRA, for example, “[m]embers of different protected classes may file an action jointly” if “they

⁸³ See CAL. ELEC. CODE § 14028(a) (West 2002) (“A violation . . . is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision . . .”).

⁸⁴ *Pico Neighborhood Ass’n v. City of Santa Monica*, No. S263972, 2023 WL 5440486, at *7 (Cal. Aug. 24, 2023).

⁸⁵ See *supra* note 68 and accompanying text.

⁸⁶ WASH. REV. CODE § 29A.92.005; see also 10 ILL. COMP. STAT. 120/5-5(a) (2011).

demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate.”⁸⁷ Lastly, an influence district is one where minority voters *can't* elect their preferred candidate (either alone or with the support of some white voters) but *can* still affect which candidate wins. The quintessential influence district has a minority population in the range of twenty to forty percent and elects a Democrat who isn't the first choice of the minority community (but isn't their last choice either). California's, Connecticut's, Illinois's, New York's, Oregon's, and Virginia's SVRAs allow influence claims to be advanced. As in the Oregon Voting Rights Act (ORVRA), this is typically done by defining a statutory violation as an impairment of minority voters' "equal opportunity to elect candidates of their choice *or* [their] equal opportunity to *influence* the outcome of an election.”⁸⁸

Certain SVRAs distinguish themselves remedially from Section 2 of the FVRA in one more way. Section 2 is silent as to whether the relief for racial vote dilution can include some version of proportional representation. Historically, by far the most common relief in successful Section 2 suits has been a set of single-member districts (in place of either an at-large electoral system or a different set of single-member districts).⁸⁹ In contrast, California's, New York's, Oregon's, and Washington's SVRAs suggest that a form of proportional representation is a proper remedy in certain cases. As in the CAVRA, this suggestion is usually found in the second half of a provision whose first half we quoted earlier. The first half confirms the waiver of *Gingles*'s first prong by making clear that “[t]he fact that members of a protected class are not geographically compact or concentrated *may not* preclude . . . a violation of [the statute].”⁹⁰ The second half continues that this fact “*may* be a factor in determining an appropriate remedy.”⁹¹

⁸⁷ N.Y. ELEC. LAW § 17-206(8) (McKinney 2023); *see also* CTVRA § 411(b)(2)(B)(i)(IV); 10 ILL. COMP. STAT. 120/5-5(a); WASH. REV. CODE § 29A.92.005. For similar provisions in proposed SVRAs, see Voting Rights Act of 2023 – Counties and Municipalities, S.B. 878, § 15.5-202(c)(1)(iv), Reg. Sess. (Md. 2023); S. 401, § 9(3)(d), 102d Leg. (Mich. 2023); and John R. Lewis Voting Rights Act of New Jersey, S. 2997, § 9(h), 220th Leg. (N.J. 2023).

⁸⁸ OR. REV. STAT. § 255.405(1)(a) (2021) (emphasis added); *see also* CAL. ELEC. CODE § 14027; CTVRA § 411(b)(1); 10 ILL. COMP. STAT. 120/5-5(a); N.Y. ELEC. LAW § 17-206(2)(a); VA. CODE ANN. § 24.2-130(A) (2021). For similar provisions in proposed SVRAs, see S.B. 878, § 15.5-201(b)(1)(ii) (Md. 2023); S. 401, § 9(1) (Mich. 2023); S. 2997, § 4 (N.J. 2023).

⁸⁹ *See, e.g., Holder v. Hall*, 512 U.S. 874, 909 (1994) (Thomas, J., concurring) (noting that federal courts have “rel[ie]d on single-member districting schemes as a touchstone”).

⁹⁰ CAL. ELEC. CODE § 14028(c) (emphasis added).

⁹¹ *Id.* (emphasis added); *see also* N.Y. ELEC. LAW § 17-206(2)(c)(viii); OR. REV. STAT. § 255.411(4); WASH. REV. CODE § 29A.92.030(5). For similar provisions in proposed SVRAs, see S.B. 878, § 15.5-202(c)(2)(iv) (Md. 2023); S. 401, § 9(3)(g) (Mich. 2023); and S. 2997, § 5(e)(8) (N.J. 2023).

Crucially, where minority voters are geographically dispersed, it's difficult or even impossible to cure racial vote dilution through single-member districts. In this scenario, single-member districts frequently can't accumulate enough minority voters to enable them to elect their preferred candidates, even if the districts are shaped very strangely.⁹² On the other hand, the geographic dispersion of minority voters is no obstacle to curing racial vote dilution through proportional representation. It simply makes no difference where minority voters are located if no districts have to be drawn and all voters in a given area participate in the same election.⁹³ Consequently, proportional representation is the "appropriate remedy" contemplated by the CAVRA and other SVRAs where minority voters aren't "geographically compact or concentrated."⁹⁴ Under these conditions, proportional representation is the one policy that can ensure adequate representation for minority voters. And this isn't just our own idiosyncratic view. In 2019, Palm Desert settled a CAVRA suit by switching from at-large elections to a hybrid regime in which four of five city council seats are elected through multimember districts using ranked-choice voting.⁹⁵ In 2022, Albany settled a threatened CAVRA suit by instituting ranked-choice voting for the citywide election of all five city council seats.⁹⁶ These settlements are proof of concept that the CAVRA (and the other SVRAs that share the CAVRA's language) can result in the adoption of proportional representation.

Finally, Section 2 of the FVRA is applicable to all elections: federal, statewide, state legislative, local, and so on. This dimension of coverage, though, is the one axis along which all SVRAs are less ambitious than Section 2 in their targeting of racial vote dilution. Florida's Fair Districts Amendment (FLFDA)⁹⁷ and the Illinois Voting Rights Act (ILVRA)⁹⁸ reach statewide district plans but *not* local district maps of any kind. Connecticut's,⁹⁹ New York's,¹⁰⁰ and

⁹² See Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329, 1384–88 (2016).

⁹³ See, e.g., *id.* at 1391–93.

⁹⁴ CAL. ELEC. CODE § 14028(c).

⁹⁵ See Sherry Barkas, *Palm Desert Lawsuit Settlement Includes Two-District Elections; Ranked-Choice Voting System Possible for 2020*, PALM SPRINGS DESERT SUN (Dec. 12, 2019, 5:08 PM), <https://www.desertsun.com/story/news/local/palm-desert/2019/12/12/palm-desert-reaches-california-voting-rights-act-settlement/4410780002/>.

⁹⁶ See Albany, Pre-Litigation Settlement Agreement and Release of All Claims (Feb. 22, 2022); Mala Subramanian, City Att'y, City of Albany City Council Agenda Staff Report (Feb. 22, 2022).

⁹⁷ See FLA. CONST. art. 3, §§ 20–21 (applying to congressional and state legislative district plans).

⁹⁸ See 10 ILL. COMP. STAT. 120/5-5(a) (2011) (applying to state legislative district plans).

⁹⁹ See CTVRA, Pub. Act No. 23-204, § 410(a)(6)–(7), 2023 Conn. Acts at 819–20 (Reg. Sess.).

¹⁰⁰ See N.Y. ELEC. LAW § 17-204(4) (McKinney 2023).

Washington's¹⁰¹ SVRAs apply to all political subdivisions but *not* to any federal, statewide, or state legislative elections.¹⁰² California's¹⁰³ and Virginia's¹⁰⁴ prohibitions of racial vote dilution extend only to political subdivisions that hold at-large elections; the measures exclude jurisdictions that rely on single-member districts. And Oregon's SVRA binds only school districts (and other entities involved in education); the statute exempts all other local governments.¹⁰⁵ In this one respect, then, all SVRAs diverge downward rather than upward from Section 2, which here represents a federal ceiling instead of a federal floor.

C. *Retgression*

To this point we've compared SVRAs to Section 2 of the FVRA. The FVRA's other key provision, Section 5, formerly applied not nationwide but rather to certain mostly southern jurisdictions. Under Section 5's coverage formula (which was part of Section 4 of the FVRA), jurisdictions were covered if they had low turnout in the 1964, 1968, or 1972 elections and also used particular voting restrictions in these years.¹⁰⁶ In the 2013 case of *Shelby County v. Holder*, the Supreme Court held that this formula was unconstitutional because it imposed current burdens on jurisdictions based on decades-old data.¹⁰⁷ Thanks to *Shelby County*, Section 5 remains on the books but no longer binds any jurisdictions.

Back when Section 5 was in force, it required covered jurisdictions to submit all changes to their election laws to either the Attorney General or a federal court for preclearance.¹⁰⁸ Preclearance was granted only if a jurisdiction could show that its new electoral policy had neither the purpose nor the effect of denying or abridging the right to vote on account of race or color.¹⁰⁹ In the 1976 case of *Beer v. United States*, the Supreme Court held that this language referred only

¹⁰¹ See WASH. REV. CODE § 29A.92.010(4) (2023).

¹⁰² For similar provisions in proposed SVRAs, see Voting Rights Act of 2023 – Counties and Municipalities, S.B. 878, § 15.5-202(a), Reg. Sess. (Md. 2023); S. 401, § 9(2), 102d Leg. (Mich. 2023); and John R. Lewis Voting Rights Act of New Jersey, S. 2997, § 5(a), 220th Leg. (N.J. 2023).

¹⁰³ See CAL. ELEC. CODE § 14027 (West 2002).

¹⁰⁴ See VA. CODE ANN. § 24.2-130(A) (2021). More specifically, the VAVRA simply repeats Section 2 of the FVRA with respect to state and local election laws *generally*, see *id.* § 24.2-126, but then expands Section 2's protections with respect to at-large electoral systems *specifically*, see *id.* § 24.2-130(A).

¹⁰⁵ See OR. REV. STAT. § 255.400(4)(a) (2021).

¹⁰⁶ See 52 U.S.C. § 10303(b)–(c).

¹⁰⁷ 570 U.S. 529, 553, 557 (2013).

¹⁰⁸ See 52 U.S.C. § 10304(a).

¹⁰⁹ See *id.*

to *retrogression*—the *worsening* of the electoral position of minority voters.¹¹⁰ Because of *Beer*, Section 5 protected against both racial vote denial and racial vote dilution but relied on a different baseline than did Section 2. Section 5’s baseline was the status quo ante, the situation immediately before the new electoral policy was enacted. Section 5 prohibited only changes to election laws that made minority voters worse off than they had been under the prior status quo.

Four SVRAs—in order of adoption, Florida’s, Virginia’s, New York’s, and Connecticut’s—include preclearance regimes and/or guard against retrogression. As pointed out above, the FLDFA applies to all of Florida’s congressional and state legislative districts.¹¹¹ The FLDFA therefore sweeps more broadly than did Section 5 of the FVRA, which formerly covered only five of Florida’s sixty-seven counties.¹¹² With respect to all these districts, the FLDFA bars them from “diminish[ing] [minority voters’] ability to elect representatives of their choice.”¹¹³ The FLDFA thus forbids retrogression in congressional and state legislative redistricting.¹¹⁴

Next, the VAVRA differs from Section 5 of the FVRA in three ways. First, the VAVRA applies to all political subdivisions in Virginia.¹¹⁵ In contrast, Section 5 formerly exempted a number of Virginia cities and counties that had “bailed out” of coverage.¹¹⁶ Second, the VAVRA only reaches a named set of “covered practices”: changing to at-large elections, changing municipal boundaries such that the minority population declines, redistricting, restricting services or materials for voters in languages other than English, and changing the number or location of polling places.¹¹⁷ On the other hand, Section 5 used to encompass all new electoral policies, the grand as well as the mundane.¹¹⁸

¹¹⁰ 425 U.S. 130, 141 (1976).

¹¹¹ See *supra* note 97 and accompanying text.

¹¹² See *Jurisdictions Previously Covered by Section 5*, U.S. DEP’T OF JUST. (May 17, 2023), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

¹¹³ FLA. CONST. art. 3, §§ 20–21. The Amendments also repeat the protections of Section 2. See *id.*; see also *In re Senate Joint Resolution of Legis. Apportionment 1176*, 83 So. 3d 597, 619 (Fla. 2012) (noting that one portion of the Amendments “is essentially a restatement of Section 2 of the Voting Rights Act”).

¹¹⁴ See *In re Senate Joint Resolution of Legis. Apportionment 1176*, 83 So. 3d at 624 (“Florida now has a statewide non-retrogression requirement independent of Section 5.”).

¹¹⁵ See VA. CODE ANN. § 24.2-129 (2021).

¹¹⁶ See *Section 4 of the Voting Rights Act*, U.S. DEP’T OF JUST. (Apr. 5, 2023), <https://www.justice.gov/crt/section-4-voting-rights-act>.

¹¹⁷ See VA. CODE ANN. § 24.2-129(A).

¹¹⁸ See *Allen v. State Bd. of Elections*, 393 U.S. 544, 563–71 (1969).

Third, and most importantly, preclearance is *opt-in* under the VAVRA. Virginia jurisdictions get to *choose* whether to submit covered practices to the Virginia Attorney General or to provide the public with notice of these practices, an opportunity to comment, and a window to sue before the practices go into effect.¹¹⁹ When jurisdictions select the preclearance route, it works essentially the same way as under Section 5 of the FVRA. The Virginia Attorney General has sixty days from submission to object to the covered practice, a period during which the practice may not be enforced.¹²⁰ The Virginia Attorney General must deny preclearance if the practice either “has the purpose or effect of denying or abridging the right to vote based on race or color” or “will result in the retrogression in the position of members of a racial or ethnic group with respect to their effective exercise of the electoral franchise.”¹²¹ These seem like two separate criteria but actually collapse into a single requirement. The first clause is drawn almost verbatim from Section 5,¹²² while the second parrots *Beer*’s holding that Section 5 prohibits retrogression.¹²³ On an opt-in basis, then, the VAVRA’s preclearance regime prevents covered (but not all) practices from being implemented if they’re deemed to be retrogressive.

The third SVRA that parallels Section 5 of the FVRA, the NYVRA, *doesn’t* apply to all political subdivisions in New York.¹²⁴ Instead, the NYVRA bases coverage on a new formula unrelated to the one in Section 4 of the FVRA. Under this formula, a political subdivision is covered if (1) it has been found liable for a voting rights violation over the previous twenty-five years; (2) it has been found liable for at least three (non-voting) civil rights violations over the previous twenty-five years; (3) the share of arrestees who are minority members exceeded the minority share of the population by at least twenty percentage points at any point over the previous ten years; or (4) the dissimilarity index (a common measure of residential segregation) exceeded fifty percent at any point over the previous ten years.¹²⁵ This formula responds to *Shelby County*’s concern about current burdens being imposed based on obsolete data (even though that

¹¹⁹ See VA. CODE ANN. § 24.2-129(B)–(D).

¹²⁰ See *id.* § 24.2-129(D).

¹²¹ *Id.* § 24.2-129(A).

¹²² See 52 U.S.C. § 10304(a).

¹²³ See *Beer v. United States*, 425 U.S. 130, 141 (1976).

