

Building Local Power: Movement Law and State Voting Rights Acts

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ABSTRACT

State voting rights acts have emerged as a novel way to fight back against federal courts' backsliding on voting rights protections, congressional gridlock on voting rights legislation, and public apathy about race-consciousness in our democracy. A new state voting rights act has been enacted in eight of the past nine years, and half a dozen more state voting rights acts have been proposed. Courts from the Superior Court of Washington for Kittitas County all the way up to the Supreme Court of the United States have issued orders affecting the operation and constitutionality of state voting rights acts. Alongside these legal developments, calls in the academy for "movement law" as a discipline have grown. Scholars of movement law ask for analysis of where and how transformations of law, policy, and jurisprudence can build up from the grassroots, rather than down from an ivory tower. This article heeds the call to bring a movement law lens to an ongoing social justice effort: using state voting rights acts to advance a multi-racial democracy. First, I identify the failures of the movement: despite having been in existence for twenty-five years, state voting rights acts have failed to build widespread power and dignity for those discriminated against on the basis of race, ethnicity, or membership in a language-minority group with respect to voting. Next, I outline the contours of how and why movement law can and should be the framework relied on by those engaging in state voting rights act litigation and advocacy. Finally, I dig through the wisdom of the critical race theorists and other movement scholars of the last fifty years to identify five lessons we should apply when seeking to utilize state voting rights acts to build local power.

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INTRODUCTION

State voting rights acts (“SVRAs”) have emerged as a novel way to fight back against federal courts’ backsliding on voting rights protections, congressional gridlock on voting rights legislation, and public apathy about race-consciousness in our democracy.¹ I define a SVRA as a state statute that (1) prohibits racial discrimination in voting; (2) includes protections that go beyond the federal voting rights act; and (3) applies at the local government level.² A new SVRA has been enacted in eight of the past nine years,³ and half a dozen more SVRAs have been proposed.⁴ Courts from the Superior Court of Washington for Kittitas County to the Supreme Court of the United

¹ See generally, e.g., Michael Pernick & Adam Harper, *State VRAs and the State of the VRA*, MINN. L. REV. (forthcoming 2025) (manuscript at 4) (on file with authors) (“[S]tate-level action is not just a stopgap—it is likely to define the future of voting rights in America.”).

² This definition is slightly narrower than that used in Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 EMORY L.J. 299, 305 (2023) (defining state voting rights acts to include application at the statewide as well as local level, such as FLA. CONST. art. 3, §§ 20-21 and 10 ILL. COMP. STAT. 120/5-1 to 5 (2011), which are not included in my definition in this paper).

³ WASH. REV. CODE §§ 29A.92.005-.900 (2023) (passed in 2018); OR. REV. STAT. §§ 255.400-.424 (2021) (passed in 2019); VA. CODE ANN. §§ 24.2-125-131 (2021) (passed in 2021); N.Y. ELEC. LAW §§ 17-200-22 (McKinney 2023) (passed in 2022); CONN. GEN. STAT. ANN. § 9-368i-368q (West 2023) (passed in 2023); MINN. STAT. ANN. § 200.50-200.59 (West 2024) (passed in 2024); Colorado Voting Rights Act, 2025 Colo. Sess. Laws 744 (hereinafter Colorado VRA) (passed in 2025); Voting Rights Act of 2026 – Counties and Municipal Corporations, Senate Bill 255 (hereinafter Maryland VRA).

⁴ See *State Voting Rights Acts*, LEGAL DEF. FUND, <https://www.naacpldf.org/state-voting-rights-protect-democracy/> [<https://perma.cc/U87V-TJ6C>] (last visited Feb. 28, 2026) (collecting links to proposed state voting rights acts).

States have issued opinions on the operation and constitutionality of state voting rights acts.⁵ Before the recent spate of SVRA adoptions, the earliest such statute was enacted by California in 2002.⁶ Despite being in operation for nearly twenty-five years, the California Voting Rights Act has not ushered in a new era of minority representation.⁷ Additionally, the state voting rights acts that followed California in the last eight years have only led to a handful of notification letters,⁸ and only half a dozen lawsuits have been filed to date. Though New York's preclearance provisions are finally operative and have led to nearly a hundred election practices being reviewed and approved,⁹ Connecticut's preclearance regime almost never got off the ground, with funding for the program only coming two years after enactment.¹⁰ SVRAs may be novel, but thus far they have not been used to make the consequential changes to the lives of the people they were designed to benefit. This article seeks to investigate why SVRAs have not been the engine of political change that the federal voting rights act ("federal VRA") once was and identify how attorneys can and should use SVRAs to build local power for systemically marginalized communities. I advocate for a movement lawyering model to realize SVRAs' promise of combating racial discrimination in voting.

SVRAs have been adopted to extend protections for the right to vote beyond the federal VRA.¹¹ These purposes are explained slightly differently in each state. In New York, the statute specifies that it considers the protections for the right to vote in New York to "exceed the protections for the right to vote provided by the [U.S.] constitution."¹² In Washington, the purpose

⁵ See, e.g., *Portugal v. Franklin County*, 530 P.3d 994, 998 (Wash. 2023), *cert. denied sub nom*; *Gimenez v. Franklin County*, 144 S. Ct. 1343, (2024) (mem.).

⁶ CAL. ELEC. CODE §§ 14025–14032 (West 2002).

⁷ See *infra* Part I.

⁸ A "notification letter," or "notice letter" is required to be sent by a prospective plaintiff prior to filing suit under many State VRAs, and though not required by the federal VRA, has often been a strategy used by prospective plaintiffs citing the federal VRA to try to make changes without litigation. See, e.g., CAL. ELEC. CODE § 10010(e).

⁹ A full list of preclearance submissions is available online at <https://nyvra-portal.ag.ny.gov/> search, and for more information on what preclearance is, see *How Preclearance Protects New York Voters*, LEGAL DEF. FUND, <https://www.naacpldf.org/wp-content/uploads/NYVRA-Fact-Sheet-Preclearance.pdf> [<https://perma.cc/M457-WWMC>] (last visited Feb. 28, 2026).

¹⁰ *LDF and ACLU Commend Connecticut for Fully Funding the Connecticut Voting Rights Act*, LEGAL DEF. FUND (July 1, 2025), <https://www.naacpldf.org/press-release/ldf-and-aclu-commend-connecticut-for-fully-funding-the-connecticut-voting-rights-act/> [<https://perma.cc/FCT6-3LMS>] (last visited Feb. 28, 2026).

¹¹ Greenwood & Stephanopoulos, *supra* note 2, at 301 ("SVRAs can be far more impactful than the [federal] VRA, whose limitations they seek to transcend.").

¹² See, e.g., N.Y. ELEC. LAW § 17-200 (McKinney 2023) ("In recognition of the protections for the right to vote provided by the constitution of the state of New York, which substantially exceed the protections for the right to vote provided by the constitution of the United States . . .").

is more narrowly to ensure that “minority groups have an equal opportunity to elect candidates of their choice.”¹³ And in Colorado, the legislative declarations invoke the power of the state to prevent “discrimination in voting and voter turnout.”¹⁴ Broadly, SVRAs seek to promote and protect the right to vote. The right to vote has long been considered more than the ability to register, vote, and have that vote count. Along with the ability to equally participate, the right to vote includes the right to equally aggregate one’s voice with others in one’s community and to have a say in the governance outcomes of one’s community.¹⁵ As to the latter, no one voter, or group of voters, should get their way all the time. The majority and minority should either each have a chance at success¹⁶ or they should take turns.¹⁷

Narrowly, the focus of most SVRAs’ language, and almost all enforcement action thus far, has been to provide minority groups with the opportunity to elect candidates of their choice to local office. This means identifying and rooting out vote dilution. In so doing, these actions ask communities to think about (and possibly to restructure) how power is distributed in local government.¹⁸

Daryl Levinson, in his lengthy exploration of power in public law, quips that the term power “is used so promiscuously in constitutional and political discourse that it might seem hopeless to insist on a single definition.”¹⁹ I discuss the nuances later, but broadly use the conception of power described by Lani Guinier and Gerald Torres, who explained that the goal of activists should be to “chang[e] the wind.”²⁰ In order to build real power,

¹³ WASH. REV. CODE § 29A.92.005 (2023).

¹⁴ Colorado VRA, *supra* note 3, § 1-47-102(2).

¹⁵ See Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1712 (1993).

¹⁶ See generally Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

¹⁷ This concept is discussed in much of Lani Guinier’s scholarship, but for a straightforward explanation of her views on turn taking, see Lani Guinier, *Keynote Address by Lani Guinier*, 25 U. TOL. L. REV. 875 (1995).

¹⁸ See, e.g., Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 40 (2004) (“[P]olitics involves, at its core, material questions concerning the organization of power.”); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1344 (1988) (“Depending on how one views society, democracy, and the historic significance of racial disenfranchisement, the ‘appropriate’ relationship between voting and representation can be defined to require anything from at-large representation to full proportional representation. Sowell’s attempt to sever voting from winning merely raises the question of process and results; it does not answer it.”).

¹⁹ Daryl J. Levinson, *Looking for Power in Public Law*, 130 HARV. L. REV. 31, 38-39 (2016).

²⁰ Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2742 (2014).

one must seize the ability to define culture and narratives by “shifting norms of fairness and justice, not just changing the rules.”²¹

Alongside these legal developments, calls in the academy for “movement law” as a discipline have grown.²² Scholars of movement law should “engage, celebrate, and participate in disruption from the grassroots.”²³ This article heeds the call to bring a movement law lens to the work to adopt and then utilize SVRAs to build local power for systemically marginalized communities.

One body of literature that scholars suggest is fundamental to the movement law oeuvre is critical race theory (“CRT”).²⁴ CRT began developing over 40 years ago, yet some of its central articles read as if they were written under circumstances facing this country today.²⁵ A leader of the CRT movement, Kimberlé Crenshaw, complained of the desire for color-blindness and how it “calls for the repeal of affirmative action and other race-specific remedial policies, urges an end to class-based remedies, and calls for the Administration to limit remedies to what it calls ‘actual victims’ of discrimination.”²⁶ The Court’s implication was that white people are the actual victims, with people of color gaining unfair advantages through programs designed to remedy historical, and ongoing, discrimination. Though Crenshaw wrote in 1988, almost every aspect of her article applies word-for-word to the situation facing our country today. For example, in 2013 the Supreme Court struck down Section 4 of the federal VRA stating that “[o]ur country has changed” (from 1965) and “today’s statistics tell an entirely different story.”²⁷ Similarly, in 2023 the Supreme Court struck down affirmative action programs at universities, reiterating Justice Harlan’s quote from a century prior, that “[o]ur Constitution is color-blind” and cannot tolerate “racial stereotyping.”²⁸ Just this term, the Supreme Court issued a ruling in the *Louisiana v. Callais* case, with the appellant arguing that race-based redistricting (of any sort) is unconstitutional because race-conscious redistricting does not comport with a “color-blind” view of the Constitution

²¹ *Id.* at 2759.

²² See, e.g., Amna A. Akbar, Sameer M. Ashar, & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021); Gregory Briker, Note, *The Anatomy of Social Movement Litigation*, 132 YALE L.J. 2304, 2306 n.1 (2023) (collecting citations).

²³ Akbar et al., *supra* note 22, at 829.

²⁴ *Id.* at 826-27.

²⁵ See generally KIMBERLÉ CRENSHAW, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

²⁶ *Id.* at 1337.

²⁷ *Shelby County v. Holder*, 570 U.S. 529, 556-557 (2013).

²⁸ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023).

or our democracy.²⁹ CRT helped us to see how, despite claims to the contrary, the civil rights movement was not over in the 1980s, and it can today help us see the same again. We celebrated 60 years of the Voting Rights Act in 2025, but we would be foolish to forget that those 60 years followed 346 years of slavery and Jim Crow.³⁰

Here I draw five lessons from this rich literature that I believe must be applied by those seeking to use SVRAs to build local power. First, litigators should “look to the bottom” and build any campaign or litigation from a solid foundation of respect for the views and experiences of affected communities. Second, litigators should establish a plan to fold in unlikely allies as their litigation and campaign grows. Third, litigators must take a hard look at themselves and their motives. Rather than saying yes to the first, or every, possible client, litigators should understand the needs of the communities in which they are working and appreciate their own limitations as they choose the right clients to represent. Fourth, litigators must not only plan the press release for the event of a court loss but must also plan a whole campaign that treats the litigation, even if lost, as merely one step in the power-building process. Fifth and finally, litigators must be prepared to turn court victories into something more than a ruling on paper. Litigators should integrate a litigation victory, as they would a loss, into a multi-faceted plan to build local power for systemically marginalized communities.

This article proceeds as follows. Part I identifies the ways that SVRAs have thus far fallen short of their promise and offers some reasons why these potentially powerful causes of action have not, yet, led to widescale power-building for systemically marginalized communities. Part II proposes that voting rights attorneys should identify and utilize the methods of movement lawyering to realize the promise of SVRAs.³¹ Part III looks to critical race theory and movement law scholarship to identify how lessons from earlier social justice campaigns could apply in the context of a movement to build local power using SVRAs.

²⁹ Supplemental Brief for Appellant, *Louisiana v. Callais* (U.S. No. 24-109) at 3-6 (Aug. 27, 2025).

³⁰ See generally CHANDLER DAVIDSON, *THE VOTING-RIGHTS ACT - A BRIEF-HISTORY: THE VOTING RIGHTS ACT IN PERSPECTIVE* 7 (Bernard Grofman & Chandler Davidson eds., 1992).

³¹ During the writing of this article, the Supreme Court of the United States issued a very rare request for re-argument in a case involving both racial gerrymandering and Section 2 of the Voting Rights Act. See *Louisiana v. Callais*, 606 U. S. ____ (2025). The decision in that case leaves open the possibility that plaintiffs can bring voting discrimination claims through state constitutional causes of action, and the lessons of this article will be equally applicable in such instances.

I. STATE VOTING RIGHTS ACTS HAVE NOT LIVED UP TO THEIR PROMISE. YET.

The vast majority of enforcement activity under SVRAs to date has involved challenges to at-large election methods, and, in most cases, the adoption of single-member district systems in response.³² This pattern—an initial flurry of activity around electoral system changes—is similar to the response to the amended Section 2 of the federal VRA in 1982 (“Section 2”). Section 2 was amended in response to a Supreme Court case, *Mobile v. Bolden*,³³ which held that plaintiffs could not show that an at-large election system for a city council was discriminatory merely because it meant the Black minority could never get a candidate of their choice elected (in the face of cohesive voting by the white majority for candidates other than those preferred by Black voters).³⁴ There, the Supreme Court found that Section 2 “was intended to have an effect no different from that of the Fifteenth Amendment itself” and that the Fifteenth Amendment, much like the Court’s interpretation of the Fourteenth Amendment in *Washington v. Davis*,³⁵ only reached state action that was “motivated by a discriminatory purpose.”³⁶ To make a claim under Section 2 of the federal VRA, plaintiffs would need to show *intentional* discrimination, not just that the electoral system had discriminatory *results*. It is perhaps no surprise that once these shackles were lifted in 1982 and Section 2 was amended to explicitly prevent a practice that “results in a denial or abridgement of the right . . . to vote,” litigators focused on vote dilution claims against at-large elections, similar to that of the plaintiffs in *Bolden*.³⁷

There are many ways that one can judge the success, or failure, of a cause of action. Here it is helpful to begin by reviewing the metrics used to analyze the effect of vote dilution claims under Section 2. Following that, I review the initial studies of the successes and failures of the California VRA. I then offer an analysis of what is driving the lack of success of the California VRA specifically and anticipate how similar issues may play out in enforcement actions under the newer SVRAs.

³² The other recent explosion of enforcement activity occurred when New York’s preclearance regime got up and running. The preclearing body has reviewed 94 electoral changes as of this writing and most have been related to relatively straightforward election administration issues like moving of polling places. *New York Voting Rights Act Portal: Search All Submissions*, OFF. OF THE N.Y. STATE ATT’Y GEN., <https://nyvra-portal.ag.ny.gov/search> [<https://perma.cc/3467-TDKS>].

³³ 446 U.S. 55 (1980).

³⁴ *Id.* at 73-74.

³⁵ 426 U.S. 229, 239 (1976).

³⁶ *Mobile*, 446 U.S. at 62.

³⁷ Ellen D. Katz, *The Evolution of Section 2: Numbers and Trends*, UNIV. MICH. L. SCH. VOTING RTS. INITIATIVE (2025), <http://voting.law.umich.edu/findings> (“The proportion of non-dilution cases to dilution cases increased over time.”) [<https://perma.cc/VT89-4BBX>] (last visited Feb. 28, 2026).

A. *Discrimination in Voting Persists but Utilization of the Federal VRA Has Broadly Been Successful*

Two of the key goals of the federal VRA were to stop discrimination in determining who could register and vote, and to allow voters to elect representatives that “will become responsive to the will of all the people.”³⁸ The latter involved improving both descriptive representation for people of color (electing representatives with the same demographic or social characteristics as the voters) and improving substantive representation (electing representatives that pursue the policy preferences of people of color).³⁹ Across each of these metrics, the federal VRA has had remarkable success. Of course, discrimination in voting is far from over,⁴⁰ and will likely increase as Section 2 continues to endure a “death by a thousand cuts.”⁴¹ But assessed through the litigation it generated and the changed descriptive and substantive representation that litigation caused, the federal VRA has allowed systemically marginalized communities access to seats at the tables where the decisions that affect their lives are made.

As to registration and voting, the effects of the federal VRA were quick: by the 1970s, “courts routinely observed that [B]lack voters throughout the South were registering and voting without interference.”⁴² Today, though there are still discrepancies in voter registration and turnout between white and non-white voters (in particular in local and off-cycle elections), we no longer see the dramatic differences of the pre-1965 era.⁴³

Empirically, there are a number of metrics scholars have examined as evidence that the federal VRA has met its goals: Who is getting elected? Are they descriptively representative of communities of color? Are they the candidates of choice of people of color? Are the candidates elected substantively representing people of color?⁴⁴ In 2016, Nicholas

³⁸ Ruth Greenwood, *Fair Representation in Local Government*, 5 IND. J.L. & SOC. EQUAL. 197, 200-03 (2017) (quoting Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1084 n.26 (1991)).

³⁹ See *id.* at 197-98; see also Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes”*, 61 J. POL. 628, 628 (1999).

⁴⁰ Ellen Katz, Margaret Aisenbrey, Anna Baldwin, Emma Cheuse & Anna Weisbrodt, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 657 (2006).

⁴¹ Ruth Greenwood, *Voting Under State Law*, in THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW 277, 278 (Eugene D. Mazo ed., 2024).

⁴² Katz et al., *supra* note 40, at 645.

⁴³ KHALILAH BROWN-DEAN, ZOLTAN HAJNAL, CHRISTINA RIVERS, ISMAIL WHITE JOINT CTR. FOR POL. & ECON. STUD., 50 YEARS OF THE VOTING RIGHTS ACT: THE STATE OF RACE IN POLITICS, 1, 12-14 (2015), <https://jointcenter.org/wp-content/uploads/2019/11/VRA-report-3.5.15-1130-amupdated.pdf> [<https://perma.cc/YH36-JF4M>]. For findings on non-November and off-cycle elections, see generally Zoltan L. Hajnal & Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 URB. AFFS. REV. 645 (2003).

⁴⁴ The effects of the federal VRA on descriptive and substantive representation should only be assessed after 1982, when Section 2 was amended to adopt a results test. See Nicholas O.

Stephanopoulos conducted an extensive review of the goals and effects of the amended Section 2, specifically since the Supreme Court's interpretation of that language in *Thornburg v. Gingles*⁴⁵ in 1986. He concluded that "the proportion of [B]lack legislators in the South rose precipitously after the Court's intervention. But neither this proportion in the non-South, nor the share of Hispanic legislators nationwide, increased much."⁴⁶ He also found that "*Gingles* worked exactly as intended for segregated and polarized [B]lack populations. These groups now elect many more of their preferred candidates than they did prior to the decision. But this progress has not materialized for Hispanics, suggesting that their votes often continue to be diluted."⁴⁷ With respect to substantive representation, Stephanopoulos looks only at state houses and assumes that minorities prefer Democrats. But, with these caveats, he finds that "the verdict is positive"—*Gingles* has helped Black voters (and to some extent Hispanic voters) to elect their preferred candidates in individual districts, without sacrificing the ability of voters across the state to elect Democrats to the state house (that is, while maintaining a level of substantive representation in the state house).⁴⁸

Second, scholars have assessed the federal VRA by cataloging the amount and success rates of litigation and enforcement action under Section 2 since its amending in 1982. In its first twenty-four years (1982-2006) it was estimated that roughly 1,600 lawsuits had been filed under Section 2.⁴⁹ Though, only 37% of the lawsuits resulted in a favorable court opinion, this lower success rate is not entirely surprising—many of the filed cases that were not litigated through to a merits decision may have settled favorably for plaintiffs, with only the close cases proceeding to trial.⁵⁰ Victories were more prevalent in the early years of enforcement. "Of the 92 total violations identified [from 1982-2006], courts found 46.7% of them during the 1980s, 38% during the 1990s, and 15.2%" from 2000-2006.⁵¹ A similar trend applies to vote dilution cases. A total of 50% of plaintiffs achieved successful outcomes in vote dilution cases brought between 1982 and 2022.⁵² Again, "success was frontloaded, with plaintiffs succeeding in 74% of the dilution

Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1325-27 (2016) (identifying the history of the amendments of Section 2 of the VRA and how the court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), adopted a standard).

⁴⁵ 478 U.S. 30 (1986).

⁴⁶ Stephanopoulos, *supra* note 44, at 1323.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1396; *see also id.* at 1380 (citing Tyson D. King-Meadows & Thomas F. Schaller, *Black State Legislators: A Case Study of North Carolina and Maryland*, in REPRESENTATION OF MINORITY TWENTY-FIRST CENTURY, 168 (2001) ("[T]he descriptive-substantive tradeoff remains the central dispute for contemporary scholars of minority representation.")).

⁴⁹ Katz et al., *supra* note 40, at 654-55. Suits include both those filed by private plaintiffs and the U.S. Department of Justice.

⁵⁰ *Id.*

⁵¹ *Id.* at 656.

⁵² Katz et al., *supra* note 37.

cases brought during the first decade following the 1982 amendments,” with the success rate reducing steadily “in subsequent decades: 35% in 1992-2001, 39% in 2002-2011, and 43% from 2012-2021.”⁵³

Interestingly, plaintiffs bringing cases against local jurisdictions had almost twice the success rate of those bringing suit over state-level redistricting plans (50% success rate vs. 27% success rate).⁵⁴ Plaintiffs in local government suits also had less success in the latter two decades than the first two decades of the life of the amended Section 2.⁵⁵

The amount of litigation does not itself show that the federal VRA’s goals of improved substantive and descriptive representation were met. It does demonstrate community activity, and presumably in the successful cases, that the plaintiffs ended up with a better (though not necessarily ideal) electoral system than what existed prior to the litigation.

Professor Ellen Katz is quick to note that despite its historical successes, Section 2 litigation is failing more today than it was in the 1980s.⁵⁶ That is not only because the proverbial “low hanging fruit” was litigated first and the edge cases are on the docket now. It is also because, since the 1990s, the Supreme Court, and some federal appeals courts, have slowly but steadily made it harder for voting rights plaintiffs to win Section 2 claims. Michael Pernick and Adam Harper have described the tightening noose around Section 2 vote dilution claims in detail.⁵⁷ In brief, restrictions range from only providing a cause of action for residentially segregated minority communities,⁵⁸ all the way to one federal circuit striking down the private right of action for plaintiffs to sue under the federal VRA at all.⁵⁹

The estimate of 1,600 filed suits between 1982 and 2006 does not capture the many threatened suits, nor cases investigated but never pursued. Threatened suits that did not end up being filed may have been settled favorably, but without extensive qualitative research, we cannot know the number or effect of these would-be suits. Cases that were investigated and never filed are presumably more likely to have had a lower chance of success, but the investigation of those suits may have resulted in engaged community discussions about race and representation. Anecdotally, in my roughly ten years investigating and filing these types of suits, I have found that the

⁵³ *Id.*

⁵⁴ *Id.* (noting that plaintiffs succeeded against local defendants in 53% of cases during Section 2’s first decades, and 44% in the latter two and that “[p]laintiffs have achieved successful outcomes in 51% of the Section 2 cases brought against local defendants, and in 29% of the cases against state defendants”).

⁵⁵ *Id.*

⁵⁶ See Katz et al., *supra* note 37 (“Plaintiff success has diminished over time. . .”).

⁵⁷ See generally Pernick & Harper, *supra* note 1.

⁵⁸ See *Bartlett v. Strickland*, 556 U.S. 1, 26 (2009).

⁵⁹ *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1214 (8th Cir. 2023), *reh’g denied*, 91 F.4th 967 (8th Cir. 2024) (mem.); see also *Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 710 (8th Cir. 2025) (finding that plaintiffs could not bring a claim for a Section 2 violation relying on 42 U.S.C. § 1983).

process of discussing possible federal litigation, working through the totality of the circumstances issues (discussing all the types of discrimination that people of color face),⁶⁰ and threatening suit can all lead to favorable changes in local power structures, even without litigation.⁶¹ The findings from Katz's project on the number, scope, and success of Section 2 litigation efforts are therefore necessarily conservative.

A final, qualitative, metric we can look to when assessing the effects of Section 2 are public education initiatives. The "Power on the Line" report and accompanying series offered in the 2021 round of redistricting by the NAACP Legal Defense Fund (LDF), Mexican American Legal Defense and Educational Fund, and Asian Americans Advancing Justice are a good example. These materials use the existence of a cause of action to spur communities to discuss what they want from their local democracy and to have a mechanism to put pressure on those in power to allow access for those who are traditionally not given the opportunity to elect candidates of their choice or otherwise have a say in their local government.⁶²

There is both quantitative and qualitative evidence that Section 2 of the federal VRA has had substantial success as a driver of power for minority voters across the country: it has been used to improve both descriptive and substantive representation and to spur community discussions on the role of electoral systems in structures of government power.

B. *The California VRA Took Years to Make Positive Change*

Though enacted in 2003, it was not until the mid-2010s that the California VRA became widely used to create electoral change.⁶³ Thus far, its contribution has, arguably, been a far cry from its federal counterpart. Much like the goals of Section 2 of the federal VRA, the aim of the

⁶⁰ Litigation under Section 2 requires plaintiffs to provide evidence on the "Senate Factors," the fifth of which is explicitly about discrimination beyond voting rights. *See* S. Rep. No. 97-417, at 28-29 (1982) ("[T]he extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.").

⁶¹ For example, see my discussion of Joliet in Greenwood, *supra* note 38, at 227-31. Joliet retained its five district plus three at-large system, which litigators contemplated challenging, yet Joliet residents still elected its first Hispanic candidate city-wide in 2021. *See* CESAR GUERRERO FOR CITY COUNCIL, <https://www.electcesarguerrero.com/> [<https://perma.cc/CL39-B2Q3>] (last visited Feb. 28, 2026) (explaining that he is "the son of Mexican immigrants" on his campaign website).

⁶² *See, e.g.,* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, ASIAN AMERICANS ADVANCING JUSTICE, & MEXICAN AMERICAN LEGAL DEFENSE FUND, POWER ON THE LINE(S): MAKING REDISTRICTING WORK FOR US (2021), https://www.naacpldf.org/wp-content/uploads/LDF_04142021_RedistrictingGuide-22e.pdf [<https://perma.cc/4SH4-NBBF>].

⁶³ This shift has been attributed to both "a well-publicized case in Palmdale in 2013" and the passage of A.B. 350 of 2016 which requires that a notice letter be sent before litigation is commenced under the California VRA. *See* Julia A. Gomez & Angélica Salceda, *Securing Fair Representation in California*, ACLU N. CAL. & ACLU S. CAL. (2025), 15, 22, <https://www.aclu-social.org/publications/securing-fair-representation-california/> [<https://perma.cc/CN9D-CBR2>].

California VRA was “to build upon the voting rights protections embodied in the federal Voting Rights Act . . . by enhancing the influence of minority populations in local government elections.”⁶⁴ It does not provide a cause of action for vote denial (suppressing the ability of people to register, vote, or have that vote count—e.g., changes to early voting, moving polling places, requiring voter ID), only vote dilution (systems that aggregate votes into representation—e.g., single member districts, at-large voting, or proportional ranked choice voting). And so, it should be assessed against a fairly narrow set of criteria: has the California VRA increased descriptive and/or substantive representation? Has it spurred community discussion of rights and power for people of color in local government?