¹²⁴ However, the NYVRA does apply to more political subdivisions in New York than did Section 5 of the FVRA. See *Jurisdictions Previously Covered by Section 5*, *supra* note 112.

¹²⁵ See N.Y. ELEC. LAW § 17-210(3) (McKinney 2023). For similar provisions in proposed SVRAs, see Voting Rights Act of 2023 – Counties and Municipalities, S.B. 878, § 15.5-401(b), Reg. Sess. (Md. 2023); S. 401, § 19(19)(a), 102d Leg. (Mich. 2023); and John R. Lewis Voting Rights Act of New Jersey, S. 2997, § 11(c), 220th Leg. (N.J. 2023).

concern pertained only to the federal government).¹²⁶ Under the formula, coverage changes on a rolling basis as the various criteria are or aren't satisfied over the specified preceding periods.

For a jurisdiction covered by the formula, the preclearance process is much the same as under Section 5 of the FVRA. The jurisdiction must submit every “covered policy”—meaning more or less every new electoral regulation—to either the New York Civil Rights Bureau or a particular New York court.¹²⁷ Whichever institution receives the submission must “grant preclearance only if it determines that the covered policy will not diminish the ability of protected class members to participate in the political process and to elect their preferred candidates to office.”¹²⁸ “Diminish” is one of the terms that *Beer* used as a synonym for “retrogress.”¹²⁹ “[P]articipate in the political process” and “elect their preferred candidates to office” are phrases that refer, respectively, to racial vote denial and racial vote dilution. Accordingly, within covered jurisdictions, the NYVRA allows new electoral regulations to go into effect only if they don't retrogress, which they can do either by denying or by diluting the vote on racial grounds.

Lastly, the CTVRA resembles the NYVRA with respect to preclearance and retrogression, except for two notable differences. One is the CTVRA's coverage formula, which is somewhat more inclusive than that of the NYVRA. The CTVRA subjects to preclearance jurisdictions with *any* voting rights *or* (non-voting) civil rights violations over the previous twenty-five years; jurisdictions that failed to transmit necessary information to the statewide database over the previous three years; jurisdictions with racial gaps in arrest rates like those specified by the NYVRA; and jurisdictions with racial gaps in voter turnout above ten percent at any point over the previous ten years.¹³⁰ The other contrast is that, for covered jurisdictions, the CTVRA requires proposed electoral policies to be denied preclearance if they're retrogressive *or* if they're “more likely than not to violate the provisions” of the rest of the statute.¹³¹ The CTVRA

¹²⁶ See *Shelby Cnty. v. Holder*, 570 U.S. 529, 550–53 (2013).

¹²⁷ See N.Y. ELEC. LAW § 17-210(2), (4), (5). Because the NYVRA's definition of “covered policies” is significantly broader than the VAVRA's definition of “covered practices,” in the table at the end of this Part, we consider the NYVRA not to be limited to specified practices.

¹²⁸ *Id.* § 17-210(4), (5). Section 17-210(4) also requires the Civil Rights Bureau to publish and solicit public comments on all submissions. *Id.* § 17-210(4). For similar provisions in proposed SVRAs, see S.B. 878, § 15.5-401(e) (Md. 2023); S. 401, § 19(3)(e) (Mich. 2023); and S. 2997, § 12(a)(5) (N.J. 2023).

¹²⁹ See *Beer v. United States*, 425 U.S. 130, 141 (1976).

¹³⁰ See CTVRA, Pub. Act No. 23-204, § 414(c)(1), 2023 Conn. Acts at 838 (Reg. Sess.).

¹³¹ *Id.* § 414(e)(2)(F)(i), 414(f)(3).

disparate impact alone								
Specification of remedies							✓	✓
Stronger ban of voter intimidation							✓	✓
Statewide database								✓
Racial Vote Dilution								
Omission of <i>Gingles</i> 's first prong	✓			✓	✓	✓	✓	✓
Liability for racially polarized voting alone							✓	
Crossover claims authorized			✓	✓				
Coalition claims authorized			✓	✓			✓	✓
Influence claims authorized	✓		✓		✓	✓	✓	✓
Proportional representation as relief	✓			✓	✓		✓	✓
Applies to statewide district plans		✓	✓					
Applies to all political subdivisions				✓			✓	✓
Applies to at-large elections only	✓					✓		
Applies to school districts only					✓			
Retrogression								
Broader coverage than Section 5		✓				✓	✓	✓
Limited to specified practices						✓		
Opt-in preclearance						✓		
New coverage formula							✓	✓

II. DEFENDING SVRAS

The hallmark of state voting rights acts is that they're more expansive than the federal Voting Rights Act. As we've mentioned, one of the pillars of the FVRA was toppled by the Supreme Court in *Shelby County v. Holder*.¹³² In light of *Shelby County*, it's natural to ask if SVRAS are constitutionally vulnerable, too. In particular, could they violate the Equal Protection Clause through their alleged focus on race?

In an earlier era, the answer to this question would have been obvious. “[R]acial discrimination in voting,” the Court declared in the 1966 case of *South Carolina v. Katzenbach*, is a “blight,” an “insidious and pervasive evil which [is] perpetuated . . . through unremitting and ingenious defiance of the Constitution.”¹³³ The FVRA, the Court thus held in *South Carolina*, was lawful because it “effectuate[d] the constitutional prohibition against racial discrimination in voting.”¹³⁴ Given this conclusion, the validity of SVRAS would have been plainer still. SVRAS are *more* effective than the FVRA in preventing and remedying racial discrimination in voting. If the FVRA is constitutional because it tries to solve this problem *less* successfully, more potent measures directed at the same illicit activity must be permissible.

Times change, however, and so does constitutional interpretation. In *Shelby County*, the Court portrayed racial discrimination in voting not as an “insidious and pervasive evil” but rather as a relic of the past, nearly eliminated in modern American politics. With respect to voting discrimination, “things have changed dramatically,” opined the Court.¹³⁵ “[O]ur nation has made great strides.”¹³⁶ “[N]o one can fairly say” that voting discrimination remains “‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant.’”¹³⁷ Largely for this reason, the Court nullified the FVRA’s preclearance regime. This regime seemed obsolete to the Court, an “extraordinary” response to conditions that had gradually become ordinary.¹³⁸ Also partly on this basis, the Court has expressed skepticism of the FVRA’s other pillar, Section 2. Like Section 5, Section 2 is “strong medicine,” a “permanent, nationwide ban” of both racial vote denial and racial vote dilution

¹³² 570 U.S. 529 (2013).

¹³³ 383 U.S. 301, 308–09 (1966).

¹³⁴ *Id.* at 326.

¹³⁵ *Shelby Cnty.*, 570 U.S. at 547.

¹³⁶ *Id.* at 549.

¹³⁷ *Id.* at 554.

¹³⁸ *Id.* at 534.

(if certain conditions are met).¹³⁹ Thinking the patient no longer needs such aggressive treatment, the Court has imposed limit after limit on Section 2¹⁴⁰ and even suggested the provision might be unconstitutional.¹⁴¹

Against this backdrop, it's hardly surprising that some jurisdictions have disputed the validity of SVRAs when sued under these statutes. In an early case of this kind, the city of Modesto convinced a California trial court that the CAVRA violates the Equal Protection Clause, thereby stopping CAVRA enforcement until this ruling was reversed on appeal almost two years later.¹⁴² More recently, a resident of Poway, California advanced a similar challenge in federal court, ultimately filing a cert petition with the Supreme Court.¹⁴³ This suit inspired an almost identical claim against the WAVRA, resolved in favor of the statute's validity by the Washington Supreme Court.¹⁴⁴ And while there has been no litigation yet under the NYVRA, Nassau County has invoked the canon of constitutional avoidance to assert (implausibly) in a memorandum that the law is coextensive with Section 2 of the FVRA.¹⁴⁵

The main argument in these proceedings has been that SVRAs constitute (or compel) unlawful racial gerrymandering. Racial gerrymandering denotes the predominant and unjustified use of race in the design of electoral districts. According to their critics, that's exactly what SVRAs do (or lead to). Another accusation against SVRAs has been that they classify individuals on the basis of their race. Under black-letter doctrine, racial classifications trigger strict scrutiny, which SVRAs' opponents say they can't satisfy. One more charge has

¹³⁹ *Id.* at 535, 557.

¹⁴⁰ *See, e.g.*, Brief of *Amici Curiae* Professors Jowei Chen et al., *supra* note 75, at 12–21 (describing these doctrinal limits in the area of racial vote dilution).

¹⁴¹ *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion) (asserting that certain readings of Section 2 would raise “serious constitutional concerns”); *see also* *Allen v. Milligan*, 143 S. Ct. 1487, 1519 (2023) (noting but not evaluating the argument that “even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future”). *But see* *Milligan*, 143 S. Ct. at 1516–17 (holding that Section 2 is constitutional).

¹⁴² *See* *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 825 (Cal. Ct. App. 2006).

¹⁴³ *See* *Petition for Writ of Certiorari*, *Higginson v. Becerra*, No. 19-1199 (U.S. Apr. 2, 2020).

¹⁴⁴ *See* *Portugal v. Franklin Cnty.*, 530 P.3d 994, 999 (Wash. 2023); *see also* Brief of Law School Clinics Focused on Civil Rights as *Amici Curiae* at 14 n.1, *Portugal v. Franklin Cnty.*, No. 100999-2 (Wash. Mar. 27, 2023) [hereinafter *Law School Clinics Brief*] (observing that “entire pages of [the petitioner’s] argument . . . are word-for-word identical to the Opening Brief of the Appellant in *Higginson*”).

¹⁴⁵ *See* Memorandum from Troutman Pepper on Proposed Redistricting Plan for Nassau County Legislature Districts 6 (Feb. 15, 2023) (on file with author); *see also* *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5025251, at *8–9 (N.D. Ill. Oct. 21, 2011) (involving a constitutional challenge to the ILVRA); *Yumori-Kaku v. City of Santa Clara*, 273 Cal. Rptr. 3d 437, 471–72 (Cal. Ct. App. 2020) (involving a constitutional challenge to the CAVRA).

been that, even if SVRAs are facially neutral, their underlying objectives are racially discriminatory. Like racial classifications, racially discriminatory motives result in the application of strict scrutiny, which supposedly dooms SVRAs.

In this Part, we refute these claims that SVRAs violate the Equal Protection Clause. We do so in reliance on the law as it stands at the time of this Article’s writing. That is, we don’t try to anticipate future changes to equal protection doctrine that might, for instance, require strict scrutiny for all statutes that refer to race in any way—even if they don’t classify by race or aim to harm members of a racial group. To simplify our analysis, we also consider primarily the CTVRA here. As we explained in the previous Part, the CTVRA is the most sweeping SVRA enacted to date as well as one of two SVRAs (the other being the NYVRA) that addresses racial vote denial, racial vote dilution, and retrogression. If the CTVRA is constitutionally valid, then so, a fortiori, must be all other SVRAs currently in operation.¹⁴⁶

A. *Racial Gerrymandering*

To reiterate, the central legal objection to SVRAs has been that they amount to (or mandate) racial gerrymandering. In the first equal protection assault on the CAVRA, Modesto’s “arguments [were] based on Supreme Court cases that struck down specific redistricting plans” on racial gerrymandering grounds.¹⁴⁷ In the Poway case, the plaintiff explicitly invoked the standard for racial gerrymandering claims, contending that “[t]he Equal Protection Clause prohibits any state law . . . in which ‘racial considerations predominated over others’ unless it can ‘withstand strict scrutiny.’”¹⁴⁸ Still more bluntly, the intervenor in the WAVRA case maintained that the statute “makes race not merely one factor or the predominant factor, but the *only* factor in triggering WAVRA litigation remedies and redistricting on racial lines.”¹⁴⁹

As these quotes suggest, the critical threshold issue in a racial gerrymandering case is whether race predominated in the creation of the

¹⁴⁶ To further simplify our analysis, we consider only certain notable provisions of the CTVRA here. It would be unmanageable to assess independently each of the CTVRA’s many parts. And we refute only the claims that the CTVRA is subject to strict scrutiny for one reason or another. We don’t address whether the CTVRA could be upheld under this very demanding standard.

¹⁴⁷ *Sanchez*, 51 Cal. Rptr. 3d at 843–44.

¹⁴⁸ Petition for Writ of Certiorari at 2, *Higginson*, No. 19-1199 (quoting *Cooper v. Harris*, 581 U.S. 285, 292 (2017)).

¹⁴⁹ Statement of Grounds for Direct Review at 16, *Portugal v. Franklin Cnty.*, No. 100999-2 (Wash. June 17, 2022).

challenged district. As the Supreme Court put it in the 1995 case that articulated this doctrine, the question is whether “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”¹⁵⁰ If race did predominate, then “the design of the district must withstand strict scrutiny.”¹⁵¹ On the other hand, if some non-racial factor predominated—compliance with traditional redistricting criteria, the protection of an incumbent legislator, the pursuit of partisan advantage, and so on—then the disputed district need only survive deferential rational basis review.¹⁵²

Under this framework, there’s a glaring flaw in the argument that the CTVRA (or any other SVRA) violates the constitutional prohibition of racial gerrymandering. It’s that a racial gerrymandering claim can only be brought against *an individual district*. As the Court made clear in a 2015 case, “[a] racial gerrymandering claim . . . applies to the boundaries of individual districts. It applies district-by-district. It does not apply to a State considered as an undifferentiated ‘whole.’”¹⁵³ However, the CTVRA obviously isn’t an individual district. Instead, it’s a statute that’s partly *about* redistricting, some of whose provisions establish rules that subsequently drawn districts must follow (like not racially diluting the vote and not retrogressing). A law of this kind can’t be attacked as a racial gerrymander because it doesn’t specify the metes and bounds of any district. Only a law *doing* redistricting—not one stating how redistricting *should be done*—is potentially vulnerable to this type of equal protection challenge.¹⁵⁴

To see the point, consider the role of the FVRA in racial gerrymandering cases. Many of the districts targeted in these cases were crafted to comply with Section 2 or Section 5 of the FVRA.¹⁵⁵ Yet the Court has never hinted, let alone held, that the FVRA itself constitutes unlawful racial gerrymandering. To the

¹⁵⁰ *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

¹⁵¹ *Cooper*, 581 U.S. at 292.

¹⁵² *See, e.g., id.* at 291 (listing non-racial factors including “compactness, respect for political subdivisions, [and] partisan advantage”).

¹⁵³ *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015).

¹⁵⁴ *See, e.g., Order Denying Motion for Judgement on the Pleadings at 2, Portugal v. Franklin Cnty.*, No. 21-2-50210-11 (Wash. Sup. Ct. Jan. 3, 2022) (holding that “the issue of unconstitutional racial gerrymandering is, at best, premature” because “the [WAVRA] is not itself a district plan and no specific district boundaries have been adopted”); *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 844 (Cal. Ct. App. 2006) (“It is equally apparent that [the racial gerrymandering doctrine] does not mean the [CAVRA] must pass strict scrutiny in order to withstand a facial challenge.”).