As with the federal VRA, the California VRA’s success on these metrics can be assessed in several ways. We can start by looking at whether descriptive and substantive representation for non-white voters has increased either following the enactment of the California VRA or, ideally, because of it.⁶⁵ The most straightforward issue—whether changing from an at-large to a district system in California in response to a threatened California VRA lawsuit increased descriptive representation for non-white voters—was investigated by political scientists Loren Collingwood and Sean Long in 2021. That study “estimate[d] the average treatment effect (ATE) of city switching [from at-large to by-district elections] on minority city council representation at 10% to 12%.”⁶⁶ This was an improvement of “roughly 1/2 a council seat.”⁶⁷ Collingwood and Long also found that the switch has a greater effect on cities with high-density Latino populations (roughly one full council seat), and no effect on cities with low-density Latino populations.⁶⁸ The difference in effects based on residential segregation is not surprising, given that districted elections will only benefit a community if they are able to constitute a large enough portion of a district that they can combine their votes with other groups to elect candidates of their choice (i.e., to have 50% plus one vote for their preferred candidate).⁶⁹ A low-density population is less likely to be able to meet this requirement. This finding is consistent with an earlier study by Justin Levitt and Douglas Johnson that found “the move to by-district elections has increased the number of Latinos

⁶⁴ David C. Powell, *The California Voting Rights Act and Local Governments*, 10(2) CAL. J. POL. & POL’Y 1, 1 (2018).

⁶⁵ Though white voters can bring claims under the California VRA, in the vast majority of jurisdictions affected by notice letters or litigation, non-white voters are the minority population, and as such are the group whose representation is lacking both descriptively and substantively.

⁶⁶ Loren Collingwood & Sean Long, *Can States Promote Minority Representation? Assessing the Effects of the California Voting Rights Act*, 57 URB. AFFS. REV. 731, 731 (2021).

⁶⁷ *Id.* at 734.

⁶⁸ *Id.*

⁶⁹ See, e.g., Jessica Trounstein & Melody E. Valdin, *The Context Matters: The Effects of Single-Member Versus At-Large Districts on City Council Diversity*, 52 AM. J. POL. SCI. 554, 563 (2008) (“Only when a group is concentrated will districts promote increased descriptive representation on the council.”).

elected to city councils, but that change has been driven by significant gains in a few cities (such as Sanger and Chula Vista) that offset a lack of any increase in others (such as Escondido and Wildomar).⁷⁰

A metric that is particularly relevant when analyzing local elections is whether the change to district elections has any effect on racial turnout disparities in local elections. Brian Schaffner, Jesse Rhodes, and Raymond La Raja found that holding off-cycle or non-November elections for local government not only drives racial disparities in turnout, but further causes a difference in the ideological congruence of local representatives with their minority constituents.⁷¹ The trio's study finds that the timing of elections (whether local elections are held concurrently with state and federal elections) has a *greater* effect on the ideological congruence of representation between people of color and their representative bodies than the mode of election (whether by-district or at-large).⁷² This is a remarkable finding. Particularly given the many years of litigation and hundreds of litigators that have focused on changes from at-large to district election.

Another study looked at the effects of California jurisdictions switching to district elections on the racial turnout disparity in local elections. This is an important addition to findings on descriptive representation because turnout disparities can “erode perceptions of democratic legitimacy . . . and eliminating [turnout disparities] has the potential to affect electoral results, political representation, and public policy.”⁷³ That study found that switching from at-large to by-district elections “led to a decrease in the Hispanic-White and Asian-White turnout gaps” but noted an important caveat: this effect was more pronounced in cities where Hispanics are a “lower than average share” of the citizen voting age population.⁷⁴ He found that the change had no significant effect on the Black-White turnout gap.⁷⁵

A very recent study by Julia Gomez and Angélica Salceda has more encouraging findings.⁷⁶ Though using a less sophisticated analysis, they

⁷⁰ JUSTIN LEVITT & DOUGLAS JOHNSON, ROSE INST. OF STATE & LOC. GOV'T, QUIET REVOLUTION IN CALIFORNIA LOCAL GOVERNMENT GAINS MOMENTUM 1 (2016), <https://roseinstitute.org/wp-content/uploads/2016/11/CVRA-White-Paper.pdf> [<https://perma.cc/93NT-Z4NQ>].

⁷¹ BRIAN F. SCHAFFNER, JESSE H. RHODES & RAYMOND J. LA RAJA, HOMETOWN INEQUALITY: RACE, CLASS, AND REPRESENTATION IN AMERICAN LOCAL POLITICS 147 (2020).

⁷² *Id.* at 136-37, 148, 162 (discussing that “the type of jurisdictions (districted or at-large) that a community uses for its elections appears to have no real relationship with ideological congruence representation,” *id.* at 148, but holding elections concurrently with federal and state elections “provide[s] better representation of the ideologies of African American and Latino residents on municipal councils than do communities that hold local elections at other times,” *id.* at 136-37, and, “[I]ncreased ideological congruence representation as a result of institutional reform does not seem to translate directly into greater policy responsiveness,” *id.* at 162).

⁷³ Zachary L. Hertz, *Does a Switch to By-District Elections Reduce Racial Turnout Disparities in Local Elections? The Impact of the California Voting Rights Act*, 22 ELECTION L.J. 213, 217 (2023).

⁷⁴ *Id.* at 223.

⁷⁵ *Id.* at 222.

⁷⁶ Gomez & Salceda, *supra* note 63, at 58-63.

conclude that the California VRA “has helped close voter participation gaps” while increasing “minority representation on local government bodies, . . . responsiveness to minority communities, . . . opportunities to build organizing bases,” and the development of “new leaders and candidates.”⁷⁷ They acknowledge that “California continues to have a racial voter participation gap,” but cite studies that find that a change to districts could reduce the gap.⁷⁸ In terms of descriptive representation, Gomez and Salceda share that (descriptive) Latine representation grew by 68% (from 11.1% to 18.6%) on school boards that switched to districts, as compared to 19% growth (from 10% to 11.9%) for jurisdictions that stayed at-large.⁷⁹ They report similar comparisons for city councils: 53% growth (from 10.2% to 15.6%) for city councils that switch to districts, while only 13% growth (from 15.4% to 17.4%) for those that stayed at-large.⁸⁰ These are encouraging findings, but they only address descriptive representation. The study provides some useful qualitative analysis of the power-building aspects of integrated organizing and litigation campaigns. Gomez and Salceda describe community empowerment in Fullerton, a leadership pipeline in Fallbrook, and substantive changes in Santa Ana that all relied on the threat of action under the California VRA.⁸¹

A third set of metrics that scholars have used to assess the effects of the California VRA involves substantive policies that would benefit, on average, minority communities. Here, again, the results are underwhelming. Michael Hankinson and Asya Magazinnik looked at the effect of a change to a district system on the availability of affordable housing. They found that “the switch to district elections ends the disproportionate channeling of new housing into minority neighborhoods.”⁸² They called this the “supply-equity trade-off” because there may be more equity in local government representation, but the supply of the thing that minorities disproportionately need (affordable housing) is lower.⁸³ Additional scholars have found similar effects for the switch to single-member districts outside of the California VRA context, including the effect on municipal spending and the availability of housing supply.⁸⁴ Similarly, Zoltan Hajnal has found that disparate racial turnout

⁷⁷ *Id.* at 22.

⁷⁸ *Id.* (citing Bernard L. Fraga, *Candidates or Districts? Reevaluating the Role of Race in Voter Turnout*, 60(1) AM. J. POL. SCI. 97, 105 (2016)).

⁷⁹ *Id.* at 24.

⁸⁰ *Id.* at 26.

⁸¹ *Id.* at 30-34.

⁸² Michael Hankinson & Asya Magazinnik, *The Supply-Equity Trade-off: The Effect of Spatial Representation on the Local Housing Supply*, 85 J. POL. 1033, 1034 (2023).

⁸³ *Id.*

⁸⁴ See generally 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). See also Evan Mast, *Warding Off Development: Local Control, Housing Supply, and NIMBYs*, 106 REV. ECON. & STAT. 671 (2024) (discussing the effect of switching to single-member districts on local housing supply).

(which, as explained above, the California VRA is mostly unable to reduce) causes substantive policy harms for people of color in terms of local government spending priorities.⁸⁵

In terms of the litigation and enforcement activity metrics, California has been very active. A 2014 study by the San Francisco Lawyers Committee for Civil Rights (“SF LCCR”) found “140 jurisdictions that voluntarily sought to change from at-large to district-based elections between 2001 and 2013—most of them school districts that applied for waivers from the California Department of Education to change their method of election.”⁸⁶ Of the 144 total enforcement actions in the SF LCCR database, 21 represented filed cases during that time (2001-2013).⁸⁷

Since 2014, the bulk of California VRA enforcement activity has been spearheaded by two attorneys: Kevin Shenkman and Scott Rafferty, who between them have sent roughly 200 notice letters to local jurisdictions, threatening suit if the jurisdictions did not switch to by-district electoral systems.⁸⁸ In theory, this amount of advocacy activity could signal a vibrant community effort, but the evidence suggests otherwise. Each lawyer accuses the other of not being sufficiently engaged with the local community and not sufficiently diving into the details of the jurisdictions they threaten to sue.⁸⁹ Reporting on Shenkman’s motives and engagement suggests that feeling in the community is mixed:

“[t]o some Latino officials and communities, he’s a straight-up hero, a one-man wrecking ball who has cleared a path for them to reach public office. Others see a cynical opportunist exploiting a flawed law to extract fees from cities and other public boards—\$15 million in the past decade, including some settlements from cash-strapped

⁸⁵ See ZOLTAN L. HAJNAL, AMERICA’S UNEVEN DEMOCRACY: RACE, TURNOUT, AND REPRESENTATION IN CITY POLITICS 101-39 (2009).

⁸⁶ LAWS.’ COMM. FOR C.R. OF THE S.F. BAY AREA, VOTING RIGHTS BARRIERS & DISCRIMINATION IN TWENTY-FIRST CENTURY CALIFORNIA: 2000-2013, 7 (2014), <https://lccrsf.org/wp-content/uploads/2014/03/REPORT-Voting-Rights-Barriers-Report-2014.pdf> [<https://perma.cc/LS3U-NRHL>].

⁸⁷ LCCR Voting Rights Database Master List, LAWS.’ COMM. FOR C.R. OF THE S.F. BAY AREA, <https://lccrsf.org/wp-content/uploads/2021/05/LCCR-Voting-Rights-Database-Master-List-2014-Updated.xls> [<https://perma.cc/Q8JT-2NQQ>] (last visited Feb. 27, 2026) [hereinafter *LCCR Master List*] (downloadable spreadsheet of relevant cases).

⁸⁸ Jason Fagone, *S.F.’s School District Is Facing Huge Changes. Behind the Drama: Two Lawyers Who Can’t Stand Each Other*, S.F. CHRON. (Feb. 10, 2024), <https://www.sfchronicle.com/california/article/cvra-rafferty-shenkman-18656796.php> [<https://perma.cc/4EVZ-DFWH>] (“[Shenkman] has sued or threatened to sue at least 175 local jurisdictions throughout California. Meanwhile, Rafferty has targeted 30 local agencies, mostly in the Bay Area.”).

⁸⁹ *Id.* (“Rafferty has criticized Shenkman for having ‘carpet-bombed’ the state with [California] VRA-related legal threats, saying that Shenkman doesn’t back up his claims and picks on small government agencies Shenkman has said Rafferty lacks his experience with voting rights cases and ‘doesn’t know what he’s doing.’”).

towns and schools that say they're doing nothing wrong but pay to avoid getting sued."⁹⁰

Ultimately the truth may be somewhere in the middle—hundreds of California jurisdictions have changed their electoral systems since 2016, and that probably would not have happened without the activity by Shenkman and Rafferty. Shenkman regularly works with organizers at the Southwest Voter Education Registration Project, and they reported that he has had an “extraordinary impact” for them.⁹¹ Shenkman maintains that he is using the California VRA to “shake things up” and he seems to have done that.⁹² But it's also possible many jurisdictions have switched to districts without any regard for whether those districts actually offer meaningful representation to minority voters. The reason this outcome is even possible isn't Shenkman or Rafferty's fault, nor that of the organizers they work with; rather it lies squarely with the language of the California VRA itself.

C. *The California VRA's Structural Problems*

No jurisdiction that adopts a by-district election system in California can be sued under the California VRA.⁹³ The drafters' stated intention was not to provide a safe harbor for jurisdictions that adopt a by-district election system—they were creating a cause of action against at-large jurisdictions, without considering the incentive structure they established. The drafters were focused on creating a cause of action targeting jurisdictions with both at-large elections and racially polarized voting.⁹⁴ They also sought to make it easier to litigate challenges to these systems than it had become under the federal VRA.⁹⁵ Two of the civil rights lawyers that helped to draft the bill, Robert Rubin and Joaquin Avila, developed what could have become an incredible strategy to create widespread reform that would build power for minority communities across California. Their first target for litigation under the California VRA was the City of Modesto. They filed suit on behalf

⁹⁰ Jason Fagone & Daniel Lempres, *Hero or Opportunist? Pugilistic Malibu Lawyer Remakes California Voting*, S.F. CHRON. (Dec. 21, 2023), <https://www.sfchronicle.com/california/article/malibu-lawyer-elections-18533273.php>. [<https://perma.cc/4S8N-9DRS>].

⁹¹ *Id.* (quoting Southwest Voter Registration Education Project President Lydia Camarillo).

⁹² Although no one has determined how many of the 680 local jurisdictions that have shifted from at-large to by-district or alternative voting systems did so directly, or predominantly, because of Shenkman's actions, it seems plausible that the many filed suits and hundreds of notice letters had a causative effect in dozens of jurisdictions.

⁹³ See CAL. STAT. § 14027 (2002) (providing a cause of action against any “at-large method of election”).

⁹⁴ See CAL. S. RULES COMM., BILL ANALYSIS, SB 976, 2001-2002 Reg. Sess., at 6 (2002) (“According to the author, this bill ‘addresses the problem of racial block voting, which is particularly harmful to a state like California due to its diversity’”).