¹⁵⁵ In *Cooper*, for example, North Carolina argued that it drew one challenged district “to avoid Section 2 liability for vote dilution.” 581 U.S. at 301 (internal quotation marks omitted).

contrary, the Court has recognized compliance with the FVRA as a compelling governmental interest, capable of *saving* a district drawn for a predominantly racial reason if the district was, in fact, narrowly tailored to satisfy the FVRA.¹⁵⁶ In the Court's words in a 2017 case, "[w]hen a State justifies the predominant use of race in redistricting on the basis of the need to comply with the Voting Rights Act, 'the narrow tailoring requirement insists only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made.'"¹⁵⁷ Under this approach, the CTVRA, like the FVRA, can't itself amount to illegal racial gerrymandering. Rather, compliance with the CTVRA, as with the FVRA, can sometimes rescue a district even in the event that strict scrutiny applies to it.¹⁵⁸

Critics of SVRAs might respond that we're misunderstanding their argument. Their claim isn't that SVRAs *themselves* are racial gerrymanders, they might say, but rather that SVRAs necessarily *cause the creation* of racially gerrymandered districts. Racially gerrymandered districts could be the remedy after liability has been found in a racial vote dilution suit. Or a jurisdiction could preemptively adopt racially gerrymandered districts in order to avoid racial vote dilution litigation.

Unlike the allegation that the CTVRA is a racial gerrymander, the charge that it inevitably leads to the design of racially gerrymandered districts is at least legally cognizable. If it were the case that the CTVRA "can be validly applied under no circumstances," because racially gerrymandered districts are the only way to remedy or avoid violations of the statute, then the CTVRA would indeed be facially unconstitutional.¹⁵⁹ But it's plainly not the case that the CTVRA has no lawful applications. For one thing, the CTVRA never explicitly or implicitly urges the creation of racially gerrymandered districts. The statute calls only for "appropriate remedies that are tailored to address [statutory] violation[s] . . . and to ensure protected class members have equitable opportunities to fully participate in the political process."¹⁶⁰ Such remedies are conceptually distinct from racially gerrymandered districts for the simple reason that minority voters

¹⁵⁶ See, e.g., *id.* ("[W]e have long assumed that complying with the VRA is a compelling interest.")

¹⁵⁷ *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 193 (2017) (quoting *Ala. Legis. Black Caucus*, 575 U.S. at 278).

¹⁵⁸ One could potentially argue that compliance with a SVRA, unlike compliance with the FVRA, isn't a compelling state interest because a SVRA lacks the grounding of the FVRA in the Fourteenth and Fifteenth Amendments. But the law on what constitutes a compelling state interest is opaque and it's far from clear that a constitutional foundation is germane here.

¹⁵⁹ *Sanchez*, 51 Cal. Rptr. 3d at 837.

¹⁶⁰ CTVRA, Pub. Act No. 23-204, § 411(e)(1), 2023 Conn. Acts at 824–26 (Reg. Sess.).

can enjoy equitable opportunity to full participation in the political process even when they reside in districts not drawn on predominantly racial grounds.

Certain SVRAs (though not the CTVRA) further disfavor the adoption of oddly shaped districts enclosing members of a dispersed minority population. Most districts struck down as unlawful racial gerrymanders have had these characteristics.¹⁶¹ But certain SVRAs state that “evidence concerning whether members of a protected class are geographically compact or concentrated . . . may be a factor in determining an appropriate remedy.”¹⁶² The implication is that, where minority members live close to one another, a reasonably-shaped district encompassing this minority population is a proper remedy. But where minority members *aren’t* geographically compact or concentrated, a district zigging and zagging to find dispersed minority members *isn’t* a suitable cure for racial vote dilution. Such a district is particularly likely to be deemed an illegal racial gerrymander. Such a district, though, is frowned upon by certain SVRAs.

If a single-member district isn’t one, then what is an appropriate remedy where minority members aren’t geographically compact or concentrated? We answered this question in the previous Part.¹⁶³ In this situation, a system of proportional representation is an appropriate remedy because it makes possible adequate minority representation despite the dispersion of the minority population and without requiring the crafting of contorted districts.¹⁶⁴ Crucially, a system of proportional representation generally can’t be attacked as a racial gerrymander because it (like the CTVRA) isn’t an individual district. Instead, it’s an entity that elects multiple legislators and whose boundaries can’t be race-based when (as is typical) they coincide with the borders of the jurisdiction as a whole.¹⁶⁵ Consequently, one more reason why the CTVRA has lawful

¹⁶¹ In the very first racial gerrymandering case, for example, the challenged district slithered “in snakelike fashion through tobacco country, financial centers, and manufacturing areas ‘until it gobble[d] in enough enclaves of black neighborhoods.’” *Shaw v. Reno*, 509 U.S. 630, 635–36 (1993) (citation omitted).

¹⁶² *E.g.*, N.Y. ELEC. LAW § 17-206(2)(c)(viii) (McKinney 2023); *see also, e.g.*, *Pico Neighborhood Ass’n v. City of Santa Monica*, No. S263972, 2023 WL 5440486, at *11 (Cal. Aug. 24, 2023) (noting that “California law directs that district boundaries comply with the state and federal Constitutions” and “requires, to the extent practicable” contiguity, compactness, and respect for neighborhoods and communities of interest).

¹⁶³ *See supra* notes 89–96 and accompanying text.

¹⁶⁴ Importantly, the CTVRA *does* authorize the imposition of proportional representation even though it lacks the language about the geographic distribution of the minority population being relevant for remedial purposes. The CTVRA defines an “[a]lternative method of election” to include “proportional ranked-choice voting, cumulative voting and limited voting,” CTVRA § 410(a)(1), and then confirms that “[a]ppropriate remedies may include . . . an alternative method of election,” *id.* § 411(e)(1).

¹⁶⁵ *See, e.g.*, *Holder v. Hall*, 512 U.S. 874, 909–10 (1994) (Thomas, J., concurring) (describing proportional “voting mechanisms—for example, cumulative voting or a system using transferable votes—that can produce proportional results without requiring division of the electorate into racially segregated districts”).

applications (and thus isn't facially invalid) is that it authorizes the imposition of proportional representation, a remedy that can rarely, if ever, constitute racial gerrymandering.¹⁶⁶

A last response to the argument that the CTVRA necessarily results in the design of racially gerrymandered districts could be experiential—based on what has actually occurred since the statute was enacted. However, the CTVRA became law so recently that there has been no litigation (and essentially no other activity) yet under the statute. Under the CAVRA, in contrast, almost 150 school districts and almost 100 cities have been forced to switch from at-large elections to single-member districts.¹⁶⁷ This vast record gives no support at all to the claim that SVRAs necessarily lead to racial gerrymandering. To the best of our knowledge, *not a single district* created to remedy or avoid a CAVRA violation has been found to be an illegal racial gerrymander. In fact, we're aware of only one suit that has even asserted that any districts drawn because of the CAVRA are unconstitutional. This was the suit by the resident of Poway, whose thrust was that the CAVRA itself is invalid, and whose racial gerrymandering objections to individual districts were summarily rejected by two federal courts. As the Ninth Circuit concluded, “the allegations of the operative complaint fail to plausibly state that [the plaintiff] is a victim of racial gerrymandering” since the “[p]laintiff alleges no facts concerning the City’s motivations for placing him or any other Poway voter in any particular electoral district.”¹⁶⁸

To be clear, the fact that no district drawn because of the CAVRA (or any other SVRA) has yet been ruled unconstitutional hardly means that no such district could be struck down in the future. If a Connecticut jurisdiction or court sought to remedy a CTVRA violation by crafting a single-member district on a predominantly racial basis, strict scrutiny would apply to—and might well doom—that district. The same rigorous standard would apply to a single-member district with a predominant racial purpose adopted preemptively to avoid CTVRA litigation. Accordingly, our position here is just that the CTVRA isn't *facially* invalid because it doesn't *inevitably* cause the construction of racially gerrymandered districts. If racially gerrymandered districts are nevertheless formed to cure or prevent infringements of the statute, plaintiffs can

¹⁶⁶ See, e.g. Law School Clinics Brief, *supra* note 144, at 27 (noting that proportional “[n]on-districted remedies . . . sidestep[] racial gerrymandering concerns altogether”).

¹⁶⁷ See *supra* notes 13–14 and accompanying text.

¹⁶⁸ *Higginson v. Becerra*, 786 F. App'x. 705, 706 (9th Cir. 2019); see also *Higginson v. Becerra*, 363 F. Supp. 3d 1118, 1126–27 (S.D. Cal. 2019) (“[The plaintiff’s] allegations do not support the inference that state actors . . . classified [him] into a district because of his membership in a particular racial group.”).

certainly challenge those districts under the well-established framework for this cause of action.¹⁶⁹

B. Racial Classification

Critics of SVRAs have only argued that their prohibitions of racial vote dilution—not of racial vote denial or of retrogression—amount to racial gerrymandering.¹⁷⁰ SVRAs' prohibitions of racial vote dilution have also been the exclusive target of a different kind of equal protection claim: that they classify individuals by race and are, for that reason, subject to strict scrutiny. In particular, critics have maintained that SVRA provisions basing liability in part or in whole on the existence of racially polarized voting are racial classifications. As Modesto put it in the city's attack on the CAVRA, "[r]acially polarized voting is an explicit racial classification subject to strict scrutiny under the Equal Protection Clause."¹⁷¹ Or in the words of the intervenor in the WAVRA case, because the statute "imposes liability . . . based on the presence of racially polarized voting," it "is a paradigmatic racial classification."¹⁷²

As we just noted, SVRAs' prohibitions of racial vote denial and of retrogression haven't yet been disparaged as racial classifications. But they might be in the future. The CTVRA's ban of racial vote denial bases liability on racial disparities in political participation as well as race-related factors like a jurisdiction's history of racial discrimination, racial differences in socioeconomic status, and racial appeals in campaigns.¹⁷³ Similarly, the CTVRA's preclearance formula covers jurisdictions due to their civil rights violations, racial differences in arrest rates, or racial differences in voter turnout.¹⁷⁴ The retrogression standard that applies to covered jurisdictions is also race-related in that it asks whether a new electoral policy worsens the electoral position of a racial group.¹⁷⁵ And more generally, SVRAs in their entirety

¹⁶⁹ See, e.g., *Portugal v. Franklin Cnty.*, 530 P.3d 994, 1006 (Wash. 2023) ("Strict scrutiny could certainly be triggered in an *as-applied* challenge to districting maps that sort voters on the basis of race . . ." (internal quotation marks omitted)); *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 844 (Cal. Ct. App. 2006) ("In reviewing a district-based remedy [to a CAVRA violation], it would be necessary to determine whether race was the predominant factor used in drawing the district lines. If it was, the plan would be subject to strict scrutiny.").

¹⁷⁰ This focus is likely attributable to the fact that most SVRAs only address racial vote dilution. Racially gerrymandered districts are also even less likely to be formed because of prohibitions of retrogression, which merely aim to preserve the status quo ante.

¹⁷¹ Petition for Writ of Certiorari at 5, *City of Modesto v. Sanchez*, No. 07-88 (U.S. July 19, 2007).

¹⁷² Brief of Appellant at 42, *Portugal v. Franklin Cnty.*, 530 P.3d 994 (Wash. 2023) (No. 100999-2).

¹⁷³ See *supra* notes 54–57 and accompanying text.

¹⁷⁴ See *supra* note 130 and accompanying text.

¹⁷⁵ See *supra* note 131 and accompanying text.

arguably classify by race because they ground eligibility to bring suit in membership in a racial group. Per the plaintiff in the Poway case, “[t]he [CAVRA] focuses exclusively on race[] by putting voters into racial groups.”¹⁷⁶ In the interest of thoroughness, we rebut all these potential racial classification claims, too, even though they have been advanced rarely, if at all, to date.

Before proceeding with these rebuttals, we need a working definition of a racial classification. The closest the Supreme Court has come to giving us one¹⁷⁷ is its statement in the 2007 case of *Parents Involved in Community Schools v. Seattle School District No. 1* that “when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”¹⁷⁸ This statement echoes the Court’s conclusion in a 1982 case that a law “does *not* embody a racial classification” if “it neither says nor implies that persons are to be treated differently on account of their race.”¹⁷⁹ Also analogous is Justice Powell’s formulation in a 1978 case that “a [racial] classification denies an individual opportunities or benefits enjoyed by others solely because of his race.”¹⁸⁰ Generalizing from these and other passages,¹⁸¹ a reasonable definition of a racial classification is a legal provision that (1) distributes burdens or benefits (2) to individuals (3) on the basis of individuals’ race.¹⁸²

Using this definition, it’s apparent the CTVRA doesn’t classify by race to the extent it imposes liability because of “divergent voting patterns,” that is, racially polarized voting.¹⁸³ Liability under this provision means that a *jurisdiction* must change its racially dilutive electoral system—say, from at-large to districted elections or from one district map to another. This shift might be a burden for a jurisdiction, but it surely isn’t a cognizable harm or benefit for

¹⁷⁶ Petition for Writ of Certiorari, *supra* note 143, at 27; *see also* Yumori-Kaku v. City of Santa Clara, 273 Cal. Rptr. 3d 437, 471 (Cal. Ct. App. 2020) (“The City generally asserts that the [CAVRA] uses race-based classifications . . . to authorize a challenge by a member of a protected class . . .”).

¹⁷⁷ Cf. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1362 (2011) (complaining that “to date, the Court has never defined what a racial classification is”).

¹⁷⁸ 551 U.S. 701, 720 (2007).

¹⁷⁹ *Crawford v. Bd. of Educ. of City of Los Angeles*, 458 U.S. 527, 537 (1982) (emphasis added).

¹⁸⁰ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978).

¹⁸¹ *See, e.g., Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 331 (2014) (Scalia, J., concurring) (“A law that ‘neither says nor implies that persons are to be treated differently on account of their race’ is not a racial classification” (quoting *Crawford*, 458 U.S. at 537)).

¹⁸² Cf. Stephen Menendian, *What Constitutes a “Racial Classification”? Equal Protection Doctrine Scrutinized*, 24 TEMP. POL. & CIV. RTS. L. REV. 81, 102 (2014) (offering a similar definition of a racial classification).