⁹⁵ See ETHAN JONES, BILL ANALYSIS, SB 976, CAL. ASSEMB. COMM. ON ELECTIONS, REAPPORTIONMENT & CONST. AMENDS., 2001-2002 Reg. Sess., at 4 (2002) (“As such, this bill would presumably make it easier to successfully challenge at-large districts.”).

of members of the Latino community in Modesto in 2004.⁹⁶ The city dug in and tried to fight the action, including claiming that the entire act was inconsistent with the Fourteenth Amendment to the Constitution.⁹⁷ After years of litigation, and a denial of a certiorari petition by the U.S. Supreme Court, the city finally settled the suit, agreeing to pay the lawyers \$3 million.⁹⁸ At the time, Robert Rubin explained that this large settlement “certainly sends a message to other cities and school boards that the at-large election system is susceptible to challenge, and that it will be very costly to defend these illegal systems.”⁹⁹ This could have been the basis to go from jurisdiction to jurisdiction, encouraging them to adopt alternate election methods that would enfranchise minority communities, to avoid costly litigation. That could have been done by working with community activists, and the attorneys could have sought terms beyond electoral system changes, because settlements can be more flexible and broad-ranging than what a court can order upon a finding of liability.¹⁰⁰ The SF LCCR database suggests that this is what Robert Rubin and Joaquin Avila in fact did—for a time.¹⁰¹

As litigation and threats of litigation continued, it became clear that the statute had set up perverse incentives for those willing to exploit it. First, and most damningly, any jurisdiction could avoid being sued by adopting a by-district election system. That system could create districts that provided *no opportunities at all* for minority voters to elect a candidate of choice. Second, the statute did not require a notice letter to be sent. A lawyer could file a complaint without notice and then demand that, in exchange for dropping the suit, the jurisdiction would have to cover the attorney’s fees for preparing and filing the suit. Third, even if an attorney sent a notice letter before filing suit, she was not required to identify a preferred remedy. Even if a jurisdiction wanted to operate in good faith and find a remedy that suited the community, it would be on the back foot—it would have to conduct its own outreach and engagement with the community to set up an electoral system that enfranchised the minority community, all the while staving off the filing of a complaint by the attorney who had noticed possible action. Fourth, there was no cap on the fees that a lawyer who had filed or threatened suit could request for the time she had spent investigating the claim.

⁹⁶ *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 826 (Cal. Ct. App. 2006).

⁹⁷ For a procedural history of the case, see *id.* at 826-30.

⁹⁸ Adam Ashton, *Settlement in Latino Voting Case Will Set Modesto Back \$3 Million*, *MODESTO BEE* (June 6, 2008), <https://www.modbee.com/news/local/article3108787.html> [<https://perma.cc/SD4L-URZN>].

⁹⁹ *Id.* (quoting Robert Rubin).

¹⁰⁰ See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 *GEO L.J.* 2663, 2675 (1995) (“[S]ettlement offers the opportunity to craft solutions that do not compromise, but [also] offer[s] greater expression of the variety of remedial possibilities in a postmodern world”); but see *United States v. Virginia*, 518 U.S. 515, 547 (1996) (“A remedial decree, this Court has said, must closely fit the constitutional violation.”).

¹⁰¹ See *LCCR Master List*, *supra* note 87.

This means that small jurisdictions with tiny budgets decided it was in their best financial interest to pay the relatively small initially requested fees, rather than pay for their own legal counsel to defend their system and risk having to pay the costs of the lawyers suing them as well. All these factors meant that it was in the interest of many jurisdictions to switch to by-district elections the moment they got wind that a lawyer might be coming to seek fees under the California VRA.

In 2016, the California legislature amended the California VRA to try to deal with some of the incentive problems that had developed. Assembly Bill 350 of 2015-2016 added a requirement that a notice letter must be sent (allowing jurisdictions to settle an action without a suit being filed) and it capped the amount of fees that an attorney could seek for costs associated with a notice letter at \$30,000.¹⁰² AB 350 also required that a jurisdiction hold a series of public hearings before and after proposing a new electoral system. This at least allowed the public to complain about the non-enfranchising districts the locality was about to adopt (though it did not provide any cause of action to actually stop such districts going into effect). Once a by-district system was adopted, the local government could not be sued under the California VRA. The League of Cities argued in favor of the adoption of the amendment because it would “ensure that cities are protected from serial litigants who have been targeting cities and other local agencies for financial gain rather than working with the local jurisdiction and stakeholder groups to ensure the best possible outcome.”¹⁰³ Despite these noble intentions, by leaving the safe harbor of switching to a by-district system in place, and allowing \$30,000 to be recovered upon the filing of a notice letter, it is obvious, in retrospect, what would happen next: hundreds of cities would adopt by-district systems,¹⁰⁴ Shenkman would become rich,¹⁰⁵ and activists would be left with no path to force by-district systems (or any other electoral system) that actually enfranchised themselves.

D. No More Safe Harbors

Following the success of the California VRA, Washington adopted its own SVRA in 2018, and that enactment was followed in relatively quick succession by eight other states also adopting their own versions of a SVRA. The Washington VRA, and all those following, established causes of action against electoral systems, whether at-large or not, that cause vote dilution

¹⁰² A.B. 350, 2015-2016 Gen. Assemb., Reg. Sess. (Cal. 2016).

¹⁰³ See ETHAN JONES, CAL. ASSEMB. COMM. ON ELECTIONS & REDISTRICTING, BILL ANALYSIS, A.B. 350, 2015-2016, at 4 (2016).

¹⁰⁴ See Powell, *supra* note 64, at 4 (“Prior to the passage of the [California] VRA, only 29 California cities used district-based elections. As of November 2016, district-based elections are now used by 59 cities. A similar pattern is apparent in school districts as well.” (citations omitted)).

¹⁰⁵ See Fagone, *supra* note 88.

due to racially polarized voting. They have also largely referred to remedies beyond districts in more explicit ways. For example, the Washington VRA specifies that remedies will be “including, but not limited to, implementing a district-based election system.”¹⁰⁶ Similarly, New York’s text names a long list of remedies that include adopting “alternative methods of election” (defined to include, *inter alia*, “ranked-choice voting, cumulative voting, and limited voting”),¹⁰⁷ “elimination of staggered elections,” “moving the dates of regular elections,” and “increasing the size of the governing body.”¹⁰⁸ Additionally, states have responded in different ways to the other structural problems of the California VRA. Most states adopt a cap on fees associated with a notice letter, while some don’t allow for fee recovery before a suit is filed.¹⁰⁹ And some require that at least one remedy be identified in a notice letter, as the starting point for a discussion between those filing the letter and the governing body deciding how to proceed.¹¹⁰

Despite these improved causes of action, litigation under the recent SVRAs has not catalyzed a creative explosion of experiments with new electoral systems or discussions about which practices can better enfranchise local minority voters. The first case filed under the Washington VRA was against Yakima County and specified in the notice letter that the potential plaintiffs’ preferred remedy was the adoption of proportional ranked choice voting.¹¹¹ Yet, within less than two years, the case had settled with the adoption of a conventional by-district system.¹¹² Subsequently the Washington Supreme Court offered a resounding defense of the Washington VRA’s constitutionality and the U.S. Supreme Court denied certiorari in that case too in 2023, and yet only a handful of notice letters have been sent since that decision.¹¹³

¹⁰⁶ WASH. REV. CODE § 29A.92.040.

¹⁰⁷ N.Y. ELEC. CODE § 17-204(3).

¹⁰⁸ N.Y. ELEC. CODE § 17-206(5).

¹⁰⁹ Compare Colorado VRA, *supra* note 3, § 1-47-203(3)(b)(I) (no cap on fees associated with notification letters), with MINN. STAT. ANN. (West 2024) § 200.56(5)(c) (capping reimbursements for notification letters at \$30,000), and WASH. REV. CODE § 29A.92.130 (awarding fees and costs only if an action is filed).

¹¹⁰ WASH. REV. CODE § 29A.92.060(2).

¹¹¹ *Letter from Campaign Legal Ctr. to Yakima Cnty. Comm’n 6*, CAMPAIGN LEGAL CTR. (Jan. 15, 2020), <https://campaignlegal.org/sites/default/files/2020-01/Yakima%20notice%20letter%201.15.20.pdf> [<https://perma.cc/PCY8-4E58>] (offering “County-Wide Elections with Multi-Winner Ranked Choice Voting” as a potential remedy). Today “multi-winner ranked choice voting” is often referred to as proportional ranked choice voting. See, e.g., *Proportional RCV Information*, FAIRVOTE (2025), <https://fairvote.org/our-reforms/proportional-ranked-choice-voting-information/> [<https://perma.cc/NC2X-PXF8>].

¹¹² See *CLC Wins State Voting Rights Act Case in Historic Settlement*, CAMPAIGN LEGAL CTR. (Aug. 31, 2021), <https://campaignlegal.org/update/clc-wins-state-voting-rights-act-case-historic-settlement> [<https://perma.cc/8JZZ-6DM4>].

¹¹³ See, e.g., *Notice Letter Issued to Port of Pasco for Violating the Washington Voting Rights Act*, UCLA VOTING RTS. PROJECT (Mar. 10, 2025), <https://vrp.ucla.edu/notice-letter-issued-to-port-of-pasco-for-violating-the-washington-voting-rights-act/> [<https://perma.cc/CM98-QS5C>]; *UCLA Voting Rights Project Challenges Franklin County PUD Election System*,

The future is a little brighter in New York, with a couple of somewhat creative settlements having recently been finalized. The first case settled under the New York VRA had challenged a district system, seeking to replace it with a different district system.¹¹⁴ The second such settlement concerned a case challenging the at-large elections in the Town of Newburgh. There, the parties adopted a novel remedy: proportional ranked choice voting with at-large voting.¹¹⁵ An earlier part of that case, on appeal to the Court of Appeals, helpfully, resulted in a ruling that will prevent future local governments from offering facial challenges to the constitutionality of the New York VRA.¹¹⁶ The third case settled under the New York VRA also adopted a somewhat novel remedy. The Town of Mount Pleasant agreed to add two new seats, representing the two villages that sit within the Town, to its Town Council.¹¹⁷ These are promising developments, but without evidence of additional enforcement activity it's hard to see how resounding change is on its way.

In short, nothing indicates that we are amidst broad social movements across states to build power for systemically marginalized communities, using SVRAs to push recalcitrant governing bodies to adopt more democratic systems. But we could be, if we adopted a movement lawyering framework and learned from the voting rights and civil rights campaigns that came before us.

II. MOVEMENT LAWYERING FRAMEWORK FOR STATE VOTING RIGHTS ACTS

Amna Akbar, Sameer Ashar, and Jocelyn Simonson recently made a pitch for academics to adopt movement law as a discipline so that “legal scholars . . . can be a part of collectively transforming these swells of power building into durable, structural change.”¹¹⁸ Work to adopt and enforce SVRAs will get the necessary infusion of energy and innovation if those involved in the adoption or enforcement of such acts see themselves as part of a movement to build power for systemically marginalized communities and learn from the tactics and lessons of movement law and critical race theory in pursuit of that goal.

UCLA VOTING RTS. PROJECT (June 7, 2024), <https://vrp.ucla.edu/ucla-voting-rights-project-challenges-franklin-county-pud-election-system/> [<https://perma.cc/VM59-QX2J>]; *Sunnyside School District Notice of Washington Voting Rights Act Violation*, ACLU WASH. (Apr. 16, 2024), <https://aclu-wa.org/docs/sunnyside-school-district-notice-washington-voting-rights-act-violation> [<https://perma.cc/E78N-A4L3>].

¹¹⁴ See Consent Judgment and Decree at 3, *Coads v. Nassau County*, 611872/2023.

¹¹⁵ See Consent Judgment and Decree, *Clarke v. Town of Newburgh*, 50325/2025

¹¹⁶ See *Clarke v. Town of Newburgh*, 226 N.Y.S.3d 310 (N.Y. 2025), *appeal docketed*, No. APL-2025-00110 (N.Y. July 8, 2025).

¹¹⁷ See Stipulation of Settlement and Agreed Order, *Serratto v. Town of Mount Pleasant*, 55442/2024.

¹¹⁸ Akbar et al., *supra* note 22, at 884.

A. Public Interest Lawyering Models

There are many names given to the different ways public interest lawyers can advocate for their clients: impact litigation,¹¹⁹ community lawyering,¹²⁰ empowerment lawyering,¹²¹ movement lawyering,¹²² political lawyering,¹²³ and integrated advocacy,¹²⁴ to name a few. Ultimately, the name we give to the style of lawyering adopted is less important than the tactics, characteristics, and methods used. But given the academic development of a reasonably clear taxonomy, it is useful to explain these terms briefly before identifying what movement lawyering is, and why it is the model best suited to the work needed to adopt and enforce SVRAs in a way that builds power for the communities we care about.

“Impact litigation” is the term generally used for large-scale litigation to challenge large-scale social problems. *Brown v. Board of Education*¹²⁵ is a quintessential case.¹²⁶ Deborah M. Weissman defines impact litigation as work “that, either through class action mechanisms or a more complicated set of facts and circumstances, seek[s] systemic relief applicable to many people.”¹²⁷ It can also refer to a strategy to use multiple cases to “target[] particular issues for focused high intensity litigation.”¹²⁸ Robert Mnookin offered criticisms of impact litigation campaigns, or what in 1985 he called litigating “test cases,” in the context of child advocacy work, noting that “[e]ven the ‘big win’—a ‘favorable’ Supreme Court ruling—may have little day-to-day impact.”¹²⁹ And so community lawyering was developed.

¹¹⁹ See William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 465 (1994) (“There are two traditional methods of public interesting lawyering: providing individual legal services to the indigent...or impact litigation which targets particular issues for focused high intensity litigation.”).

¹²⁰ See Charles Elsesser, *Community Lawyering – The Role of Lawyers in the Social Justice Movement*, 14 LOY. J. PUB. INT. L. 375, 375-76 (2013).

¹²¹ See Quigley, *supra* note 119, at 455-56.

¹²² See Akbar et al., *supra* note 22, at 843.

¹²³ See Deborah N. Archer, *Political Lawyering for the 21st Century*, 96 DENVER L. REV. 399, 401-02 (2019).

¹²⁴ See Perry Grossman & Adriel I. Cepeda Derieux, *Reform Begins at Home: Integrating Voting Rights Litigation and Advocacy in Progressive States*, 74 RUTGERS U. L. REV. 1773, 1797 (2022).

¹²⁵ 347 U.S. 483 (1954).

¹²⁶ Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 VA. L. REV. 1693, 1693 (2004) (“*Brown* came to exemplify the possibility that lawyers could structure and execute a litigation strategy designed to produce substantial changes in the law.”).

¹²⁷ Debroah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between “The Truly National and the Truly Local,”* 42 B.C. L. REV. 1081, 1130 n.268 (2001).

¹²⁸ Quigley, *supra* note 119, at 465.

¹²⁹ ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 525 (1985).

“Community lawyering” was given its name by social justice lawyers seeking to rebuff a lawyer-centric view of civil rights work.¹³⁰ A central tenet of community lawyering, in addition to the belief that social change will occur only when those without power are able to “organize and recognize common grievances,” is that lawyers are not only peripheral to the movements, but that they should be so non-directive that upon meeting potential clients and being asked what they might do for the community, an acceptable answer would be “I don’t know. You haven’t told me yet.”¹³¹

“Empowerment lawyering” was offered as a model by William P. Quigley, to build on community lawyering but with the addition of an explicit goal of “enabl[ing] a group of people to gain control of the forces which affect their lives.”¹³² Though this name has not endured in the scholarship, it provides a similar underpinning to what has come to be called “movement lawyering.” Movement lawyering retains the community-centered approach of community lawyering, without the jack-of-all-trades skills required of community lawyers. Definitions have spanned the academic¹³³ to the practical.¹³⁴ It is very similar to “political lawyering,” a term offered by Deborah Archer,¹³⁵ and “integrated advocacy,” a term favored by voting rights litigators Perry Grossman and Adriel I. Cepeda Derieux,¹³⁶ but differs because it focuses on the goal of power building, not the description of tactics that should be used when seeking social or political change.

Along with the overall goal of power-building, Scott L. Cummings identifies three interrelated objectives that unite movement lawyers: “[1] help[ing] marginalized collectives gain power to change structural conditions of inequality, [2] deepen[ing] participation in democratic decision

¹³⁰ See Elssesser, *supra* note 120, at 378 (explaining how many people come to social justice lawyering believing that “being a lawyer would somehow make them more central participants in the struggle to achieve social justice”); see also *id.* at 375 n.1 (gathering citations).

¹³¹ This is adapted from a quote by an organizer, rather than a self-identified community lawyer, but it explains a similar phenomenon. See Quigley, *supra* note 119, at 464.

¹³² *Id.* at 455-56.

¹³³ “[A] model of practice in which lawyers accountable to marginalized constituencies mobilize law to build power to produce enduring social change through deliberate strategies of linked legal and political advocacy.” Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1652-53 (2017) (emphasis omitted).

¹³⁴ Movement lawyers should move beyond focusing on “largely inconsequential shifts in policy or symbolic victories” and instead think, like organizers, in terms of power to help “low-income communities of color and other oppressed communities . . . to advance their interests.” Alexi Nunn Freeman & Jim Freeman, *It’s About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 CLINICAL L. REV. 147, 150-51 (2016).

¹³⁵ Archer, *supra* note 123, at 402 (“While litigation is central to political lawyering, political lawyers recognize that litigation, interdisciplinary collaboration, policy reform, and community organization must proceed together. Litigation is just one piece of a complex advocacy puzzle.”).

¹³⁶ Grossman & Cepeda Derieux, *supra* note 124, at 1797 (explaining that litigation should also “take advantage of support from organizers, communications professionals, legislative advocates, and legislators in developing facts and constructing narrative” in order to produce “the virtuous cycle of integrated advocacy”).

making, and [3] chang[ing] social attitudes and cultural norms.”¹³⁷ He sees the *strategies* of integrated advocacy, political lawyering, and even community lawyering, as ways to achieve the *objectives* of movement lawyering.¹³⁸ Movement lawyering traces its roots to many scholarly traditions, but in particular to critical race theory.¹³⁹ This is one of the reasons movement lawyering is the right framework for those seeking to enact and enforce SVRAs. Critical race theorists are a pluralistic community with many objectives, but a key innovation of their body of work has been to:

“realize[] that the very notion of a subordinate people exercising rights was an important dimension of Black empowerment during the civil rights movement, significant not simply because of the occasional legal victories that were garnered, but because of the transformative dimension of African-Americans re-imagining themselves as full, rights-bearing citizens within the American political imagination.”¹⁴⁰

Drafting or litigating under a provision that allows people whose votes are diluted because of their race or ethnicity as a mechanism to seek a seat at the table is insufficient without appreciating that the right to vote is not just about access to fair participation, aggregation, and governance.¹⁴¹ It is about dignity and it is about power. Anyone involved in litigation or advocacy under SVRAs should operate from an appreciation of this framework.

Before I explain in detail why I propose a movement lawyering posture for the work of SVRAs, I offer a few words to identify the group(s) for whom voting rights power is lacking.

B. Who Should Seek Access to Power Through State Voting Rights Acts?

Cummings refers to “marginalized collectives” as the groups that movement lawyering seeks to empower. In the voting rights context, we can get a little more specific. The margins may be blurred, but there is general consensus among scholars and practitioners that the people who lack power in our democracy—the “outs”—are “marginalized communities,”¹⁴²

¹³⁷ Cummings, *supra* note 133, at 1653.

¹³⁸ *Id.* at 1657 (theorizing that a renewed interest in movement lawyering as a response to “a longstanding problem in progressive legal scholarship: how to connect authentic bottom-up participation by marginalized groups to an accountable and effective strategy for structural reform that targets legal institutions as a critical site of social struggle”).

¹³⁹ See Akbar et al., *supra* note 22, at 826. For a detailed discussion of the connection between critical race theory and social movements, see *id.* at 832-42.

¹⁴⁰ CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 25, at xiii-xxxii.

¹⁴¹ See Karlan, *supra* note 15, at 1707-08, 1737-38.

¹⁴² Guinier & Torres, *supra* note 20, at 2801.

“nonwealthy and other disenfranchised groups,”¹⁴³ “formations of poor people, working-class people, and people of color,”¹⁴⁴ “workers and minorities,”¹⁴⁵ “people who, acting as individuals, are disempowered relative to wealthy individuals and institutions,”¹⁴⁶ or simply just those who are “other[ed].”¹⁴⁷

Guinier explained her view of herself as a civil rights lawyer as “encourage[ing] ordinary people to make their own lives better.”¹⁴⁸ And she further explained that the problem with the belief in race neutrality by the Reagan Department of Justice, with which she interacted as a young voting rights attorney, was that it “denied the existence of disadvantaged groups who by virtue of historical, social, and economic circumstances were structurally positioned at the bottom, unable to take advantage of formal neutrality.”¹⁴⁹ One of the proponents of adopting what was in the 1980s called a “color-blind” (as opposed to a “color-conscious”) approach to civil rights in the Reagan DOJ was a young staffer named John Roberts. Roberts wrote then of “our commitment to the color-blind principle.”¹⁵⁰ It is perhaps no surprise then that, as Chief Justice, Roberts has doubled down on what is now called a race-neutral approach (“the way to stop discrimination on the basis of race is to stop discriminating on the basis of race”).¹⁵¹ I will refer to the people that I believe SVRAs are designed to serve as not just “marginalized communities,” per Guinier and Torres, but *systemically* marginalized communities. This roughly comports with what Akbar et al. call “formations of poor people, working-class people, and people of color” in the context of movement law.¹⁵²

We know that what I have defined as systemically marginalized communities are disproportionately “othered” when it comes to political power because the empirical data could not be clearer, at least at the federal level.

¹⁴³ Levinson, *supra* note 19, at 136-37.

¹⁴⁴ Akbar et al., *supra* note 22, at 850.

¹⁴⁵ Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 375 n.12 (1982).

¹⁴⁶ Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 552 (2021).

¹⁴⁷ Crenshaw, *supra* note 18, at 1385.

¹⁴⁸ LANI GUINIER, *LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE* 85 (1998).

¹⁴⁹ *Id.*

¹⁵⁰ Letter from John Roberts, Att’y for the U.S. Dep’t of Just., to William French Smith, U.S. Att’y Gen. (Sep. 15, 1983), <https://www.archives.gov/files/news/john-roberts/accession-60-89-0372/doc036.pdf> [<https://perma.cc/M74Q-99N9>].

¹⁵¹ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). *But see* *Allen v. Milligan*, 599 U.S. 1 (2023) (upholding the constitutionality of § 2 of the VRA, with Chief Justice Roberts writing for the majority).

¹⁵² Akbar et al., *supra* note 22, at 850. Note that white people can avail themselves of claims under the federal and state voting rights acts. *See, e.g.*, *United States v. Brown*, 494 F. Supp. 2d 440 (S.D. Miss. 2007). Even though the experience of many racial or ethnic minorities in the U.S. is unique, this doesn’t exclude other groups from experiencing systemic marginalization.

“Government policy bears absolutely no relationship to the degree of support or opposition among the poor” and “the preferences of the vast majority of Americans . . . have essentially no impact on which policies government does or doesn’t adopt.”¹⁵³ Further, when white and non-white people disagree about a federal policy, white people are more likely to get their preferred policy enacted.¹⁵⁴ Despite its many problems,¹⁵⁵ the federal VRA has been used over the past 50 years to improve descriptive and substantive representation for non-white voters.¹⁵⁶ Equality has not been achieved, but there is much less inequality for Black and Hispanic voters in particular, and Asian and Native American voters to some extent.¹⁵⁷

Research at the state level also shows a similar bias in favor of wealthier white voters getting their preferred policies enacted where their views diverge from the views of poorer voters of color.¹⁵⁸ Devin Caughey and Chris Warshaw made an additional, startling, finding with respect to political ideology at the state level, “when a bare majority favors a liberal outcome, the actual policy result is conservative about three-fourths of the time.”¹⁵⁹ Given that systemically marginalized communities currently trend in a liberal direction,¹⁶⁰ this is strong evidence that these communities are, in many places, still the “outs” and will need something to change if they are to gain equal access to power as the “ins.”

At the local level, though cities and towns are broadly believed to be responsive to the views of their constituents,¹⁶¹ there are still large racial inequalities in the provision of services. For example, in 2018, Brian An, Morris Levy, and Rodney Hero made a robust and, frankly, depressing finding that “[t]he more that income inequality is attributable to inequities

¹⁵³ Levinson, *supra* note 143, at 38 (citing MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 81 (2012)).

¹⁵⁴ See NICHOLAS O. STEPHANOPOULOS, *ALIGNING ELECTION LAW* 78-79 (2024).

¹⁵⁵ See, e.g., Pernick & Harper, *supra* note 1.

¹⁵⁶ For a discussion of the definitions of descriptive and substantive representation, see note 38 and accompanying text. See also Mansbridge, *supra* note 39, at 628. For data on the effect of minority-opportunity districts from 1992 to 2005, see David Lublin, Thomas Brunell, Bernard Grofman, & Lisa Handley, *Do We Still Need the VRA: In a Word “Yes,”* (Ctr. for the Study of Democracy, Univ. of Cal., Irvine, Working Papers, 2007), <https://escholarship.org/content/qt3801w0n7/qt3801w0n7.pdf> [<https://perma.cc/2R64-9BEC>].

¹⁵⁷ See generally CHANDLER DAVIDSON & BERNARD GROFMAN, *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990* (1994); see also Pei-te Lien, Dianne M. Pinderhughes, Carol Hardy-Fanta, & Christine M. Sierra, *The Voting Rights Act and the Election of Nonwhite Officials*, 40 POL. SCI. & POLS. 489 (2007).

¹⁵⁸ See STEPHANOPOULOS, *supra* note 154, at 78-79.

¹⁵⁹ DEVIN CAUGHEY & CHRISTOPHER WARSHAW, *DYNAMIC DEMOCRACY: PUBLIC OPINION, ELECTIONS, AND POLICY MAKING IN THE AMERICAN STATES* 121 (2022).

¹⁶⁰ But see generally Nicholas O. Stephanopoulos, *Election Law for the New Electorate*, (Harv. Pub. L., Working Paper No. 24-02, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4871529 [<https://perma.cc/33XF-D7ZR>].

¹⁶¹ See Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government*, 108(3) AM. POL. SCI. REV. 605, 620-21 (2014) (“Policy outcomes in city and town governments can be predicted by the policy conservatism of their citizens.”).

between racial and ethnic groups, rather than between individuals within groups, the less investment localities make in public goods.”¹⁶²

More recently, Justin de Benedictis Kessner made a narrower but important finding, attributing the lower participation of people of color in municipal government elections to inequities in basic government services provision.¹⁶³ In that study, de Benedictis Kessner used sidewalk repairs as a proxy for basic government service delivery. He analyzed the relationship between calls to 311 for sidewalk repairs and the rate of actual sidewalk repairs. He found that “streets in higher income neighborhoods were more likely to improve regardless of the amount of citizen 311 requests for sidewalk repairs, while those in lower income neighborhoods improved only with larger degrees of participation.”¹⁶⁴ That is, those in whiter, wealthier areas would have their services delivered regardless of their input, while those in poorer, minority-heavy areas had to call up their government at higher rates in order to receive similar services.¹⁶⁵ This is a small, proven example of systemic marginalization. Colloquially, organizers know this to be true, at least as to voting and showing up to the rooms where decisions are made. I have heard many organizers speak with community members using an old adage, “if you’re not at the table, you’re on the menu,” to help them visualize their power being eaten up by those, at the table, who are making decisions about how local government will affect people’s lives.

Turning up (to vote, to a meeting, even to call 311) is not just a matter of interest or willpower. We know that people of color and those with lower socio-economic status turn out at lower rates in local elections.¹⁶⁶ The roots of this inequality are deep and varied. For example, Congress recognized the influence of historical discrimination on differential voter turnout when it developed the “Senate Factors” to be used by Courts to analyze the effect of the totality of circumstances under the federal VRA.¹⁶⁷ In recent years, scholars have identified vastly different disparate effects of certain electoral policies compared to others. Though there are still debates about the magnitude of any effect of requiring a photo identification to vote, on the one hand, on the other it is undisputed that holding elections in non-November and odd years can cause a huge skew in the demographic turnout of voters compared to the resident population.¹⁶⁸

¹⁶² Brian An, Morris Levy & Rodney Hero, *It’s Not Just Welfare: Racial Inequality and the Local Provision of Public Goods in the United States*, 54 URB. AFFS. REV. 833, 857 (2018).

¹⁶³ See JUSTIN DE BENEDICTIS KESSNER, WHERE THE SIDEWALK ENDS: HOW PARTICIPATION CONTRIBUTES TO INEQUITY IN BASIC GOVERNMENT SERVICE PROVISION (2023).

¹⁶⁴ *Id.* at 16-17.

¹⁶⁵ *Id.*

¹⁶⁶ Zoltan L. Hajnal & Jessica Trounstein, *Race and Class Inequality in Local Politics*, in TASKFORCE ON RACIAL INEQUALITIES IN THE AMERICAS 139, 140 (Am Pol. Sci. Ass’n., 2016).

¹⁶⁷ See S. REP. NO. 97-417, at 28-29 (1982), *supra* note 60.