¹⁸³ CTVRA, Pub. Act No. 23-204, § 411(b)(2)(A), 2023 Conn. Acts at 821 (Reg. Sess.).

any *individual*. After all, no individual has to do anything in response to a statutory violation. Voters keep voting as they did before, just under a new non-dilutive system rather than the old dilutive one. Moreover, even if a change in electoral structure were somehow an individual injury, it isn't required by the statute on account of any individual's race. A jurisdiction isn't forced to switch electoral systems because any individual (or group of individuals) is Black, Latino, Asian, white, or anything else. Instead, liability ensues only when members of different racial groups vote in different ways—so due to their *behavior*, not their *racial affiliation*.¹⁸⁴

But isn't a requirement of racially polarized voting a race-conscious criterion? Of course it is, but that's not the test for whether a provision is a racial classification. A provision can acknowledge race, refer to race, call for the analysis of race-related issues, but it's still not a racial classification if it doesn't use race to distribute burdens or benefits to individuals. As the Supreme Court made clear in a 2015 case, a statute's "mere awareness of race in attempting to solve [race-related] problems . . . does not doom that endeavor at the outset."¹⁸⁵ Or as a California court explained in rejecting the city of Modesto's challenge to the CAVRA, "a statute is [not] automatically subject to strict scrutiny because it involves race consciousness even though it does not . . . impose any burden or confer any benefit on any particular racial group."¹⁸⁶

Additionally, you might think from their critics' emphasis on racially polarized voting that establishing its existence is an innovation of SVRAs. However, nothing could be further from the truth. Proving racially polarized voting was the *Supreme Court's* idea for a precondition for liability in racial vote dilution claims brought under Section 2 of the *FVRA*. In *Gingles*, the Court made the political cohesiveness of the minority group the second prerequisite for a Section 2 violation and white bloc voting the third condition.¹⁸⁷ Together, as we mentioned earlier, the second and third *Gingles* prongs create a requirement of racial polarization in voting.¹⁸⁸ Consequently, if the CTVRA classifies by race

¹⁸⁴ See, e.g., *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 837 (Cal. Ct. App. 2006) (holding that the CAVRA "does not allocate benefits or burdens on the basis of race or any other suspect classification").

¹⁸⁵ *Tex. Dep't of Hous. & Cmty. Aff. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 545 (2015).

¹⁸⁶ *Sanchez*, 51 Cal. Rptr. 3d at 838; see also, e.g., *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5025251, at *8 (N.D. Ill. Oct. 21, 2011) ("[R]edistricting laws *can* take race into consideration."); Order Denying Motion for Judgment on the Pleadings at 4, *Portugal v. Franklin Cnty.*, No. 21-2-50210-11 (Wash. Sup. Ct. Jan. 3, 2022) ("[T]he [WAVRA], while race conscious, does not discriminate based on race.").

¹⁸⁷ See *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986).

¹⁸⁸ See *supra* note 69 and accompanying text.

because it asks for a showing of racially polarized voting, then so does the FVRA. If the CTVRA is subject to strict scrutiny for this reason, then so is the FVRA.¹⁸⁹ But that conclusion is untenable. Not only is it in conflict with more than forty years of FVRA rulings—none of which has suggested that the FVRA is valid only if it can survive the most stringent possible review—it would also represent a virtual death sentence for one of the most important and impactful laws in American history. Moreover, this virtual death sentence would be issued in the wake of the Court’s emphatic holding in the 2023 case of *Allen v. Milligan* that Section 2 of the FVRA is constitutional.¹⁹⁰

Turning from racial vote dilution to racial vote denial, the CTVRA relies on a legal standard similar to that of Section 2 of the FVRA. The CTVRA forbids any electoral practice that “results in an impairment of the right to vote for any protected class member.”¹⁹¹ In comparable language, Section 2 bans any electoral practice that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”¹⁹² The above argument about the equivalence of the CTVRA and Section 2 with respect to racially polarized voting therefore applies equally with respect to racial vote denial. If the CTVRA’s prohibition of racial vote denial is a racial classification subject to strict scrutiny, then so is the FVRA’s parallel provision. But since no court has intimated that the FVRA’s prohibition of racial vote denial classifies by race, the CTVRA’s parallel provision should also be safe from this charge.¹⁹³

It’s true the CTVRA identifies several circumstances probative of liability in racial vote denial cases that are different from *Brnovich*’s list of factors for FVRA litigation, more advantageous for plaintiffs, and related to race.¹⁹⁴ But *Brnovich* never implied, let alone insisted, that its factors were constitutionally compelled. To the contrary, *Brnovich* presented its factors as the products of ordinary statutory interpretation—as “circumstance[s] that ha[ve] a logical bearing on whether voting is ‘equally open’ and affords equal ‘opportunity.’”¹⁹⁵

¹⁸⁹ See, e.g., *Sanchez*, 51 Cal. Rptr. 3d at 838 (“If the [CAVRA] were subject to strict scrutiny because of its reference to race, so would . . . the FVRA . . .”).

¹⁹⁰ See 143 S. Ct. 1487, 1516 (2023) (“We also reject Alabama’s argument that § 2 as applied to redistricting is unconstitutional under the Fifteenth Amendment.”).

¹⁹¹ CTVRA, Pub. Act No. 23-204, § 411(a)(1), 2023 Conn. Acts at 820–21 (Reg. Sess.).

¹⁹² 52 U.S.C. § 10301(a).

¹⁹³ More technically, the CTVRA’s prohibition of racial vote denial, like its requirement of racially polarized voting, doesn’t distribute any burdens or benefits to *individuals* (as opposed to *jurisdictions*), and doesn’t impose liability because any individual (or group of individuals) affiliates with any race. See *supra* notes 183–84 and accompanying text.

¹⁹⁴ See CTVRA § 411(c)(1).

¹⁹⁵ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2338 (2021) (quoting 52 U.S.C. § 10301(b)).

That the CTVRA's factors are easier for plaintiffs to establish than are *Brnovich*'s is also constitutionally irrelevant. A statutory provision that doesn't satisfy the definition of a racial classification doesn't turn into one because it puts a thumb on the scale in favor of plaintiffs. And as to that definition, several of the CTVRA's factors may be race-conscious, but none of them actually turns on the race of any individual (or group of individuals). Inquiring into a jurisdiction's history of racial discrimination, the existence of a racial gap in turnout, racial differences in socioeconomic status, or racial appeals in campaigns is entirely different from asking if a person affiliates with a certain race (and then distributing burdens or benefits to that person on that basis).¹⁹⁶

It's true as well that liability is possible under the CTVRA, but not under the FVRA, solely because an electoral practice produces a racial disparity in political participation.¹⁹⁷ But "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups" was one of *Brnovich*'s factors, just not the *only* one.¹⁹⁸ A disparate impact element doesn't transmute into a racial classification simply because it's unaccompanied by other factors that also have to be analyzed. The Supreme Court recently confirmed, too, that there's nothing constitutionally objectionable about voting rights laws that target racially discriminatory effects. In *Milligan*, the Court "foreclose[d] any argument that Congress may not . . . outlaw voting practices that are discriminatory in effect."¹⁹⁹ According to the Court, such disparate impact provisions are "an appropriate method of promoting the purposes of the Fifteenth Amendment."²⁰⁰

Next, the CTVRA's preclearance regime closely resembles the one that used to operate under Section 5 of the FVRA. The main difference of note is that the CTVRA's coverage formula uses rolling and recent—not static and old—data.²⁰¹ By now, the reasons why this statutory approach doesn't constitute a racial classification should be familiar. First, no court ever intimated that Section 5's preclearance regime classified by race. If Section 5 didn't do so, then neither does the analogous provision of the CTVRA. Second, this part of the CTVRA

¹⁹⁶ See CTVRA § 411(c)(1).

¹⁹⁷ See *id.* § 411(a)(2)(A).

¹⁹⁸ *Brnovich*, 141 S. Ct. at 2339.

¹⁹⁹ *Allen v. Milligan*, 143 S. Ct. 1487, 1516 (2023) (internal quotation marks omitted).

²⁰⁰ *Id.* (internal quotation marks omitted).

²⁰¹ See CTVRA § 414(c)(1); see also *supra* note 130 and accompanying text. The other material difference is that the CTVRA allows preclearance to be denied not just for retrogression but also for other kinds of racial discrimination in voting. See CTVRA § 414(e)(2)(F)(i), 414(f)(3)(B). As the rest of this section discusses, prohibitions of those other kinds of racial discrimination in voting—racial vote denial and racial vote dilution—aren't racial classifications either.

applies only to jurisdictions. Jurisdictions are covered if they have committed civil rights violations, failed to comply with their data disclosure obligations, or exhibited large racial differences in arrest or voter turnout rates.²⁰² Covered jurisdictions are barred from changing their election laws if the shifts will worsen the electoral position of a racial group or otherwise violate the statute.²⁰³ As a result, this part of the CTVRA *doesn't* apply to individuals. It doesn't distribute any burdens or benefits to particular people. And third, the race-related aspects of the CTVRA's preclearance regime—its coverage formula and preclearance standard—don't hinge on anyone's racial affiliation. Coverage isn't extended, nor is preclearance denied, because anyone affiliates with one race or another. These events occur, rather, because of empirical realities. A jurisdiction has a poor civil rights record, a jurisdiction has a stark racial gap in voter turnout, a jurisdiction's proposed electoral policy would reduce a racial group's electoral influence, and so on. These facts about the world do pertain to race, but they don't collapse into a criterion of racial affiliation.

What about *Shelby County*? How can the CTVRA's preclearance regime be valid after that decision struck down the FVRA's coverage formula? The answer is that *Shelby County* dealt only with Congress's authority to enact legislation to enforce the Fifteenth Amendment. To do so constitutionally, the Court held, Congress must at least act rationally.²⁰⁴ In the Court's view, however, it was "irrational for Congress to distinguish between States . . . based on 40-year-old data, when today's statistics tell an entirely different story."²⁰⁵ This ruling plainly has no bearing on the lawfulness of the CTVRA. Unlike the FVRA, the CTVRA isn't congressional legislation. It's a *state* statute, to which the doctrine about Congress's power to enforce the Fifteenth Amendment is wholly inapplicable.²⁰⁶ Moreover, even if *Shelby County*'s rule that "a coverage formula [must be] grounded in current conditions"²⁰⁷ somehow extended to a state statute, the CTVRA would pass with flying colors. Again, the key way in which the CTVRA's preclearance regime differs from the FVRA's is its use of a coverage formula that incorporates rolling, recent data.²⁰⁸

²⁰² See CTVRA § 414(c)(1).

²⁰³ See *id.* § 414(e)(2)(F), 414(f)(3).

²⁰⁴ See *Shelby Cnty. v. Holder*, 570 U.S. 529, 531, 546, 550–51, 554, 556 (2013).

²⁰⁵ *Id.* at 556.

²⁰⁶ See, e.g., *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 838–39 (Cal. Ct. App. 2006) (observing that doctrine about congressional authority to enforce the Reconstruction Amendments "has nothing to do with strict scrutiny" because "[i]t is about the source of constitutional power for Congress' enactment of certain types of statutes, not the constitutional right of individuals to be free from discrimination").

²⁰⁷ *Shelby Cnty.*, 570 U.S. at 554.

²⁰⁸ See CTVRA § 414(c)(1).

This leaves only the unfocused allegation that SVRAs in their entirety are racial classifications because they base eligibility to bring suit on membership in a racial group. To begin with, this claim is factually incorrect with respect to the CTVRA. Under the statute, “[a]ny individual aggrieved by a violation of this section . . . may file an action” asserting racial vote denial or racial vote dilution—not just a person with a particular racial affiliation.²⁰⁹ And *no* person may launch litigation on account of retrogression since the CTVRA’s preclearance regime doesn’t authorize private enforcement.²¹⁰ In addition, eligibility to bring suit is an odd, even ethereal, individual benefit in this context. That’s because of what follows if a SVRA action succeeds. The plaintiff doesn’t receive a concrete asset like employment, housing, or admission to an educational institution. Instead, the jurisdiction has to change its challenged electoral policy to one that no longer denies or dilutes the vote on racial grounds. With respect to this jurisdiction-wide remedy, the plaintiff is in the same position as any other voter, or at least any other voter with the same racial affiliation. The remedy is in no way limited to the plaintiff or tailored to the plaintiff’s individual circumstances.²¹¹

Lastly, this argument about race-based eligibility to bring suit, too, falls victim to the analogy to the FVRA. Under Section 2, only members of a particular racial group—the group alleged to suffer racial vote denial or racial vote dilution—have standing to sue. As Heather Gerken writes in a seminal article on Section 2, “[c]ourts . . . grant[] standing to . . . *members of the minority group* who reside . . . within the state or locality.”²¹² This feature of Section 2 doctrine has never been thought to transform the provision into a racial classification. By the same token, it shouldn’t have that effect on SVRAs that racially restrict who may serve as a plaintiff. And this point can be generalized beyond Section 2 to all disparate impact, even all antidiscrimination, laws. Who’s injured by, and so has standing to dispute, a practice that causes a racial disparity? A person who affiliates with the racial group that’s disadvantaged by that disparity. Likewise, who’s harmed by, and can go to court over, intentional racial discrimination? Again, a member of the racial group targeted by the

²⁰⁹ *Id.* § 411(d) (emphasis added).

²¹⁰ *See id.* § 414. *But see, e.g.*, CAL. ELEC. CODE § 14032 (West 2002) (stating that, under the CAVRA, “[a]ny voter *who is a member of a protected class* . . . may file an action” (emphasis added)).

²¹¹ *Cf., e.g.*, League of United Latin Am. Citizens v. Abbott, 604 F. Supp. 3d 463, 485–86 (W.D. Tex. 2022) (“A person has standing to bring racial-discrimination, racial-gerrymandering, malapportionment, or Section 2 vote-dilution claims only where she resides, votes, and personally suffers such injuries.”).

²¹² Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1690 (2001) (emphasis added).

deliberate discriminatory action.²¹³ If these commonsense rules amounted to racial classifications, then strict scrutiny would apply to—and mark the effective end of—the entire antidiscrimination project.²¹⁴

C. Racially Discriminatory Intent

Under current equal protection law, there's one final route through which SVRAs could be subject to strict scrutiny. Even if these policies are neither racial gerrymanders nor racial classifications, they would still be presumptively invalid if their underlying objectives were racially discriminatory. Modesto made exactly this accusation in its attack on the CAVRA. “[E]ven if the [CAVRA] is facially neutral,” the city maintained, “it is subject to strict scrutiny because it was enacted *solely* for racial purposes, i.e., to remedy racial bloc voting in at-large voting systems.”²¹⁵ The plaintiff in the Poway case leveled the same charge against the CAVRA. Supposedly, “there [was] direct evidence of legislative purpose and intent that confirms” the CAVRA’s racially discriminatory aims.²¹⁶ “The legislature . . . wanted the [CAVRA] to make race a *more* prominent factor than does the federal Voting Rights Act”²¹⁷

Crucially, current doctrine distinguishes between *invidious* racial purposes, which subject facially neutral laws to strict scrutiny, and other race-conscious purposes, which don't. In the 1976 case that first established this doctrine, the Supreme Court announced “the basic equal protection principle” that “an *invidious* discriminatory purpose” is “forbidden by the Constitution.”²¹⁸ In the 1977 sequel that identified types of evidence probative of racially discriminatory intent, the Court reiterated the constitutional issue: “whether *invidious* discriminatory purpose was a motivating factor” for the challenged governmental action.²¹⁹ More recently, the Court has confirmed the continuing

²¹³ See, e.g., Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1422–23 (1995) (observing that white plaintiffs typically have standing to challenge affirmative action programs).