¹⁶⁸ Compare Justin Gimmer, Eitan Hersh, Marc Meredith, Jonathan Mummolo & Clayton Nall, *Obstacles to Estimating Voter ID Laws’ Effect on Turnout*, 80(3) J. POL. 1045 (2018)

C. *A Movement to Build Local Power Using State Voting Rights Acts*

It often feels like federal and state governments dominate our lives. Political spending would suggest as much.¹⁶⁹ But, even now, when so much is changing at the federal level, it is local governments that can mediate how higher levels of government interact with people on the ground.¹⁷⁰ For example, note the stark contrast between two neighboring counties in New York in how they interact with federal immigration authorities. In Suffolk County, police will not detain an arrestee solely pursuant to a request or administrative warrant from Immigration and Customs Enforcement (ICE),¹⁷¹ while in neighboring Nassau County, the County Legislature signed an agreement with ICE providing that local law enforcement could interrogate and arrest people without a warrant so long as the officer has “reason to believe” the person is in the United States in violation of law “and is likely to escape before a warrant can be obtained.”¹⁷² Suffolk and Nassau counties voted in very similar numbers for Trump (55% and 52% respectively),¹⁷³ yet one has sided with its immigrant residents, and the other has abandoned them. Why?

I believe the answer lies in a broad understanding of the concept of power. Power is not just about who was elected to the Suffolk and Nassau County legislatures, nor is it only about who was able to vote for the candidates, though both are important and relevant.¹⁷⁴ Daryl Levinson used a

(finding that certain models yield results that would refute the claim that voter ID laws suppress turnout), with Melissa Marschall & John Lappie, *Turnout in Local Elections: Is Timing Really Everything*, 17 ELEC. L.J. 221 (2018) (summarizing literature on election timing and turnout).

¹⁶⁹ See Robby Brod, *Outside Money, Inside Influence: How National Donors Shaped the 2024 Congressional Elections*, OPEN SECRETS (2024), <https://www.opensecrets.org/news/reports/outside-money-inside-influence> [<https://perma.cc/2RXE-62G3>] (last visited Feb. 28, 2026) (“As congressional campaigns have become more nationalized, the share of money coming from within a candidate’s state or district has continued to fall . . .”).

¹⁷⁰ See Greenwood, *supra* note 38 at 212 (“Local governments contribute to whether we make our society a place where people can thrive economically, politically, and socially, regardless of their race or ethnicity, or whether people of color will face an uphill battle just to live, work, and be educated.”).

¹⁷¹ SUFFOLK CNTY. POLICE DEP’T, POLICY 414, at § 414.4 (Oct. 9, 2023), https://suffolkpd.org/portals/18/scpd_pdfs/infoandpolicies/414%20Immigration_Status.pdf [<https://perma.cc/2TSM-7JVN>] (“Arrestees shall not be detained solely pursuant to a request from Immigration and Customs Enforcement (ICE) to hold the arrestee or on the basis of an ICE administrative warrant”).

¹⁷² U.S. IMMIGR. & CUSTOMS ENF’T & NASSAU CNTY. POLICE DEP’T, MEMORANDUM OF AGREEMENT (Mar. 10, 2025), <https://www.documentcloud.org/documents/25589934-nassau-county-pd-ny-tfm-moa-ice-signed-31025/> [<https://perma.cc/FV83-CY43>].

¹⁷³ See *Presidential Election Results: Trump Wins, Margin by County*, N.Y. TIMES, <https://www.nytimes.com/interactive/2024/11/05/us/elections/results-president.html> [<https://perma.cc/N6G2-QLHK>] (last updated Mar. 4, 2025).

¹⁷⁴ See Levinson, *supra* note 19, at 126 (2016) (citing ANNE PHILLIPS, *THE POLITICS OF PRESENCE* 3(1995)). Levinson claims that “the law of democracy has been more concerned with ‘who is present in the legislative assemblies’ than with ‘more urgent questions of what the representatives actually do.’” *Id.* (quoting PHILLIPS, *supra*, at 3). Though I contend here there is a third step beyond the latter.

relatively straightforward definition of power: “[T]he ability to effect substantive policy outcomes by influencing what the government will or will not do.”¹⁷⁵ This was stated even more simply by Gerald López: power is “the capacity to make things the way we want them.”¹⁷⁶ Though these definitions are helpfully simple explanations, they are somewhat circular, in that they substitute “ability” or “capacity” for power. In thinking through how to construct countervailing power, Kate Andrias and Benjamin Sachs observed that, as part of the “tradition of critical legal studies and critical race theory,” we must interrogate the “limits of traditional legal rights in bringing about progressive social change.”¹⁷⁷ In the context of voting rights, Guinier and Torres explained that the goal of activists should be to “chang[e] the wind.”¹⁷⁸ In order to build real power, one must seize the ability to define culture and narratives by “shifting norms of fairness and justice, not just changing the rules.”¹⁷⁹ Guinier and Torres offered the term “demosprudence” to describe power in terms of “ongoing collective action by ordinary people [to] permanently alter the practice of democracy by changing the people who make the law and the landscape in which that law is made.”¹⁸⁰ Everyone can see that SVRAs offer the opportunity for changed laws, but if we are to turn individual victories into a shift in power, we need a movement. As Guinier and Torres proposed, voting rights must be “a precondition to mobilization, not its end.”¹⁸¹

By illuminating the “oft-unrecognized connection between [critical race theory] and social movements”¹⁸² Akbar et al. have offered a framework, movement law, for conceiving of actions taken pursuant to SVRAs as part of a movement to build power for systemically marginalized communities. Even the oft-maligned, and aforementioned, Mr. Shenkman believes that his work is having a “transformative impact . . . on representation and government . . . We are bettering people’s lives.”¹⁸³ But by ignoring the most basic lessons from critical race theory, he hasn’t turned those rule changes into power building. It doesn’t have to be this way. I next outline some of the major lessons from critical race theory and movement lawyering that I think anyone litigating in the SVRA space (whether they consider themselves a “voting rights lawyer” or not) would do well to heed.

¹⁷⁵ *Id.* at 39.

¹⁷⁶ Gerald P. López, *Transform—Don’t Just Tinker with—Legal Education (Part II)*, 24 CLINICAL L. REV. 247, 285 (2018).

¹⁷⁷ Andrias & Sachs, *supra* note 146, at 554.

¹⁷⁸ Guinier & Torres, *supra* note 20, at 2742.

¹⁷⁹ *Id.* at 2759.

¹⁸⁰ *Id.* at 2750.

¹⁸¹ *Id.* at 2772.

¹⁸² Akbar et al., *supra* note 23, at 832.

¹⁸³ Fagone & Lempres, *supra* note 90, at 4 (quoting Kevin Shenkman).

III. CRITICAL RACE THEORY AND SOCIAL MOVEMENTS: LEARNING FROM HISTORY

“Changing the wind” is an ambitious goal for any movement, let alone a lawyer pursuing a single voting rights case under a lone statute.¹⁸⁴ It’s tempting to just focus on the wording in the complaint and the arguments in the briefs. But I think it is possible, even for lawyers untrained in organizing, messaging, campaigns, or any of the other tools of social movements, to make a contribution to “wind changing” if they understand their clients’ goals within the context of a desire for community power—the power of the “outs” to have just as much a say in the rules and policies that govern their lives as the “ins.”¹⁸⁵

Many brilliant scholars have written of historical social movements and litigation campaigns, and I do not here seek to engage in a comprehensive review. Rather, I extract five lessons from the movement law literature, as defined by Akbar et al. to include critical race theory literature,¹⁸⁶ that I think we can use prescriptively in the context of a campaign to build local power using SVRAs.

A. Look to the Bottom

1. Scholarship

The once-dominant narrative that Thurgood Marshall and his LDF team were the sole ingredient needed to lead Black Americans towards a desegregated society was thoroughly dismantled by scholars like Gerald Rosenberg in 1971,¹⁸⁷ Derrick Bell in the 1980s,¹⁸⁸ Michael Klarman in 2004,¹⁸⁹ and Kenneth Mack¹⁹⁰ and Tomiko Brown-Nagin in 2005.¹⁹¹ Briefly:

“Rosenberg argued that the Supreme Court’s decree in *Brown* was largely ineffective until the executive branch and Congress began

¹⁸⁴ See Guinier & Torres, *supra* note 142, at 2749 (explaining that if social movements can produce “durable social and legal change” that would be changing the wind, not just securing a legal victory here or there).

¹⁸⁵ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 103 (1980) (describing a democratic malfunction as including when “the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out”).

¹⁸⁶ Akbar et al., *supra* note 22, at 826.

¹⁸⁷ See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (3d ed. 2023).

¹⁸⁸ See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

¹⁸⁹ See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

¹⁹⁰ See generally Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256 (2005).

¹⁹¹ See generally Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005).

to support civil rights reform a decade later. He concluded that [B]lack communities and the NAACP had misplaced their resources by relying on legal liberal transformation and should have supported lobbying, community mobilization, and direct action instead.”¹⁹²

Bell criticized the movement following *Brown* in multiple ways. Most relevant here, he believed litigators in the 1970s were merely seeking to replicate *Brown* over and over, and “fail[ing] to consider continually the limits imposed by the social and political circumstances under which clients must function even if the case is won.”¹⁹³ He warned litigators that legal victories would “bring little meaningful change unless there is continuing pressure for implementation from the [B]lack community.”¹⁹⁴ For example, in the context of Boston school desegregation litigation, Bell explained that the lawyers ended up actively working against their clients’ interests. Pursuing desegregation to the exclusion of claims to increase funding to predominantly Black schools meant that the litigators were scoring Pyrrhic victories— “racial balance measures have often altered the racial appearance of dual school systems without eliminating racial discrimination.”¹⁹⁵ Guinier similarly chided post-1960s civil rights litigators, including herself, for letting the lawyers lead, rather than listening to the demonstrators and the marchers. She explained that “[w]e were advocates not agitators. We pursued those options we knew best: formal, technical strategies that often seemed mysterious even to clients most invested in our success.”¹⁹⁶ She regretted that they relied on their learned experience more than the lived wisdom of community members; “[t]hough these others knew more about local politics, had to endure the consequences of local wrath, and had more at stake, they nevertheless had less input.”¹⁹⁷

Michael Klarman doesn’t fault the post-*Brown* school desegregation litigators per se, but he notes that the litigation alone had limited success in changing the level of segregation in schools (and almost no effect in the South). He does, however, credit the backlash to *Brown* (and the following litigation efforts) as being used effectively by the social movement that ushered in the environment in which the civil rights advances of the 1960s could occur.¹⁹⁸

¹⁹² Mack, *supra* note 190, at 260-61.

¹⁹³ Bell, *supra* note 188, at 513.

¹⁹⁴ *Id.* at 514. Bell cited Gary Bellow’s earlier criticism to support his argument (“‘[R]ule’ [sic] change, without a political base to support it, just doesn’t produce any substantial result because rules are not self-executing: they require an enforcement mechanism.” (alteration in original) (quoting Gary Bellow, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1077 (1970))).

¹⁹⁵ *Id.* at 518.

¹⁹⁶ GUINIER, *supra* note 148, at 227.

¹⁹⁷ *Id.* at 228.

¹⁹⁸ Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 85 (1994) (“That *Brown* had little direct impact on school desegregation is

Tomiko Brown-Nagin agreed with Klarman's findings that a social movement will often be more important than the work of litigators. In her analysis of the movement for affirmative action, she suggested "[J]uridical law should play a secondary role in social movements seeking fundamental change; mass movements must lay the groundwork for constitutional litigation. Those seeking social justice should first mobilize outside the law before attempting to change society through law in the courts."¹⁹⁹

In the same year as Brown-Nagin's analysis of the affirmative action campaign, Kenneth W. Mack looked back at the pre-WWII movement for civil rights and concluded that even then, the movement was about so much more than just litigation. Mack finds that, despite many scholars assuming that the main driver of change in the inter-war period was the NAACP, and later NAACP LDF, and their litigation strategy, instead the real power of the movement was to "generate[] disputes within civil rights politics and arguments about law, social change, and African-American identity that far exceed the scope of the debates that have animated standard legal histories of the civil rights movement."²⁰⁰ He concludes that "[t]he civil rights lawyers believed that litigation was a necessary, but not sufficient, part of the movement to make African-American citizenship real."²⁰¹

Despite the various ways these scholars describe the deficiencies of the later civil rights movement, they converge on two related prescriptions for movement lawyers. First, as Brown-Nagin explained, lawyers must accept that "the ability of communities to leverage the law for social change should not be understood as a power resting with attorneys."²⁰² Second, following this logic, lawyers should "not attempt to lead clients" but look to the clients to decide the movement's strategy, if not the individual litigation decisions.²⁰³

apparent, yet the decision may still have been tremendously important because of its indirect effects.").

¹⁹⁹ Brown-Nagin, *supra* note 191, at 1445.

²⁰⁰ Mack, *supra* note 190, at 263.

²⁰¹ *Id.* at 349. There are, of course, many movements lawyers who have employed similar approaches in their fights. For additional analysis on movement lawyering in the environmental justice context, see also Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENV'T. L. J. 687, 694, 707 (1995) (advocating lawyering models that "aim[] to maximize community involvement in [administrative proceedings]," and "strive[] to create an active, powerful community presence that can wield political influence,").

²⁰² Brown-Nagin, *supra* note 191, at 1521; see also Mack, *supra* note 192, at 349 (noting that civil rights lawyers in the inter-war period understood that "litigation was a necessary, but not sufficient, part of the movement to make African-American citizenship real").

²⁰³ Bell, *supra* note 188, at 512.

2. Application to Campaigns Using SVRAs

As a matter of theory, many lawyers seeking to utilize something like a newly adopted SVRA will agree that it is normatively good to defer to the people on the ground who are affected by the current system and will need to live with any remedy. Even if one does not agree that this is the right normative stance, in practice, lawyers will at least understand that following their clients' directions is required by the rules of professional responsibility.²⁰⁴ But, as will be discussed further below, choosing which clients to represent in a community will involve its own set of moral choices and beliefs about the preferred mechanisms of social change. It may be tempting to avoid stepping into this moral quagmire, and to retreat to selecting a client that shares a concrete and limited goal with the lawyer, and then to tell oneself that one's professional obligations mean the lawyer can do only what that one client wants. Though I think choosing a client that has goals aligned with the lawyers' interests and competencies is a good idea, it should be done *after* fully engaging with a community—from the bottom up.

The first possible set of clients are those members of the utterly disenfranchised community. The place where no one can even conceive of their problem as one that could involve voting rights litigation. The connection between daily struggles like fear of ICE raids, stolen wages, or unequal high school graduation rates and voting rights is not obvious, nor necessarily the most direct way, for communities to deal with immigration, employment, or education inequities. Occasionally a person will file a federal VRA action *pro se*,²⁰⁵ or call up a civil rights organization asking for help with redistricting,²⁰⁶ but if litigators wait around for these calls, they will miss many opportunities to help systemically marginalized communities build power.

Rather than wait for opportunities to present themselves, movement lawyers seeking to build power should take a leaf from the community lawyering playbook. Charles Elsesser explains the many ways that lawyers can engage in base-building: through “know your rights” events, explaining the “dramatic impact of packing a courtroom with neighbors and organizational members,” and engaging in outreach such as “go[ing] door to door and talk[ing] to individual families.”²⁰⁷ These should all be parts of the

²⁰⁴ Each state bar promulgates its own rules of professional responsibility, but they are largely similar to those outlined in MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2020), which dictates that “a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”

²⁰⁵ See Motion for Declaratory Judgment and Injunctive Relief at 1, *Holloway v. City of Virginia Beach*, 531 F.Supp.3d 1015 (E.D. Va. Mar. 31, 2021) (2:18-cv-00069).

²⁰⁶ This is how my representation of the Concerned Citizens of Joliet began, when they called Jorge Sanchez at MALDEF for help (who called me). See Greenwood, *supra* note 38, at 227-28.

²⁰⁷ Elsesser, *supra* note 120, at 393-94 (“Lawyers can be powerful allies in base building. Public interest lawyers often provide ‘know your rights’ trainings for client groups and

movement lawyers' playbook, at least if they are trying to help a community understand the possibilities that could unfold from a newly adopted SVRA. This should be done with the goal of education and learning. It should not be done as a front for instruction while the lawyer is really falling into the trap outlined by Derrick Bell, that lawyers "attempt to lead clients" and "adopt an attitude of 'we know what's best' in determining legal strategy."²⁰⁸

I believe there is a way to find the goldilocks zone between leaving a disenfranchised community alone and telling a disenfranchised community what to do. I learned most of the following steps from a creative and energetic organizer in New York. First, lawyers should hitch their wagon to organizers and find trusted messengers who can do general training about power imbalances and structures of oppression in our society. This type of training is fairly typical of social justice work and, provided it is done with sensitivity to the needs of the target community, can build trust within the group, and establish a safe space for community members to describe their frustrations. It's possible that this training could occur over a one-to-two-day session, or perhaps over shorter sessions spread out over weeks or months. Keeping lawyers (external, movement lawyers at least) out of these initial trainings may work best, because, despite our best efforts to find common cause with systemically marginalized communities, we will be seen, at least initially, as part of the establishment that the community wants to reform. Keeping the establishment (even if only perceived) out of the room will allow community members to speak freely of their frustrations and concerns.²⁰⁹

Once the community has identified a list of grievances and started to identify both what they want to stop in their community and what positive changes they might seek, it will be useful to add lawyers to the mix. Lawyers can offer information about what policies and laws could be changed (given the legal restrictions of the particular jurisdiction), and how easy or difficult various routes to those changes are. In the context of SVRAs, this will usually be a discussion about electoral system change and/or changes to the laws and policies that govern access to voting. I have rarely found a better messenger for electoral system change than a person that has been through a similar effort in their own community. That activist is usually agnostic as to the needed change in the community they visit (though very much in favor of the change they adopted for their community), so they can

participate in other public presentations. These trainings and presentations can be used in conjunction with organizational events to introduce the organization, build the organizational power, or simply provide added benefits to the organization members.").

²⁰⁸ Bell, *supra* note 188, at 512.

²⁰⁹ A student of mine, Maria Nolan, attended an organizing session with a community we work with. The session was conducted in Spanish, her native language, but she related that she had to move away from certain conversations, as she became aware that people of color felt they couldn't speak freely in her presence—she is a white woman, and community members moved into hushed tones when sharing experiences of skin color-based discrimination.

present their experiences, without trying to pressure people to follow in their footsteps. Ideally, multiple types of changes can be presented by multiple activists, each explaining why a particular change was right for their community. Though the process of identifying problems and solutions will be dynamic—changing over time in response to changes in law and society—selecting opportunities when a community can agree to a chosen strategy for a chosen period, can be helpful to keep momentum high through the long process of seeking to build local power.

When it comes time to work with a community as they decide which direction to pursue, there is one fundamental hurdle that lawyers must acknowledge and seek to minimize: money and their need for it. The private lawyers that have thus far worked on SVRA cases have come from one of three places: a public interest organization, a law firm that relies on winning attorneys' fees to keep operating in the space, or a law firm where attorneys take on state voting rights work purely pro bono. In each case, money can drive perverse incentives. For those at public interest firms, the lawyers will be supported by funders, and they will usually need to report on their work to those funders. Try as one might to set one's own course through soliciting philanthropic giving, some types of work are easier to "sell" to these audiences, and lawyers should be aware of their own bias in wanting a community to pursue a campaign that makes such selling easier. This bias might favor a particular type of remedy, a particular speed of campaign, or a particular choice of allies for the work. For those at firms that need to win attorneys' fees to cover the costs of their involvement, there can be an intense pressure to move into litigation quickly, and to settle on whatever terms are possible, so long as attorneys' fees are included. And for those at firms engaging in pro bono work, there will be numerous other paid clients taking one's attention away, such that the ability of lawyers to attend weekly or monthly organizing meetings is almost impossible. They may ask for the clients to call them only when they are ready to file suit. Each of these incentives may be genuinely helpful if well aligned with a client (e.g. bringing in allies that the lawyer knows; pushing for a quick settlement; or keeping the lawyers out of the organizing discussions may all be very welcome to particular communities). But where interests don't align, lawyers should be ready to hold back on their own desires, such that the community's needs come first.

3. *Illustration*

Riverhead is a small town in Suffolk County at the eastern end of Long Island. It has an increasing Latino population, many of whom are either farm workers in the large agricultural industry, or service workers for the nearby wealthy visitors to the Hamptons. Riverhead Central School District is a subset of the area of the Town. The School District area is comprised of 74% non-Hispanic white citizens of voting age (a rough estimator of

the eligible voter population),²¹⁰ yet only 25% of the student body in the schools are non-Hispanic white.²¹¹ The schools are 64% Hispanic (though only 11% Hispanic by citizens of voting age) and 7% Black (but 13% Black by citizens of voting age).²¹² Demographic differences like these will only cause a representational problem if white and non-white citizens have different preferences for educational policy, different preferred candidates for the school board, and different ideas about how to run the schools. Sadly, these differences are indeed borne out in Riverhead.

A group of Latino parents with children in Riverhead schools got together in 2017 to try to work out how they could better advocate for their children in the schools. They formed the Comité de Educación Inclusiva y Equitativa (Committee for Inclusive and Equitable Education) and started meeting every other week. They were lucky to be in a community that had a physical space for them to meet—Rural & Migrant Ministry has a headquarters there. They were also lucky to have a Suffolk County-based organizer with the New York Civil Liberties Union (“NYCLU”) willing to offer training sessions to parents on the educational rights of both their children and them, as parents. The Committee has now been running yearly workshops, led by NYCLU, for over eight years. The workshops provide information on the educational rights with a focus on issues commonly facing Latino parents. For example, rights to bilingual information and classes, additional assistance completing admission forms using foreign identification documents, and the like.

The Committee parents soon realized that a lot of decisions were made for the Riverhead schools at the board meetings, so they started to attend. The meetings were held entirely in English with all written materials provided in English. The Committee parents decided to bring their own interpreter and interpretation equipment for parents to use, so that they could not only attend the meetings, but actually understand what was going on at them. After years of workshops to train parents, Committee meetings, and school board meetings, the Committee came up with a long list of changes they wanted to see in the schools. They asked the lawyers to help represent them in discussions with the school board, as they pressed for the changes they wanted.

Over the past few years, I have been part of a group of lawyers working with these organizers to try to use the threat of litigation to bring the changes that those on the ground want to see in their community. It is long, slow, and hard work. We suffer setbacks, personnel changes are frequent, and new national policies change the focus of the community and the School

²¹⁰ *Riverhead CSD* (“Citizen VAP 2024”), DAVE’S REDISTRICTING APP, <https://davesredistricting.org/join/345608b1-8d51-4abe-a9b6-5b47e6a810db> [<https://perma.cc/5VFG-3TQ3>].

²¹¹ *Id.*, *Riverhead CSD Enrollment (2023 - 24)*, N.Y. STATE EDUC. DEP’T, <https://data.nysed.gov/enrollment.php?year=2024&instid=800000036960> [<https://perma.cc/K84Z-8NUE>] (last visited Nov. 6, 2025).

²¹² *Id.*

Board. But we are advancing towards a more equal system—for example, the School Board agreed to stand up a new “Community Involvement & Language Access Advisory Committee”—and if progress stops, we can always revert to legal action.

If the lawyers had taken over and chosen the strategy, they would have missed the value of letting a community organization slowly grow, learn, and decide for itself what strategy to pursue. The lawyers haven’t built local power, but their presence and advice are a necessary ingredient as the community builds its own power. Though time will tell, I feel confident that this strategy will have more success than if the lawyers had turned up and filed a New York VRA suit early on and then tried to work with the community on how to remedy the violation.

Even in a community without such committed parents, and pre-existing philanthropically funded organizers, lawyers can help to identify and shepherd organizing resources that can be brought into a community, can set up meetings that center members of the affected community, and can do all the legal and factual digging needed to educate the community as they consider which goals to prioritize and which strategies to pursue.

B. Find the Right Client

1. Scholarship

Lawyers in the United States do not have the “cab rank rule”—that is, they need not take on a client just because they have available capacity and the proper expertise.²¹³ Who then is the “right” client for a public interest minded lawyer to sign on? I referenced in the section above certain clients that would be “wrong” to represent (beyond those with formal conflicts)—namely those with conflicts that are not formal in terms of legal ethics but are still apparent in terms of strategy. For example, a client that wants a remedy that a public interest organization does not want to promote, or a client that wants to fight to the bitter end without settlement if a lawyer will feel pressure from its organization to settle. Putting these aside, there are more considerations in the choice of clients.

Plaintiffs can and should be the heart and soul of their legal case. Putting them on the stand gives them a chance to be given the respect and space that they are so often denied in their community. When they sit in the witness box, they are usually physically elevated above the attorneys, looking almost eye to eye with the judge. The courtroom must stay quiet

²¹³ See generally *Cab Rank Rule: Statement of the Four Bars*, BAR COUNCIL UK (May 26, 2023), <https://www.barcouncil.org.uk/resource/cab-rank-rule-statement-of-the-four-bars.html> [<https://perma.cc/LCL6-7LT8>] (“The cab rank rule is a bedrock obligation for the independent referral Bar. The rule means that barristers cannot discriminate between clients, and that they must take on any case provided that it is within their competence and they are available and appropriately remunerated.”).

and listen to what this person has to say. And if a defense attorney is badgering the plaintiff, her lawyer can jump up and object—asking that the attorney respect the plaintiff and let her explain herself in her own way.²¹⁴ Putting aside all the rest of the case and the movement, this opportunity is something that can provide meaning and dignity for a person who is so often othered, ignored, or beaten down. In addition to the worth to the plaintiff of the testimonial experience, a case that hinges on questions of discrimination (as SVRA cases do) may often be best put into words by “those who have experienced discrimination” because they can “speak with a special voice.”²¹⁵ Elite lawyers can describe the problems of discrimination in opening and closing arguments, and well-paid experts can recite the historical and current conditions faced by communities of color in the jurisdiction. But when a plaintiff speaks from the witness box and repeats slurs used against her, or describes the daily indignities she bears, the lonely thud of each small moment alongside the overwhelming force of oppression are made clear. It’s not only the judge that will experience this, but the defendants themselves, community members watching in court, along with press who can share those stories beyond the courtroom.

People or organizations that are left out of the plaintiff group will end up not being able to join certain strategic discussions because the attorney-client privilege will not extend to them. This problem has been identified in the context of class actions, wherein the suit “serv[es] only those who pay the attorney fee [which] has the effect of permitting the fee paying minority to impose its will on the majority of the class on whose behalf suit is presumably brought.”²¹⁶ But it applies perhaps with more force here because there is not a class into which community members can opt into. Some will be deeply invested in the outcome of the litigation, yet utterly without standing to be a named plaintiff.

Finally, lawyers must consider that “social movements are not always democratic or accountable to the grassroots,” and “[f]actions are often jockeying for position and power in ways that are difficult to assess from the outside.”²¹⁷ By spending time with a community, and on-the-ground organizers, lawyers can get a sense of not only whose story should be highlighted, but also who should be at the table as decisions are made about the direction of the case and the movement.

²¹⁴ For a narrative discussion of the power to plaintiffs, and witnesses, of their own testimony, see GUINIER, *supra* note 148, at 205-19.

²¹⁵ Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

²¹⁶ Bell, *supra* note 188, at 491.

²¹⁷ Akbar et al., *supra* note 22, at 852.

2. Application to Campaigns Using SVRAs

The factors listed above suggest signing up a broad and diverse pool of plaintiffs, but there are many pressures weighing against such a decision, particularly in the context of SVRA litigation. Being a plaintiff is not a cakewalk. Plaintiffs will usually be required to provide written answers to interrogatories, to search their physical and digital files in response to requests for production, and to attend an hours-long deposition where they can be required to answer all sorts of questions about their life and private opinions. They must stay up to date on the case so they can give input as to case direction at each stage, and the case may last for many years, so this obligation may follow them through various phases of their life. Movement lawyers must warn their prospective clients of both the good and the bad that may come their way, so they can make an informed choice as to whether to be part of the plaintiff team. Further, the lawyers themselves must be prepared to support the plaintiffs through this arduous process. Managing dozens of plaintiffs through the discovery process can be overwhelming and a drain on already-limited resources.

Once the lawyer has worked out whom she will represent, she should have a plan to deal with the fact that she is setting up a hierarchy—plaintiffs over non-plaintiffs—when it comes to information received and decision-making authority. Even certain plaintiffs within the group, perhaps those that are less marginalized by language or class, may take on a lead role, setting up a further hierarchy. Allowing these hierarchies to harden “can undermine movement goals such as mobilizing and organizing communities to challenge authority.”²¹⁸ Similarly, establishing from the beginning that the lawyer is not above the clients in any meaningful way is important for both lawyers and clients to understand. Patricia Williams described clients looking “to lawyers almost as gods” and how that led clients to be “frightened, pleading, dependent (and resentful of their dependence).”²¹⁹ Not allowing this type of power imbalance to develop (or breaking it down the moment it starts) is crucial for lawyer-client relationship to reflect the goals of the litigation and the movement itself.