²¹⁴ See, e.g., *Portugal v. Franklin Cnty.*, 530 P.3d 994, 1006 (Wash. 2023) (commenting that if “the [WAVRA] makes ‘racial classifications’ by recognizing the existence of race, color, and language minority groups[,] . . . then every statute prohibiting racial discrimination or mandating equal voting rights would be subject to facial equal protection challenges triggering strict scrutiny”).

²¹⁵ *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 843 (Cal. Ct. App. 2006) (internal quotation marks omitted).

²¹⁶ Petition for Writ of Certiorari, *supra* note 143, at 28 (internal quotation marks omitted).

²¹⁷ *Id.*

²¹⁸ *Washington v. Davis*, 426 U.S. 229, 240, 242 (1976) (emphasis added).

²¹⁹ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (emphasis added); see also, e.g., *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (“‘Discriminatory purpose’ . . . implies that the decisionmaker [took] a particular course of action at least in part ‘because of,’ not merely ‘in

force of this distinction by holding that facially neutral measures with benign race-conscious purposes don't trigger strict scrutiny. As we pointed out above, the "mere awareness of race" of the Fair Housing Act "does not doom that [statute]" by resulting in the application of strict scrutiny.²²⁰ Similarly, facially neutral but "race conscious" school district policies that "pursue the goal of bringing together students of diverse backgrounds and races" don't "demand strict scrutiny to be found permissible."²²¹

Under this framework, SVRAs don't warrant strict scrutiny because their objectives are race-conscious but not invidious. Certain SVRAs helpfully articulate their "[l]egislative purpose[s]," which include defending "against the denial or abridgement of the voting rights of members of a race, color, or language-minority group" and "[e]nsuring that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state . . . and especially to exercise the elective franchise."²²² These goals refer to race but can't be characterized as malicious or malignant. They don't aspire to deny anyone the right to vote on a racial basis. Nor do they seek the dilution or retrogression of any racial group's electoral influence. To the contrary, SVRAs' aims are to *prevent* and *remedy* racial discrimination in voting—to *cure* and *avoid* racial vote denial, racial vote dilution, and retrogression. These are quintessentially benign purposes, representing attempts to heal rather than to inflict race-related injuries in the electoral arena. As a California court reasoned in the Modesto case, "[a] legislature's intent to remedy a race-related harm" simply doesn't "constitute[] a racially discriminatory purpose."²²³

spite of,' its adverse effects upon an identifiable group." (quoting *United Jewish Org. v. Carey*, 430 U.S. 144, 179 (1977) (plurality opinion)).

²²⁰ *Tex. Dep't of Hous. & Cmty. Aff. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 545 (2015).

²²¹ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *see also, e.g., Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 385–86 (2016) (assuming the validity of Texas's Top Ten Percent Plan, which, "though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment"). Racial gerrymandering is an arguable exception to this doctrine in that a *predominant* (not *any*) racial purpose must be proven and this racial purpose need not be invidious to trigger strict scrutiny. *See supra* Part II.A. If this approach became generally applicable, potential strategies for future SVRAs could include (1) enabling members of all kinds of communities, not just racial groups, to bring claims; (2) requiring plaintiffs advancing claims as members of racial groups to show that these groups also have salient nonracial dimensions; and (3) simply mandating proportional representation, under which proportionality ensues with respect to whichever cleavages, racial or nonracial, are most politically significant.

²²² *E.g., N.Y. ELEC. LAW § 17-200* (McKinney 2023). The CTVRA doesn't specify its legislative purposes.

²²³ *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 843 (Cal. Ct. App. 2006).

Bolstering this conclusion is the fact that the CTVRA doesn't try to limit its safeguards to members of any particular minority group—or even to minority as opposed to nonminority members. *Any* “protected class member” may bring claims of racial vote denial or racial vote dilution.²²⁴ By the same token, retrogression of the electoral position of *any* “protected class members” is prohibited.²²⁵ In turn, “[p]rotected class” is defined as *any* “class of citizens who are members of a race, color, or language minority group.”²²⁶ Accordingly, Black, Latino, Asian, and white citizens alike are equally protected by the CTVRA. And so, even if the shielding of minority citizens alone could somehow be seen as invidious—not a proper recognition that these individuals have borne the brunt of racial discrimination in voting historically—that's not what the CTVRA does. Instead, it enables members of all racial groups to win relief, and to get preclearance denied to covered jurisdictions, if the statute's criteria are satisfied. This evenhandedness only reinforces how implausible a finding of intentional malice would be in this context.²²⁷

Such a finding would be implausible for one last reason: It would be impossible to limit to the CTVRA. Remember that the argument that the CTVRA has an invidious racial purpose is that it strives to end racial discrimination in voting.²²⁸ This logic applies equally to the FVRA, which has the same hope (just pursued through less potent means) of elections untainted by racial vote denial, racial vote dilution, and retrogression.²²⁹ But why stop with the FVRA? Myriad disparate treatment and disparate impact statutes, federal and state, target some kind of racial discrimination. Justice Scalia once alluded to “the evil day” when the Court would “have to confront the question” of whether antidiscrimination laws are “consistent with the Constitution's guarantee of equal protection.”²³⁰ Subjecting the CTVRA to strict scrutiny because of its allegedly intentional malice would sharply and unnecessarily hasten the arrival of that evil day. And speaking of the Constitution's equal protection guarantee, what it promises, above all, is that the government won't discriminate on the basis of race. In other words, the Constitution's equal protection guarantee is

²²⁴ CTVRA, Pub. Act No. 23-204, § 411(a)–(b), 2023 Conn. Acts at 820–23 (Reg. Sess.).

²²⁵ *Id.* § 414(e)(2)(F)(i)(I), 414(f)(3)(A).

²²⁶ *Id.* § 410(a)(9).

²²⁷ *See, e.g.,* Portugal v. Franklin Cnty., 530 P.3d 994, 999 (Wash. 2023) (reasoning that because “[t]he [WAVRA] protects all Washington voters from discrimination on the basis of race, color, and language minority group, . . . the [WAVRA] does not require race-based favoritism in local electoral systems”).

²²⁸ *See supra* notes 215–17 and accompanying text.

²²⁹ *See, e.g.,* South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966) (“The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting.”).

²³⁰ Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

itself an antidiscrimination provision, of the sort that would be suspect if this argument against the CTVRA were to succeed. This argument must therefore fail since no claim *based* on the Equal Protection Clause can imply the Clause's *own* invalidity.

III. EXTENDING SVRAS

So far we've explained how state voting rights acts diverge from the federal Voting Rights Act and why SVRAS are constitutional despite these departures. Our one remaining goal in this Article is to explore how SVRAS could be made (even) more practically effective and less legally vulnerable. The backdrop for this discussion is that SVRAS are still quite novel. Almost all SVRA litigation to date has occurred in just one state: California. All this CAVRA litigation has involved at-large elections because the CAVRA doesn't apply to single-member districts. Outside California, there have been only a handful of racial vote dilution challenges under SVRAS. As far as we're aware, there have been no racial vote denial challenges yet under SVRAS. Nor have any covered jurisdictions' proposed electoral changes yet been denied preclearance.

In light of the paucity and recency of this activity, there's no reason to treat existing SVRAS as sacred cows—fixed policies whose parameters must all be faithfully preserved. The better attitude, we think, is to approach SVRAS flexibly, experimentally, with the aim of improving these measures through iterative trial and error. It's in this spirit that Maryland, Michigan, and New Jersey are currently drafting SVRAS. These states aren't slavishly copying any given statute; instead, they're picking and choosing among existing SVRAS' provisions while devising new elements of their own. It's also in this spirit that states that have already enacted SVRAS are contemplating reforms to their policies. California considered extending the CAVRA to single-member districts in 2014.²³¹ Washington recently updated its SVRA, among other things, to clarify the analysis of racially polarized voting and to expand organizational standing.²³² New York may soon add to its SVRA a requirement that a statewide electoral database be created.²³³

It's in this spirit, too, that we offer a menu of potential changes to SVRAS in this Part. All our proposals share the fundamental objective of fighting racial

²³¹ See, e.g., ASSEMB. COMM. ON JUDICIARY 2013–2014 REG. SESS., BILL ANALYSIS OF S.B. 1365, at 3 (as amended Aug. 7, 2014).

²³² See 2023 Wash. Legis. Serv. 3–5 (West).

²³³ See S. 657, 205th Leg. (N.Y. 2023).

discrimination in voting even more vigorously than do existing SVRAs (let alone the FVRA). All our proposals thus diverge even further from the federal voting rights floor than do the SVRAs now in operation. In addition, our proposals span the three kinds of racial discrimination in voting: racial vote denial, racial vote dilution, and retrogression. Racial vote dilution is our focus, though, reflecting the prioritization of most SVRAs. Furthermore, some of our proposals not only sharpen SVRAs' swords but also strengthen their shields against legal attacks. As we elaborated in the previous Part, these attacks seem fairly feeble to us. But it's still prudent to minimize SVRAs' legal exposure. Lastly, a few of our proposals aren't entirely novel in that they're adopted to some degree by the CTVRA. We still expound on these proposals both because the ink on the CTVRA is barely dry and because the statute includes these measures partly on account of consultations with us.

A. *Mandates for Localities*

Our first idea is for SVRAs simply to *direct* substate jurisdictions to adopt particular electoral practices. Like Section 2 of the FVRA, all SVRAs currently rely on conventional litigation to achieve their ends.²³⁴ Like Section 5 of the FVRA, Connecticut's, New York's, and Virginia's SVRAs also require preclearance for certain policies and localities.²³⁵ Litigation and preclearance are hardly toothless—but they do tend to result in gradual and piecemeal progress. Even successful litigation takes time to unfold. Litigation proceeds jurisdiction by jurisdiction, too, targeting each defendant individually. And when preclearance is paired with a non-retrogression rule, it doesn't necessarily yield *any* progress. Rather, it merely guards against the deterioration of the status quo ante.

In contrast, mandates for substate localities produce essentially immediate and universal change. Being non-sovereign instrumentalities of the state, localities have no choice but to comply when ordered by the state to take some action. For an illustration, think of at-large elections in California. The CAVRA makes it quite easy for plaintiffs to win suits alleging that at-large elections are racially dilutive.²³⁶ Nevertheless, more than twenty years after the passage of the CAVRA, the vast majority of California cities and school districts continue to use at-large elections. We noted earlier that almost 100 cities and almost 150

²³⁴ See *supra* Parts I.A–B.

²³⁵ See *supra* Part I.C.

²³⁶ Indeed, as we previously observed, “[n]o defendant has ever prevailed in a [CAVRA] case.” Powell, *supra* note 12, at 2.

school districts have been compelled to switch electoral systems by the CAVRA.²³⁷ These figures sound impressive until you realize how many more localities *haven't* switched electoral systems. Approximately 400 cities and 800 school districts in California still rely on at-large elections, despite decades of CAVRA enforcement under a pro-plaintiff standard.²³⁸ By comparison, suppose the CAVRA had simply required all jurisdictions to abandon at-large elections and to elect representatives using single-member districts. Then more than twenty years of costly litigation would have been avoided, and at-large elections would be a distant memory—not a mainstay of the municipal landscape—in California.

For another example, consider systems of proportional representation. Recall that several SVRAs suggest that proportional representation can be an appropriate remedy after liability for racial vote dilution is established.²³⁹ Exactly two localities, Albany and Palm Desert, have actually implemented forms of proportional representation in response to CAVRA actions.²⁴⁰ Imagine, however, that a SVRA had directly instructed jurisdictions to switch to proportional representation, not indirectly authorized proportional representation as available relief in the wake of victorious litigation. Then in one fell swoop, that SVRA would have brought proportional representation to more localities than all the efforts of all municipal reformers over all of American history.²⁴¹ Proponents of proportional representation would no longer have to be content with the crumbs of the Albany and Palm Desert wins (which were consensual settlements, not court-imposed remedies). Instead, these activists could celebrate an entire state breaking with American tradition and spreading proportional representation to every municipal nook and cranny.²⁴²

At-large elections are a cause of, and systems of proportional representation are a cure for, racial vote dilution. In the racial vote denial context, Connecticut's and New York's SVRAs further illustrate how much more potent mandates can

²³⁷ See *supra* notes 13–14 and accompanying text.

²³⁸ See Abott & Magazinnik, *supra* note 13, at 721 (noting that 138 of 978 California school districts have switched electoral systems); Hertz, *supra* note 14, at 214 (noting that more than 80 California cities have switched electoral systems); *Cities in California*, BALLOTPEDIA, https://ballotpedia.org/Cities_in_California (last visited Aug. 15, 2023) (noting that California has 482 cities).

²³⁹ See *supra* notes 89–94 and accompanying text.

²⁴⁰ See *supra* notes 95–96 and accompanying text.

²⁴¹ Cf. JACK SANTUCCI, MORE PARTIES OR NO PARTIES: THE POLITICS OF ELECTORAL REFORM IN AMERICA (2022) (discussing the history of municipal proportional representation in the United States).

²⁴² Less potent than a mandate that jurisdictions switch to proportional representation, but still more effective than the status quo, would be a presumption that proportional representation is the appropriate remedy in any successful racial vote dilution suit under a SVRA.

be than lawsuits. Remember that the CTVRA and the NYVRA identify several remedies that courts *can* grant after finding unlawful racial vote denial: more time to vote, more polling locations, additional means of voting, additional opportunities to register to vote, and so on.²⁴³ To date, courts *haven't* actually granted any of these remedies, because no racial vote denial claim under the CTVRA or the NYVRA has yet succeeded. But say these statutes had decreed that jurisdictions must facilitate voting in these ways, not merely recognized such facilitation as permissible relief after a determination of liability. Then casting ballots would already be substantially easier throughout Connecticut and New York. All the desired improvement in registering to vote and voting would be a fact of the past, not a hope for the future.

The promise of immediate and universal progress, then, is the primary advantage of mandates over existing SVRAs' procedures. A secondary benefit is that mandates are facially race-neutral. They don't refer to race in any way. They simply order localities to adopt certain electoral practices, like single-member districts, forms of proportional representation, or voting expansions. As a result, mandates can't possibly be accused of *classifying* by race since they don't even *mention* race. They're completely immune from the charge that they're racial classifications subject for that reason to strict scrutiny. Now, we argued at length in the previous Part that existing SVRAs don't classify by race either because they don't distribute burdens or benefits to individuals on the basis of their race.²⁴⁴ We stand by that argument, but we acknowledge that it hinges on the distinction between classifying by, and referring to, race. In contrast, the claim that mandates aren't racial classifications doesn't depend on that distinction. Rather, it follows from the even more incontrovertible point that mandates are entirely mute about race.²⁴⁵

A potential concern about mandates is that they're so procedurally different from litigation and preclearance that they don't belong in SVRAs. It's true that mandates aren't a tactic used by existing SVRAs or by the provisions of the FVRA—Section 2 and Section 5—on which existing SVRAs are modeled.²⁴⁶

²⁴³ See *supra* notes 48–54 and accompanying text.

²⁴⁴ See *supra* Part II.B.

²⁴⁵ Mandates that jurisdictions switch to proportional representation are also essentially immune from the charge that they lead to unlawful racial gerrymandering. As we discussed above, a system of proportional representation isn't a single-member district and doesn't typically rely on any race-based boundaries. See *supra* notes 165–66 and accompanying text.

²⁴⁶ Though note that, in the same session in which the VAVRA was enacted, the use of at-large elections with residency districts was entirely banned by the legislature through a separate law. See VA. CODE ANN. § 24.2-222 (2021).

But *other* parts of both the original FVRA and its subsequent amendments *do* rely on mandates. For instance, Section 4 of the original FVRA prohibits covered jurisdictions from enforcing literacy, educational achievement, and good moral character tests for voting.²⁴⁷ Likewise, the 1970 amendments to the FVRA require states to enfranchise citizens over the age of eighteen,²⁴⁸ to eliminate early registration deadlines for presidential elections, and to allow voters to vote absentee in presidential elections.²⁴⁹ Consequently, there's ample precedent for including mandates in voting rights laws and no basis for thinking that mandates are inappropriate in this context. The FVRA's most famous provisions may not be mandates but several of the statute's other key elements are indeed commands that certain electoral practices be embraced or eschewed.

Of course, such commands aren't advisable in all circumstances. A state may not wish to forbid a policy across the board because the state doesn't believe the policy constitutes racial vote denial or racial vote dilution in all cases. In this scenario, the state is better off deferring the issue of the policy's validity to future judicial or administrative decisionmakers through the vehicles of litigation or preclearance. Or a state may have a normative or even a constitutional commitment to local autonomy over some aspects of elections. If so, mandates are more intrusive and less respectful of local control than are remedies imposed only after successful litigation or denials of preclearance issued only in the event of retrogression. Our argument here, then, isn't that mandates are always preferable to more complex procedures like litigation and preclearance. Our more modest point, instead, is just that mandates belong on the menu of options for drafters of SVRAs.

B. Specifications of Benchmarks

Our next suggestion relates only to racial vote dilution actions. It's that plaintiffs in these suits be required (1) to prove racially polarized voting; *and* (2) *to identify a benchmark relative to which the dilution of the challenged practice can be determined*. To reiterate, most SVRAs already insist on a showing of racially polarized voting.²⁵⁰ But these laws then splinter as to what else (if

²⁴⁷ See Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), (c), 79 Stat. 437, 438-39 (1965).

²⁴⁸ See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 301-05, 84 Stat. 314, 318-19 (1970); see also *Oregon v. Mitchell*, 400 U.S. 112, 117-18 (1970) (opinion of Black, J.) (upholding this provision with respect to federal elections).

²⁴⁹ See Voting Rights Act Amendments of 1970, §§ 201-05, 84 Stat. at 315-18.

²⁵⁰ See *supra* note 70 and accompanying text. *But see supra* note 69 (observing that the CTVRA and the NYVRA also allow liability to be found under the totality of circumstances, even if racial polarization in voting isn't proven).

anything) plaintiffs have to establish. The NYVRA has no other element if an at-large electoral system is targeted.²⁵¹ The CAVRA seems to have no other element,²⁵² though the California Supreme Court recently held that “dilution is a separate element under the [CAVRA].”²⁵³ The CTVRA and the VAVRA respectively demand proof that the disputed practice “results in a dilutive effect on the vote of protected class members”²⁵⁴ or “dilutes the voting strength of members of a protected class.”²⁵⁵ And the ORVRA and the WAVRA state that “[m]embers of a protected class” must “not have an equal opportunity to elect candidates of their choice” because of “the dilution or abridgement of the rights” of these individuals.²⁵⁶

The formulations of Connecticut’s, Oregon’s, Virginia’s, and Washington’s SVRAs are all getting at the same idea. To prevail in a claim of racial vote dilution, plaintiffs must show that they’re *underrepresented* under the policy they’re attacking. That’s what it means for plaintiffs’ “vote” or “voting strength” to be “dilut[ed],”²⁵⁷ for them “not [to] have an equal opportunity to elect candidates of their choice,”²⁵⁸ and for their “rights” to suffer “dilution or abridgement.”²⁵⁹ Critically, however, none of these statutes specifies *relative to what benchmark* plaintiffs must show that they’re underrepresented. In each case, there’s a void where, more helpfully, there would be a clearly labeled baseline. Without a baseline, it’s anyone’s guess what amounts to underrepresentation. Underrepresentation compared to some previously enacted policy? Underrepresentation compared to any configuration of single-member districts? Underrepresentation compared to single-member districts satisfying certain criteria? Underrepresentation compared to proportional representation? The possibilities go on and on.

Our proposal would resolve this ambiguity by simultaneously obligating and liberating racial vote dilution plaintiffs. They would be obligated by having to identify a benchmark relative to which their underrepresentation would be

²⁵¹ See N.Y. ELEC. LAW § 17-206(2)(b)(i) (McKinney 2023).

²⁵² See CAL. ELEC. CODE § 14028(a) (West 2002).

²⁵³ Pico Neighborhood Ass’n v. City of Santa Monica, No. S263972, 2023 WL 5440486, at *7 (Cal. Aug. 24, 2023).

²⁵⁴ CTVRA, Pub. Act. No. 23-204, § 411(b)(2)(A), 2023 Conn. Acts at 821 (Reg. Sess.).

²⁵⁵ VA. CODE ANN. § 24.2-130(B) (2021).

²⁵⁶ OR. REV. STAT. § 255.411(1)(b) (2021); WASH. REV. CODE § 29A.92.030(1)(b) (2023).

²⁵⁷ CTVRA § 411(b)(2)(A); VA. CODE ANN. § 24.2-130(B).

²⁵⁸ OR. REV. STAT. § 255.411(1)(b); WASH. REV. CODE § 29A.92.030(1)(b).

²⁵⁹ OR. REV. STAT. § 255.411(1)(b); WASH. REV. CODE § 29A.92.030(1)(b).

evaluated. This is an element that's absent from every existing SVRA.²⁶⁰ On the other hand, plaintiffs would be liberated by being able to offer (almost²⁶¹) any benchmark for assessing their underrepresentation. They could put forward one of the policies noted in the paragraph above. Or they could name a governmental entity with more members, an entity with elections held at a different time, an entity elected under a different system, or any other policy as their preferred baseline. It would be plaintiffs' responsibility, but also their prerogative, to explain relative to what alternative approach they're currently underrepresented.²⁶²

Compared to our proposal, Section 2 of the FVRA is much less flexible with respect to benchmarks. In a 1994 case, a plurality of the Supreme Court held that plaintiffs can never allege that the size of a governmental body is racially dilutive because "there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate" this factor.²⁶³ In its many cases refining the *Gingles* framework, the Court has also rejected both proportional representation and any possible set of single-member districts as appropriate baselines. The only benchmark the Court now recognizes is a set of single-member districts that represent minority voters through reasonably compact,

²⁶⁰ However, the California Supreme Court recently endorsed this element as a matter of statutory interpretation, holding that "a plaintiff in a [CAVRA] action must identify a reasonable alternative voting practice to the existing at-large electoral system that will serve as the benchmark undiluted voting practice." *Pico Neighborhood Ass'n v. City of Santa Monica*, No. S263972, 2023 WL 5440486, at *7 (Cal. Aug. 24, 2023) (internal quotation marks omitted).

²⁶¹ The one restriction we recommend is that plaintiffs not be permitted to offer a benchmark that would increase the disproportionality of their group's representation. For example, suppose that, under the status quo, a minority group makes up twenty percent of the eligible voter population and controls twenty percent of the seats in the legislature. This group shouldn't be able to satisfy this element by identifying an alternative policy under which the group would control thirty percent of the legislative seats. Under that alternative policy, the disproportionality of the group's representation would increase from zero percent to ten percent. We think this restriction is warranted for two reasons. First, proportional representation has at least some normative appeal as a baseline for measuring racial vote dilution. Few observers would say a minority group's electoral influence is diluted if the group enjoys proportional, let alone super-proportional, representation. *See, e.g., Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994) ("One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast."). Second, this restriction is the most intuitive way to prevent victory for one group from diluting the electoral influence of one or more other groups. Without this restriction, one group could win super-proportional representation, which could entail sub-proportional representation for another group, which in turn could sue for super-proportional representation, and so on in a cycle without end. *See, e.g., id.* at 1004 (observing that a rule along these lines avoids scenarios where "remedies for [multiple minority groups are] mutually exclusive").

²⁶² An alternative to our proposal is for SVRAs simply to specify all valid benchmarks for determining racial vote dilution. But this is difficult to do *ex ante* given the many ways (some surely not yet known) in which racial vote dilution can be effectuated.

²⁶³ *Holder v. Hall*, 512 U.S. 874, 881 (1994) (plurality opinion).

majority-minority districts.²⁶⁴ Moreover, reasonable compactness encompasses not just district shape but also other criteria like respect for political subdivisions, respect for communities of interest, and the homogeneity of the minority population.²⁶⁵

It's clear that most SVRAs reject the Court's crabbed view of valid benchmarks for racial vote dilution claims. That's why these statutes state that there can be liability even if minority voters aren't "geographically compact or concentrated."²⁶⁶ That's also why these statutes authorize suits even where minority voters are only numerous enough to form new crossover or influence—not majority-minority—districts.²⁶⁷ And that's why the CTVRA and the NYVRA, in particular, specify a range of permissible remedies other than single-member districts: "an alternative method of election" like a form of proportional representation, "reasonably increasing the size of the governing body," "moving the dates of . . . elections," and so on.²⁶⁸ These remedies make sense only if liability is first determined using baselines completely different from the Court's unitary reference point.

But while most SVRAs reject the Court's conception of benchmarks, these statutes then fail to finish this thought. They say what baseline they're *against*, but next they don't say what baselines they're *for*. Our proposal supplies this missing conclusion, and it does so in a manner that's consistent with both the concept of racial vote dilution and the intent that animates SVRAs. The concept of racial vote dilution requires a benchmark relative to which dilution can be assessed. So our proposal demands that plaintiffs always identify a benchmark. And the intent that animates SVRAs is a desire to escape the Court's unitary reference point, to acknowledge the many ways in which minority electoral influence can be diluted. So our proposal doesn't substitute one baseline for another but rather empowers plaintiffs to tell their own story of how and why they're underrepresented.

C. Calculations of Racial Polarization

We have one more suggestion regarding racial vote dilution claims, pertaining to SVRAs' common element that plaintiffs prove racial polarization

²⁶⁴ See *Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) (plurality opinion).

²⁶⁵ See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 432–35 (2006).

²⁶⁶ E.g., CAL. ELEC. CODE § 14028(c) (West 2002).

²⁶⁷ See, e.g., 10 ILL. COMP. STAT. 120/5-5(a) to -5(b) (2011).

²⁶⁸ E.g., N.Y. ELEC. LAW § 17-206(5)(a) (McKinney 2023); see also CTVRA, Pub. Act. No. 23-204, § 411(e)(1), 2023 Conn. Acts at 824–26 (Reg. Sess.).

in voting. Mirroring Section 2 of the FVRA, SVRAs assume that racially polarized voting will be analyzed using a combination of demographic data and past election results. We recommend that this conventional kind of calculation be complemented or even (in appropriate cases) replaced by *surveys* of voters. Surveys can produce accurate information about voters' (and racial groups') preferences among candidates. Surveys can also go beyond candidate preferences and reveal voters' (and racial groups') policy views.²⁶⁹

To be fair, some SVRAs already diverge from—and address recurring issues with—the analysis of racial polarization in voting under Section 2 of the FVRA. For instance, racial patterns of voting behavior sometimes change after racial vote dilution litigation has commenced. So Connecticut's, New York's, Oregon's, and Washington's SVRAs all state that “[e]lections conducted prior to the filing of an action . . . are more probative to establishing the existence of polarized voting.”²⁷⁰ Likewise, defendants sometimes assert that racial polarization in voting should be discounted because it stems from partisan, not racial, factors. In response, Connecticut's, New York's, and Washington's SVRAs provide that “[t]he court is not required to consider explanations, including partisanship, for why polarized voting . . . exists”²⁷¹ And the calculation of racial polarization in voting can sometimes be complicated by heterogeneity in voting behavior among members of a given racial group. The NYVRA avoids this difficulty by stipulating that “evidence that sub-groups within a protected class have different voting patterns shall not be considered.”²⁷²

These departures from federal voting rights law are fine as far as they go, but they don't go far enough. The localities to which most SVRAs apply often have only a few voting precincts. In these places, the empirical methods that are used to estimate racially polarized voting become unreliable.²⁷³ The localities subject to most SVRAs are also increasingly racially integrated. This is good news overall, but it again worsens the performance of the tools for evaluating racial

²⁶⁹ See generally D. James Greiner & Kevin M. Quinn, *Exit Polling and Racial Bloc Voting: Combining Individual-Level and R x C Ecological Data*, 4 ANNALS APP. STAT. 1774 (2010) (urging the use of surveys to analyze racial polarization in voting).

²⁷⁰ OR. REV. STAT. § 255.411(5) (2021); see also CTVRA § 411(b)(2)(B)(i)(I); N.Y. ELEC. LAW § 17-206(2)(c)(i); WASH. REV. CODE § 29A.92.030(2) (2023).

²⁷¹ WASH. REV. CODE § 29A.92.030(2) (2023); see also CTVRA § 411(b)(2)(B)(ii); N.Y. ELEC. LAW § 17-206(2)(c)(vi).

²⁷² N.Y. ELEC. LAW § 17-206(2)(c)(vii).

²⁷³ See, e.g., Christopher S. Elmendorf et al., *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 682–89 (2016) (making this point with a stylized three-precinct example).

polarization in voting.²⁷⁴ However, surveys of voters are unaffected by both small numbers of precincts and greater racial integration. No matter how few precincts there are, surveys can be conducted as long as representative samples of voters can be obtained. Because surveys ask *individuals* for their opinions, they're also insensitive to *group*-level developments like people of different races living closer to one another. In fact, only one condition has to be satisfied for a survey to be a sound technique for estimating racially polarized voting. It must be possible to identify one or more minority-preferred candidates who have recently, or will soon, run for office in a jurisdiction. These are the candidates as to whom the survey will ask voters for their opinions.²⁷⁵

What if a jurisdiction lacks even a single minority-preferred candidate? Then racial polarization *in voting* simply can't be assessed, neither with any conventional method nor with a survey.²⁷⁶ Even in this situation, though, a survey can shed light on the related issue of racial polarization *in policy views*. To do so, a survey merely has to ask voters for their opinions on various policy matters. Voters' answers can then be aggregated and compared by racial group. Where racial polarization in policy views exists, it has many of the same implications as racial polarization in voting. Racially polarized policy views mean that race is a powerful political cleavage in a jurisdiction. Racially polarized policy views also give candidates a strong incentive to cater to the distinct attitudes of one or another racial group, and if elected to enact policies that please one but upset another community. Our proposal takes advantage of these similarities between racial polarization in voting and racial polarization in policy views. It would allow plaintiffs to substitute evidence of the latter for evidence of the former where, because of the absence of minority-preferred candidates, racial polarization in voting can't be calculated.²⁷⁷

²⁷⁴ See, e.g., Stephanopoulos, *supra* note 92, at 1386–87.

²⁷⁵ See, e.g., Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2193 (2015) (“[E]ven the most cautious, incrementalist judges are likely to give progressively more weight to survey data because survey-based estimates do not suffer from the problems [with conventional methods of calculating racially polarized voting].”).

²⁷⁶ However, even in this situation, an *experiment* could be conducted, asking voters about their views of a *hypothetical* minority-preferred candidate. See, e.g., Marisa A. Abrajano et al., *Using Experiments to Estimate Racially Polarized Voting 2* (U.C. Davis Legal Rsch. Paper Series, 2015).

²⁷⁷ See, e.g., Elmendorf & Spencer, *supra* note 275, at 2210 fig.1 (calculating and displaying levels of racial polarization in policy views at the county level for the entire country). Note that another option, where it's difficult for practical reasons to estimate racial polarization in voting, is simply to drop this requirement in favor of analysis under the totality of the circumstances. See *supra* note 69.

D. Standards for Racial Vote Denial

Turning from racial vote dilution to racial vote denial, we suggest rewriting the standard for liability in the NYVRA, one of the two SVRAs (along with the CTVRA) that tries to stop this kind of racial discrimination in voting. To recap, the NYVRA's "[p]rohibition against voter suppression" almost perfectly copies Section 2 of the FVRA.²⁷⁸ Like Section 2, it forbids any electoral practice that "results in a denial or abridgement of the right of members of a protected class to vote."²⁷⁹ Also like Section 2, it states that a violation occurs if, "based on the totality of the circumstances, members of a protected class have less opportunity than the rest of the electorate to elect candidates of their choice or influence the outcome of elections."²⁸⁰ Only after replicating Section 2 in these ways does the NYVRA diverge from it by listing several novel factors probative of liability and favorable to plaintiffs. These factors emphasize racial disparities in the political process²⁸¹ and whether a jurisdiction has "a compelling policy justification" for its challenged practice "that is substantiated and supported by evidence."²⁸²

The primary problem with this part of the NYVRA is its mimicry of Section 2 of the FVRA. In *Brnovich*, the Supreme Court announced a series of probative factors for racial vote denial claims under Section 2 that are difficult for plaintiffs to demonstrate.²⁸³ The strong resemblance between this part of the NYVRA and Section 2 creates a risk that *Brnovich*'s pro-defendant factors will be extended to racial vote denial claims under the NYVRA. If this were to happen, the NYVRA's legislative purpose of "[e]ncourag[ing] participation in the elective franchise . . . to the maximum extent" would be undermined.²⁸⁴ Conflict would also ensue between *Brnovich*'s pro-defendant factors and the pro-plaintiff factors the NYVRA says are relevant to "determining whether . . . a violation . . . has occurred."²⁸⁵ Secondly, we think it's incongruous for a "[p]rohibition against voter suppression" to emphasize voters' opportunity "to

²⁷⁸ Compare N.Y. ELEC. LAW § 17-206(1) (McKinney 2023), with 52 U.S.C. § 10301(a) (2018).

²⁷⁹ Compare N.Y. ELEC. LAW § 17-206(1)(a), with 52 U.S.C. § 10301(a) (forbidding any electoral practice that "results in a denial or abridgement of the right . . . to vote on account of race or color").

²⁸⁰ Compare N.Y. ELEC. LAW § 17-206(1)(b), with 52 U.S.C. § 10301(b) (stating that a violation occurs if, "based on the totality of circumstances . . . [racial group] members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").

²⁸¹ See N.Y. ELEC. LAW § 17-206(3)(b), (d)–(f), (h)–(j).

²⁸² *Id.* § 17-206(3)(k).

²⁸³ See *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338–40 (2021).

²⁸⁴ N.Y. ELEC. LAW § 17-200(1).

²⁸⁵ *Id.* § 17-206(3).

elect candidates of their choice or influence the outcome of elections.”²⁸⁶ Less opportunity to elect preferred candidates or influence electoral outcomes is the hallmark of racial vote *dilution*. It’s different from less opportunity to *vote* or otherwise *participate* in the political process, which is the crux of racial vote *denial*.

Accordingly, we recommend scrapping the NYVRA’s current standard for racial vote denial liability. In its place, we advise something like the following language: No electoral practice shall be enacted or implemented in a manner that results in *a substantial and unjustified disparity in voting or otherwise participating in the political process between members of a protected class and the rest of the electorate*. The terms in italics are our contribution; the non-italicized words merely paraphrase the statute as it now stands. This approach would clearly distinguish this part of the NYVRA from Section 2 of the FVRA. The risk that *Brnovich*’s pro-defendant factors might be exported to racial vote denial claims under the NYVRA would therefore be eliminated. This approach would also drop the statute’s odd references to electing candidates of choice and influencing electoral outcomes. This part of the NYVRA would thus address only racial vote denial, not a confusing mix of racial vote denial and racial vote dilution.

What about the key adjectives in our proposed language—a *substantial* and *unjustified* racial disparity in voting or otherwise participating in the political process? The substantiality criterion is drawn straight from Justice Kagan’s memorable dissent in *Brnovich*. It ensures that liability arises when a racial disparity is statistically and practically significant but not when it’s “just too trivial for the legal system to care about.”²⁸⁷ And the justifiability criterion is an abbreviated version of the analogous factor that’s identified a couple subsections later by the NYVRA’s list of relevant circumstances. Again, that factor asks whether a jurisdiction has a compelling justification for its challenged practice that’s substantiated by evidence.²⁸⁸ The justifiability criterion foreshadows the subsequent factor, while also calling for an inquiry into whether a jurisdiction’s compelling interest could be achieved in some other way that results in a smaller racial disparity. If so, that’s another basis for concluding that the actual racial disparity caused by the challenged practice is unjustified.²⁸⁹

²⁸⁶ *Id.* § 17-206(1).

²⁸⁷ *Brnovich*, 141 S. Ct. at 2358 n.4 (Kagan, J., dissenting).

²⁸⁸ See N.Y. ELEC. LAW § 17-206(3)(k).

²⁸⁹ For a similar proposal for adjudicating racial vote denial claims, see generally Stephanopoulos, *supra* note 41 at 1570–71.

Recall that, in addition to the NYVRA, the CTVRA tackles racial vote denial too. We have fewer nits to pick with this portion of the CTVRA because, unlike the NYVRA, it doesn't slavishly follow the lead of Section 2 of the FVRA. Instead, the CTVRA omits the familiar phrase, "denial or abridgement of the right" to vote, and replaces it with the new term, "impairment of the right to vote."²⁹⁰ "Impairment" may not be dramatically different from "denial or abridgement," but it doesn't evoke Section 2 in the same way. Consequently, it reduces the likelihood that unfavorable Section 2 law will migrate into doctrine about the CTVRA. Even more importantly, the CTVRA allows liability for racial vote denial to be found not just based on the totality of the circumstances (like the NYVRA and Section 2) but also if an electoral practice results in a racial disparity in political participation.²⁹¹ This second option for establishing liability sharply distinguishes the CTVRA from Section 2, under which a disparate racial impact is merely one of *Brnovich*'s factors.²⁹²

However, the CTVRA isn't perfect either. Like the NYVRA, one of its liability prongs refers to voters' opportunity to "elect candidates of their choice or otherwise influence the outcome of elections."²⁹³ Again, this is the characteristic language of racial vote dilution, which is out of place in a provision dealing with racial vote denial. Additionally, we're uncomfortable with the lack of qualifiers for the critical statutory word, "disparity."²⁹⁴ Without any limits, this part of the CTVRA appears to be a pure disparate impact provision, imposing liability whenever an electoral policy produces any racial disparity—even a very small gap or one warranted by a compelling state interest. We therefore support inserting the same adjectives we noted above, "substantial" and "unjustified," into this liability prong. That way, the CTVRA would only prohibit electoral regulations that cause material racial disparities whose necessity can't be demonstrated. It wouldn't insist, unrealistically, that no electoral rule have any disparate impact at all.

E. Alternatives to Retrogression

The last kind of racial discrimination in voting is retrogression: the worsening of the electoral position of members of a given racial group. Three of the four SVRAs that prohibit retrogression—Connecticut's, New York's, and

²⁹⁰ Compare CTVRA, Pub. Act. No. 23-204, § 411(a)(1), 2023 Conn. Acts at 820–21 (Reg. Sess.), with 52 U.S.C. § 10302(a) (2018).

²⁹¹ CTVRA § 411(a)(2)(A).

²⁹² See *Brnovich*, 141 S. Ct. at 2339.

²⁹³ CTVRA, § 411(a)(2)(B).

²⁹⁴ *Id.* § 411(a)(2)(A).

Virginia's, but not Florida's—pair this prohibition with a preclearance process. Covered jurisdictions (in Connecticut and New York) or all jurisdictions that opt into the process with respect to covered practices (in Virginia) can implement new electoral measures only if an executive branch official (in all three states) or a court (in Connecticut and New York) first finds them non-retrogressive.²⁹⁵ Our suggestion here (recently heeded by Connecticut) is to break the linkage between preclearance and retrogression. Specifically, we think the non-retrogression requirement for preclearance under the NYVRA and the VAVRA should be supplemented or replaced by other, more stringent conditions.

The linkage between preclearance and retrogression in these SVRAs is another manifestation of the gravitational pull of the FVRA. Decades ago, in *Beer*, the Supreme Court held that preclearance should be denied under Section 5 only if new electoral measures are retrogressive.²⁹⁶ Ever since, the concepts of preclearance and retrogression have been associated with each other. This association, however, is neither inevitable nor desirable. It's not inevitable because Section 5's text makes no mention, explicit or implicit, of retrogression.²⁹⁷ Lacking any textual support, the *Beer* Court was forced to base the non-retrogression rule on nothing sturdier than a few snippets of legislative history.²⁹⁸ Three dissenters furiously objected on this very ground: that the non-retrogression rule unjustifiably deviates from the language of Section 5.²⁹⁹ The association between preclearance and retrogression isn't desirable, either, because retrogression is relatively weak tea. Banning it prevents covered jurisdictions from *backsliding* but doesn't compel them to make any *forward* progress. As Justice Marshall bemoaned in his *Beer* dissent, the non-retrogression rule “dilutes the meaning of [Section 5] to the point that the congressional purposes . . . are no longer served and the sacred guarantees of the Fourteenth and Fifteenth Amendments emerge badly battered.”³⁰⁰

If the bond between preclearance and retrogression isn't indissoluble (or even advisable), to what could preclearance be tied instead (or in addition)? Compliance with SVRAs' *other* provisions—their prohibitions of racial vote denial and/or racial vote dilution—is our first idea, and the one recently adopted by the CTVRA. Covered jurisdictions could be precleared to implement new electoral practices only if an appropriate decisionmaker first finds that these

²⁹⁵ See *supra* notes 115–31 and accompanying text.

²⁹⁶ *Beer v. United States*, 425 U.S. 130, 141 (1976).

²⁹⁷ See 52 U.S.C. § 10304 (2018).

²⁹⁸ See *Beer*, 425 U.S. at 140–41.

²⁹⁹ See *id.* at 143 (White, J., dissenting); *id.* at 149–56 (Marshall, J., dissenting).

³⁰⁰ *Id.* at 146 (Marshall, J., dissenting).

measures aren't unlawful under SVRAs' non-preclearance sections. This approach would heavily fortify the weak tea of retrogression. Unlike retrogression, the theories of racial vote denial and racial vote dilution don't valorize the status quo ante. Their baselines are aspirational, not retrospective, so they can obligate jurisdictions to improve, not just to maintain, their current electoral policies. This approach also wouldn't be redundant, as it might initially seem. Yes, if preclearance could be denied for racial vote denial and/or racial vote dilution, then the same standard would apply to both litigation and preclearance. But the same substantive standard would have different consequences in these different procedural contexts. In litigation, the onus would be on the plaintiff to prove a violation, and a new electoral practice would go into effect until and unless it was ruled illegal. In a preclearance proceeding, in contrast, there would be no plaintiff to bear the burden of proof, and a new measure would be blocked until and unless it was approved.³⁰¹

Our other idea (not yet endorsed by any state) hearkens back to our first proposal in this Part: mandates for substate localities. We observed earlier that a state might not want to issue mandates because it might think that different rules are better suited to different jurisdictions. The option of mandates *for covered jurisdictions alone* could be appealing to such a state because it would avoid one-size-fits-all uniformity and distinguish between localities on a sensible basis, namely their histories of racial discrimination. For example, suppose New York doesn't mind most jurisdictions relying on at-large elections but does worry about this electoral system being used by localities that are serial racial discriminators (which are the localities captured by the NYVRA's coverage formula³⁰²). Then a directive that only these localities must switch to districted elections could be both politically feasible and normatively defensible. In case it isn't obvious, note also how this idea discards retrogression *and preclearance*. Mandates for covered jurisdictions alone don't depend on a racial group's worsened electoral position. Nor do they require any decisionmaker to approve any electoral practice before it goes into operation. Rather, the only vestige of Section 5 of the FVRA retained by selective mandates is a coverage formula, on whose basis some localities but not others are ordered to take certain actions.

³⁰¹ See, e.g., Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 62–73 (discussing the procedural differences between preclearance and litigation under the FVRA).

³⁰² See N.Y. ELEC. LAW § 17-210(3) (McKinney 2023).

F. State Databases

Establishing any kind of racial discrimination in voting requires data. Racial vote denial, racial vote dilution, and retrogression are partly or wholly concepts about the effects of electoral practices. These effects can be determined only when the right information is analyzed with the right tools. So our next suggestion—also recently incorporated into the CTVRA³⁰³—is that SVRAs require states to create databases containing fine-grained demographic, electoral, and administrative data. SVRAs could further require local jurisdictions to provide information for these databases. The necessary data would vary based on SVRAs' substantive provisions—a SVRA that doesn't prohibit racial vote denial, for instance, might not mandate the production of information about voter registration or turnout rates. Some types of data that could be included in databases are (1) precinct-level population estimates by racial group; (2) precinct-level federal, state, and local election results; (3) geocoded voter registration lists; (4) geocoded voter history files; (5) shapefiles of district plans; (6) shapefiles of precinct boundaries; and (7) geocoded polling place and ballot drop box locations.³⁰⁴

The obvious rationale for compelling the creation of databases is to assist parties (and courts) in SVRA litigation. Think of a plaintiff, under the status quo where no SVRA outside Connecticut demands the collection of any information, who wishes to challenge a locality's electoral practice for denying or diluting the vote on racial grounds. The plaintiff needs data to substantiate these claims. But the necessary data might be (indeed, often is) publicly unavailable. The necessary data might not be available at all if the jurisdiction hasn't compiled it. And even if the jurisdiction has compiled it, the plaintiff might have to file time-consuming discovery or freedom of information requests to obtain it. Publicly accessible demographic, electoral, and administrative databases would obviate all these difficulties. Instead of scrounging together less reliable data from other sources or haranguing jurisdictions for information, plaintiffs could simply download the necessary data with a few keystrokes. By the same token, localities could use information from databases to assess *ex ante* their vulnerability to SVRA litigation. If one or more of their electoral policies appeared to result in

³⁰³ CTVRA, Pub. Act No. 23-204, § 411(c)(1), 2023 Conn. Acts at 823–24 (Reg. Sess.).

³⁰⁴ For similar lists of useful data types in proposed SVRAs, see Voting Rights Act of 2023 – Counties and Municipalities, S.B. 878, § 15.5-505(a)(1), Reg. Sess. (Md. 2023); S. 402, 102d Leg. § 5(4) (Mich. 2023); and S. 657, 205th Leg., § 2 (N.Y. 2023).

substantial racial disparities, they could preemptively amend these measures to avoid suits.³⁰⁵

The data we've mentioned so far either exists already or could be gathered reasonably easily. A somewhat more novel informational strategy (absent from the CTVRA) would be for SVRAs to ask individuals to identify their race and ethnicity when they register to vote. This approach isn't unheard of; a few southern states do exactly that.³⁰⁶ The Census also asks people to state their race and ethnicity (although not in connection with voter registration).³⁰⁷ And private vendors predict the race of voter registrants with reasonable accuracy when this data isn't disclosed.³⁰⁸ Individual-level racial affiliation would be most helpful in racial vote denial cases. These cases often hinge on racial differences in voter registration or turnout rates.³⁰⁹ These differences could be directly calculated using voter files if individual-level racial affiliation was available—not more roughly approximated through other methodologies. In racial vote dilution cases, individual-level racial affiliation would also make possible better estimates of precincts' racial compositions. Precincts' racial compositions are one of the two key inputs for conventional techniques of measuring racially polarized voting (the other being precincts' election results). At present, precincts' racial compositions are usually determined using Census data. But Census data captures all people or, at best, all *eligible* voters. In contrast, voter files with individual-level racial information zero in on all *registered* or all *actual* voters. This data, when combined with precincts' election results, yields more reliable conclusions about racial patterns of voting behavior.³¹⁰

³⁰⁵ See, e.g., Written Testimony of Election Law Clinic at Harvard Law School in Support of Senate Bill 1226, An Act Concerning State Voting Rights in Recognition of John Lewis (Mar. 19, 2023), https://www.hlselectionlaw.org/s/ELC_CT_VRA_Testimony.pdf (discussing these and other rationales for SVRA-mandated databases).

³⁰⁶ See, e.g., *Availability of State Voter File and Confidential Information*, U.S. ELECTION COMM'N (Oct. 29, 2020), https://www.eac.gov/sites/default/files/voters/Available_Voter_File_Information.pdf (North and South Carolina).

³⁰⁷ See, e.g., *Why We Ask Questions About . . . Race*, U.S. CENSUS BUREAU, <https://www.census.gov/acs/www/about/why-we-ask-each-question/race/> (last visited May 1, 2023).

³⁰⁸ See, e.g., RUTH IGIELNIK ET AL., *COMMERCIAL VOTER FILES AND THE STUDY OF U.S. POLITICS* 34–36 (2018).

³⁰⁹ See, e.g., Complaint at ¶¶ 46–50, *Citizens Project v. City of Colorado Springs*, No. 1:22-cv-01365 (D. Colo. June 1, 2022) (citing racial differences in turnout rates in a FVRA Section 2 challenge to the timing of Colorado Springs's municipal elections).

³¹⁰ See, e.g., Ari Decker-Frain et al., *Comparing Methods for Estimating Demographics in Racially Polarized Voting Analyses*, SOCARXIV (Apr. 21, 2022), <https://osf.io/preprints/socarxiv/e854z/> (referring to this data as the “known truth” and using it to assess other methods of estimating precincts' racial compositions).

G. Electoral Levels

Our final proposal is our most straightforward one. It's simply that SVRAs should apply to all elections, for all positions. At present, no SVRA achieves universal electoral coverage. Florida's³¹¹ and Illinois's³¹² SVRAs regulate statewide district plans but not executive branch or substate elections. Connecticut's,³¹³ New York's,³¹⁴ and Washington's³¹⁵ SVRAs govern all substate but no federal or state elections.³¹⁶ And California's,³¹⁷ Oregon's,³¹⁸ and Virginia's³¹⁹ SVRAs are limited to subsets of substate elections: at-large elections in California and Virginia, and school district elections in Oregon. Compared to this status quo, universal electoral coverage would be both simpler and more effective. Simpler because every election, not some fraction thereof, would be subject to SVRAs' prohibitions of racial vote denial, racial vote dilution, and/or retrogression. And more effective because these prohibitions would prevent and remedy racial discrimination in voting throughout the electoral system. This "insidious and pervasive evil"³²⁰ wouldn't be allowed to persist in some elections despite being extirpated from others.

A potential concern about a SVRA applying to federal or state elections, in particular, is that a past state legislature can't tie the hands of a future state legislature. A future legislature, that is, can always revise or rescind a law enacted by a past legislature.³²¹ This basic rule of parliamentary procedure is true enough, but it hardly negates the value of a SVRA extending to federal or state elections. That's because, even though such a SVRA *could* be amended or annulled, such amendment or annulment wouldn't happen automatically. Instead, a future legislature (and governor) would have to agree to weaken or waive the SVRA's terms, and that agreement could be hard to reach. To illustrate the point, consider the state-level criteria that regulate congressional and state

³¹¹ See FLA. CONST. art. 3, §§ 20–21 (applying to congressional and state legislative district plans).

³¹² See 10 ILL. COMP. STAT. 120/5-5(a) (2011) (applying to state legislative district plans).

³¹³ See CTVRA, Pub. Act No. 23-204, § 410(a)(6)–(7), 2023 Conn. Acts at 819–20 (Reg. Sess.).

³¹⁴ See N.Y. ELEC. LAW § 17-204(4) (McKinney 2023).

³¹⁵ See WASH. REV. CODE § 29A.92.010(5) (2023).

³¹⁶ With the caveat that Connecticut's and New York's racial vote denial (in contrast to their racial vote dilution) provisions arguably apply to the local administration of *all* elections. See CTVRA § 411(a); N.Y. ELEC. LAW § 17-206(1).

³¹⁷ See CAL. ELEC. CODE § 14027 (2002).

³¹⁸ See OR. REV. STAT. § 255.400(4)(a) (2021).

³¹⁹ See VA. CODE ANN. § 24.2-130(A) (2021); *see also supra* note 104.

³²⁰ *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

³²¹ Alternatively, a future legislature can state that its new electoral regulations are in compliance with any old requirements imposed by a past legislature. *See, e.g.*, 10 ILL. COMP. STAT. 120/5-15 (2011) ("The General Assembly Redistricting Act of 2021 . . . complies with all of the requirements of [the ILVRA].").

legislative redistricting. In many states, these criteria are merely statutory: nothing more than the products of past state legislatures.³²² Nevertheless, these criteria tend to endure from one redistricting cycle to the next, and political actors typically abide by them notwithstanding their formal authority to alter or abolish these limits on their line-drawing discretion.³²³

Moreover, if the status quo bias in favor of enacted legislation is thought insufficient, a SVRA could be constitutionalized. A SVRA embedded in a state constitution, of course, would necessarily bind the elected branches, not just provisionally constrain them until and unless they could agree on new legislation. In our universe of eight SVRAs, one of them—Florida’s—is constitutional rather than statutory. The Fair Districts Amendment became part of the Florida Constitution after it was approved by Florida voters in 2010.³²⁴ Since its adoption, the FLFDA has indeed had sharp teeth, resulting in the repeated judicial invalidation of congressional and state legislative districts. Several of these cases have involved the FLFDA’s anti-retrogression provision, often applying it in ways opposed by the Florida legislature.³²⁵ Had the FLFDA been only a statute, the Florida legislature could perhaps have edited or erased its requirements (with the governor’s cooperation). Because of the FLFDA’s constitutional stature, however, the elected branches have had no choice but to submit to it.

Our subject in this Part has been the extension of SVRAs: making them more potent and thus more distinct from the FVRA. But we also want to flag a couple areas where existing SVRAs arguably go too far and so might benefit from some paring back.³²⁶ We want to throw some cold water, too, on the notion that SVRAs are, or could realistically become, a full substitute for the FVRA. The first way in which certain SVRAs (specifically, New York’s) may be overzealous is by rendering at-large elections unlawful solely on the basis of racially polarized voting.³²⁷ This approach seems unwise to us because it leads to liability even where no racial group is underrepresented or can obtain more

³²² See *Redistricting Criteria*, NAT’L CONF. ST. LEGIS. (July 16, 2021), <https://www.ncsl.org/redistricting-and-census/redistricting-criteria>.

³²³ Compare *id.*, with NAT’L CONF. ST. LEGIS., REDISTRICTING LAW 2010, at 172–217 (2009) (listing the very similar state-level criteria used in the 2010 redistricting cycle).

³²⁴ See *In re Senate Joint Resolution of Legis. Apportionment 1176*, 83 So. 3d 597, 598 (Fla. 2012).

³²⁵ See, e.g., *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 284–87 (Fla. 2015); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 403–05 (Fla. 2015).

³²⁶ In addition to the areas we discuss here, we noted above that, in our view, the CTVRA should be amended to prohibit only electoral practices that result in *substantial* and *unjustified* racial disparities in political participation. See *supra* note 294 and accompanying text.

³²⁷ See *supra* notes 81–85 and accompanying text.

representation. Suppose an at-large electoral system consistently yields proportional representation by racial group (an unlikely but plausible scenario). Under the NYVRA, this fact doesn't save the system from invalidation. Or say a racial group is so small that it can't win representation under any electoral system—not at-large elections, nor single-member districts, nor any form of proportional representation.³²⁸ Again, under the NYVRA, this fact has no legal significance. Accordingly, to ensure that liability arises only where underrepresentation exists and can be corrected, we think all SVRAs should implement the second proposal we outlined above. Under all SVRAs, that is, plaintiffs should have to prove racially polarized voting *and* identify a benchmark relative to which they're currently underrepresented.

Our other reservation about most SVRAs (all but Florida's and Washington's) is their full-throated endorsement of influence district claims.³²⁹ We have no objection to an influence district claim where a minority group constitutes a genuine, geographically defined community but isn't numerous enough to elect its preferred candidate in any reasonable district. In this circumstance, crafting a district that comprises this group enables a real community to hold some sway over its representative. However, we worry about conceiving of an influence district more broadly as *any* district where a nontrivial minority population can't elect its preferred candidate but can secure the election of its second-choice candidate.³³⁰ In many parts of the country, minority voters' preferred candidate is a minority Democrat and their second-choice candidate is a white Democrat.³³¹ In these areas, authorizing influence district claims is tantamount to authorizing claims for as many Democratic districts as possible, at least where the population is racially diverse. Such authorization conflicts with the norm (if not the law in many states) against partisan gerrymandering. It also departs from any common understanding of racial discrimination in voting. We therefore recommend that influence district

³²⁸ This was the crucial fact in *Pico Neighborhood Ass'n v. City of Santa Monica*, 265 Cal. Rptr. 3d 530, 547 (Cal. Ct. App. 2020), *vacated, rev'd*, No. S263972, 2023 WL 5440486 (Cal. Aug. 24, 2023), where Latinos were fourteen percent of the eligible voter population in Santa Monica but could comprise at most thirty percent of the eligible voter population of any single-member district.

³²⁹ See *supra* note 88 and accompanying text.

³³⁰ See, e.g., 10 ILL. COMP. STAT. 120/5-5(b) (2011) (“The phrase ‘influence district’ means a district where a racial minority or language minority can influence the outcome of an election even if its preferred candidate cannot be elected.”).

³³¹ See, e.g., *Rose v. Raffensperger*, 619 F. Supp. 3d 1241, 1252 (2022); see also Kuriwaki et al., *supra* note 76, at 9–12 (showing that most minority voters preferred a white Democrat to a Republican in the 2016 presidential election).

claims be either dropped from SVRAs or cabined to discrete, geographically bounded minority communities.

As for tempering enthusiasm for SVRAs as an adequate substitute for the FVRA, our skepticism has nothing to do with the merits of SVRAs. It stems, instead, from the limited numbers of states that have enacted, or are likely to enact, SVRAs. To date, only states with unified Democratic governments have passed statutory SVRAs. (The voters of Florida also approved a constitutional SVRA without the involvement of the state's elected branches.³³²) Only states with unified Democratic governments are currently debating the passage of new statutory SVRAs.³³³ No state under unified Republican control has seriously considered, let alone adopted, a statutory SVRA. Nor has any state under divided government done so.

Unfortunately, as long as SVRAs remain blue state policies, their benefits will be unable to reach many of the country's minority voters. States with unified Republican or divided governments and more than one million Black residents include Alabama, Georgia, Louisiana, Mississippi, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and Texas.³³⁴ Similarly, Arizona, Georgia, North Carolina, Pennsylvania, and Texas are states with unified Republican or divided governments and more than one million Hispanic residents.³³⁵ None of these states has enacted a SVRA or is apt to do so anytime soon. In all these states, in all probability, minority voters will have to make do without SVRAs' prohibitions of racial vote denial, racial vote dilution, and/or retrogression for the foreseeable future. Lacking these protections, minority voters in this large swath of the country will have to settle for the FVRA's defenses against racial discrimination in voting. These defenses are less robust than the analogous provisions of SVRAs. But for many minority voters, these weaker federal defenses are, and will be, the only defenses available.

³³² See *supra* note 324 and accompanying text.

³³³ See *supra* notes 7–9 and accompanying text.

³³⁴ See *List of U.S. States and Territories by African-American Population*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_African-American_population (last visited Sept. 4, 2023).

³³⁵ See *List of U.S. States by Hispanic and Latino Population*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_U.S._states_by_Hispanic_and_Latino_population (last visited Sept. 4, 2023).

CONCLUSION

Despite their confinement so far to blue states (and Florida), state voting rights acts are the most exciting development in the voting rights field in years. As we have discussed, SVRAs diverge from, and build on, the federal Voting Rights Act in many respects, above all in their more vigorous safeguards against racial vote dilution. SVRAs are also constitutional under current equal protection law because they neither racially gerrymander, nor racially classify, nor have invidious racial purposes. And SVRAs could be made more potent still, for instance, by mandating certain measures or by allowing plaintiffs to select any benchmark for assessing racial vote dilution. In light of the pessimism of the last two paragraphs, this possibility of extending SVRAs is a happier note on which to close. After all, it's not just SVRAs that could be extended but also the FVRA. The same reforms that would make SVRAs more effective would also render the FVRA a stronger bulwark against racial discrimination in voting. And crucially, if it was the FVRA that was bolstered in these ways, the enhanced protections *wouldn't* be restricted to blue state residents. Rather, voters of every race, throughout the country, would be the beneficiaries of this voting rights renaissance.