Even with plaintiffs that choose to protect their attorney-client privilege, there are many aspects of litigation that are public facing—every court filing, for example, will usually be a public document.²²⁰ This allows a group of plaintiffs and attorneys to make connections with the wider community to plan out organizing, communications, and advocacy campaigns. How to choose which groups to align with has been the subject of much debate in

²¹⁸ Brown-Nagin, *supra* note 191, at 1506.

²¹⁹ Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R. C. L. L. REV. 401, 403 (1987).

²²⁰ The rules on filing under seal are set out in FED. R. CIV. P. 5.2.

the movement law literature, and those seeking to practice using SVRAs can learn a lot from those lessons.

3. *Illustration*

In almost every case I have worked on, a plaintiff or witness has had a well-founded concern about retaliation or harassment by the defendant government entity. Some examples include: a woman who asked to be removed from the witness list for fear that speaking out against discriminatory practices in the jurisdiction could lead a 16-year old family member to be tried as an adult for a non-violent crime; a plaintiff that invoked his First Amendment rights in refusing to give the name of a member of his union that he spoke with about government action with which they disagreed; and a plaintiff that received death threats in the days after trial, resulting in the court sealing address records for her.²²¹ When I write of the “right” client, I don’t only mean that the person has a legally cognizable, concrete, and particularized harm, that is redressable by the government entity.²²² I also mean that the client should be able to survive the grueling process of being a possible target for defense counsel, the media, and community members who do not support the litigation’s cause.

C. *Make Unusual Allies*

1. *Scholarship*

There will necessarily be a divide between the information shared with, and instructions received from plaintiffs as compared to non-plaintiffs. Despite this, movement lawyers should assist those on the ground to seek out all kinds of allies—whether to join the litigation as a whole, be supportive of parts of the movement but not involved in the litigation itself, or come in at only certain stages of the litigation. The purpose of engagement beyond the plaintiff group, and even beyond the group committed to the movement, is encapsulated by what Derrick Bell called the “interest convergence dilemma.”²²³ Bell wrote that “[t]he interest of [B] lacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”²²⁴ Julian Bond said as much when reflecting on the very first case in which he served as a plaintiff seeking to end segregated schools in Pennsylvania: he noted that it wasn’t until the prospect of the white political boss having to send his son to a Black school materialized that the

²²¹ I am not including citations for these stories in order to protect the individuals involved.

²²² *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

²²³ Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

²²⁴ *Id.*

schools were integrated.²²⁵ And Guinier included “broad-based coalitions” in her four reasons why the Selma campaign for voting rights was successful (albeit a legislative, not litigation based, campaign).²²⁶ Extending this idea, Kate Andrias has identified a “new labor law” in which employers, employees, and government actors work together in a new way, at least at the state and local levels, and with results to show for it: for instance, the success of the Fight for \$15 campaign in New York.²²⁷ Bell even went so far as to identify judges as possible unlikely allies.²²⁸

2. Application to Campaigns Using SVRAs

Here, I urge those litigating under SVRAs to see themselves as just one part of a broad effort by racial, ethnic, or language minorities to seek local power. By definition, a minority group will need allies to gain majority support. Sometimes the allies are obvious—other racial or ethnic minorities may benefit from an electoral system that no longer allows a white majority to choose every candidate for local office.²²⁹ But if it’s minorities that are enfranchised by a new electoral scheme, then that benefit will extend to non-racial minorities like political minorities, socio-economic minorities, age minorities and so forth.

Another bucket of individuals and organizations that might be called “unusual allies” are those focused on an issue that has failed to gain traction

²²⁵ See Julian Bond, *With All Deliberate Speed: Brown v. Board of Education*, 90 IND. L. J. 1671, 1672 (2015).

²²⁶ GUINIER, *supra* note 148, at 182 (“The preachers couldn’t do it alone. Black preachers couldn’t do it alone. White clergy, Jewish leaders, business people, all eventually joined that march from Selma to Montgomery.”).

²²⁷ See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 68 (2016) (“In contrast, the Fight for \$15 is making demands on state actors, as well as employers. It has systematically engaged regulatory and legislative structures, through testimony, strikes, and protests. In so doing, the campaign has positioned government as a co-negotiator in determining workers’ material conditions; it has pushed government actors away from the role they have occupied since Taft-Hartley, while moving labor unions more squarely into the public policy space.”).

²²⁸ See Bell, *supra* note 224, at 530 (“Surely, I was not the only civil rights attorney who received a favorable decision in a school desegregation case less by legal precedent than because a federal judge, initially hostile to those precedents, my clients and their lawyer, became incensed with school board litigation tactics that exhibited as little respect for the court as they did for the constitutional rights of black children.”).

²²⁹ This can be furthered by coalition claims, *see, e.g.*, Verified Complaint ¶ 149, *Clarke v. Town of Newburgh*, 226 N.Y.S.3d 310 (N.Y. Sup. Ct. 2024) (“Black and Hispanic voters residing within the Town, including Plaintiffs, are members of a protected class within the meaning of Election Law § 17-206(2)(a).”), but can also be furthered by a single racial minority winning a case and a new electoral system being adopted, *see, e.g.*, *United States v. Village of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010) (adopting cumulative voting in response to a claim alleging that Hispanic voters’ votes were diluted by the at-large system); Gabriel Rom, *Port Chester Vote Signals New Era in Village Politics*, THE JOURNAL NEWS, (Oct. 12, 2018), <https://www.lohud.com/story/news/local/westchester/2018/10/11/port-chester-vote-signals-new-era-village-politics/1601883002/> [https://perma.cc/M4XV-36R8] (explaining the “gains in African-American and Hispanic representation” since adoption of cumulative voting).

with the majority. For example, inequities in resource distribution and policies like flood abatement, trash collection, or snow removal, may disproportionately impact people of color in an unrepresentative local government, but may also affect members of the racial majority. Though these majority members may not have an interest in democratic reform to enhance their power in general, if you can raise their voices to join your chorus on a specific issue, your numbers will swell. A brilliant organizer I know has often described policy convenings as an effort to make “intentional spaces for unintentional connections” and she has also said: “I don’t need you to care about redistricting the *most*, but I need you to care about it *first*.” Once the electoral system includes basic fairness, such that the outs aren’t always the outs, then people with all sorts of minority policy views can have a genuine chance at representation. They will need to gain majority support for actual policy change, but even raising minority policy issues is out of the question if all the representatives are chosen by a fixed majority. It doesn’t take too much reform to at least give minority-supported representatives a seat—and a voice—at City Hall. And that reform can form the basis for unlikely allies to converge on at least some interests.

3. *Illustration*

In the early 1990s, Guinier was famously derided for her (entirely reasonable and nuanced) support for proportional representation remedies to improve minority representation.²³⁰ Yet today, Kevin Kosar of the American Enterprise Institute (“AEI”), a conservative think tank that “wielded unprecedented influence during the George W. Bush years,”²³¹ writes that conservatives should consider electoral reforms like proportional representation because they could roll back some of the polarization, destructive competition, and extreme stands taken by the two major political parties.²³² I doubt that supporters of Guinier and AEI agree on much, but when it comes to having your voice heard, they do have one thing in common—wanting the views of those outside the mainstream, whether left or right, be a part of the conversation, and even part of the systems of power. This type of strange bedfellow may extend to many more jurisdictions than those linked by political and racial minorities. For example, Republicans in California and Democrats in Texas both stand to lose under the recent mid-decade

²³⁰ See GUINIER *supra* 148 at 36-55 (discussing the attacks on Guinier during her nomination for Assistant Attorney General for Civil Rights).

²³¹ Michael Schaffer, “A Real Chilling Effect”: A Lefty Scholar is Dumping CAP—For AEI, POLITICO (Jul. 15, 2022), <https://www.politico.com/news/magazine/2022/07/15/capital-city-ruy-teixeira-american-enterprise-institute-00045819> [<https://perma.cc/CS6P-Y3EG>].

²³² Kevin R. Kosar, *Conservatives Should Look More Closely at Systemic Election Reforms*, AMERICAN ENTERPRISE INSTITUTE, 7 (Oct. 3, 2023), <https://www.aei.org/research-products/report/conservatives-should-look-more-closely-at-systemic-election-reforms/> [<https://perma.cc/MQZ6-W8SK>].

redistricting efforts by their governors.²³³ The key to any unlikely alliance is not that the two groups have the same reason for supporting a particular reform—in fact, they will likely have very *different* reasons for doing so. They must only support the same policy, however small. Then those groups can take a single step forward together, and each venture off to find new allies for the steps after that.

D. *Winning Through Losing*

1. *Scholarship*

The moniker “winning through losing” was coined by Douglas NeJaime in 2010.²³⁴ He explained that “sophisticated advocates may use litigation loss (1) to construct organizational identity and (2) to mobilize constituents.”²³⁵ Though the term was new in 2010, the concept dates back at least to Charles Hamilton Houston, the much-revered first general counsel of the NAACP. In 1937, when trying to explain the role that he saw litigation playing in the NAACP’s campaigns for racial equality, Houston wrote:

“(1) we use[] the courts as dissecting laboratories to extract from hostile officials the true machinations of their prejudices, (2) we use the courts as a medium of public discussion, since it is the one place that we can force America to listen, and (3) we attempt to activate the public into organized forms of protest and support behind these cases, under the theory that a court demonstration unrelated to supporting popular action is usually futile and a mere show.”²³⁶

These accounts don’t suggest that adopting a “winning through losing” stance means you must plan to lose. Rather, the idea is that without these broad campaign plans, you almost certainly won’t win. But if you are up against stiff odds, then planning how you will use the fact of litigation to spur the movement toward change by other means is crucial. First, the litigation process itself can confer dignity on those who testify and engage with the media and public throughout the litigation and trial. I outlined above how this can occur for plaintiffs, but it can also be empowering for anyone who will take the witness stand and share their truth. Guinier described this in the context of voting-related litigation she undertook early in her career with LDF:

²³³ Joshua Zeitz, *California and Texas are Going Full Gilded Age*, POLITICO (Nov. 3, 2025), <https://www.politico.com/news/magazine/2025/11/03/should-democrats-gerrymander-too-history-says-yes-00633178> [<https://perma.cc/F46Y-AU5C>].

²³⁴ See generally Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2010).

²³⁵ *Id.* at 941.

²³⁶ Mack, *supra* note 190, at 348-49 (internal citations omitted).

“Through the simple act of testifying, these private people gained dignity and safeguarded their status as members of a community. In the singular, however, whether as voters or witnesses, they did not have power. Only by bringing people together and allowing them to speak their stories to the court and the world at large did their status generate power.”²³⁷

The evidence compiled during the litigation can also help make the record. That record may help in later litigation,²³⁸ or it may “focus public concern on systemic problems and create momentum for legislative or administrative change.”²³⁹ An obvious example in the context of SVRAs is for activists to plan a ballot initiative campaign to seek change in case they cannot get it through litigation. Convincing a majority that has all the power to choose a new electoral system by initiative (in which they will no longer have all the power) may seem difficult, but if the right messages are developed alongside the litigation, it might just work.

2. Application to Campaigns Using SVRAs

Planning to turn losing into winning may not be possible or necessary in all litigation seeking social change. In particular, it may not be desirable or necessary for those pursuing conservative causes. When a case presents a clear liberal-conservative cleavage, the Roberts Court sides with conservatives in almost all cases,²⁴⁰ so a widespread people-powered campaign is probably not necessary to secure a win at the Supreme Court for certain policy positions. Perhaps this is why the conservative legal movement has not been guided by ground-up organizing; rather, it has been an elite-led affair. For example, Steven Teles traces the success of the conservative legal movement to, *inter alia*, “constructions of expertise, conventional wisdom, and prestige.”²⁴¹ And Jane Mayer describes the Kochs’ influence movement as creating a “fully integrated network” of think tanks, academic programs, advocacy groups, Congressional lobbyists, legal groups and judicial junkets, notably excluding any grassroots based efforts.²⁴²

²³⁷ Guinier, *supra* note 148, at 221.

²³⁸ For a discussion of the ways this can occur in the context of social movements see Gregory Briker, *The Anatomy of Social Movement Litigation*, 132 YALE L.J. 2304, 2331-37.

²³⁹ Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 539 (1987-88).

²⁴⁰ See Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 178 (positing that a legal realist theory of the Roberts Court may be an accurate explanation of its rulings, as “[r]unning like a red thread through the Roberts Court’s anti-*Carolene* decisions is perceived, and actual, partisan advantage . . . [for] conservative elites”).

²⁴¹ STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 3 (2008).

²⁴² JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* 6 (2016).

Perhaps pro-democracy litigators can learn from the conservative legal movement's tactics. Indeed, building a network that spans different sectors of society and seeks to influence different levers of power is exactly what movement lawyers do. And, just as the Supreme Court is a good venue for conservative litigators, many state courts are good venues for those relying on the "democracy principle."²⁴³ Despite these parallels, I don't see the work of the conservative legal movement as a deep well of knowledge for movement lawyers seeking to build power for systemically marginalized communities. First, and perhaps most obviously, there is the hypocrisy of planning a movement for inclusivity and democracy grounded in elite capture and top-down organizing. But, more practically, getting court victories on paper is not going to build local power for those currently left behind. To follow the conservative legal movement's playbook would be to risk losing through winning.

3. Illustration

This illustration draws from my work in partisan gerrymandering, rather than racial vote dilution, but I think its message is helpful and so I share it here. Starting in 2015, I was a member of the counsel team representing Bill Whitford and twelve other individuals arguing that the Wisconsin State Assembly plan was a partisan gerrymander in violation of the First and Fourteenth Amendments.²⁴⁴ In June 2017, the U.S. Supreme Court took the case, making it possible that it might, for the first time ever, set a standard for unconstitutional partisan gerrymandering and strike down a redistricting plan on that ground. It was also possible that the Court would decide that partisan gerrymandering claims were nonjusticiable and close off the avenue of federal litigation for the foreseeable future across the entire country.²⁴⁵ The stakes were high. Earlier in the litigation, I had met with some potential funders, and they asked me who was running the national campaign. I explained we hadn't built out a national, or even statewide, campaign yet because we were still pre-trial and the local attorneys didn't want to litigate the case in the media. They told me, with sympathetic eyes that only highlighted my naivety, that we would not win without a national campaign. And, as I learned, we weren't going to turn losing into winning without a campaign either. By the time the case was argued in October 2017, and

²⁴³ Jessica Bullman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 909 (2021) ("State courts are particularly well-suited to implement the democracy principle, given their own democratic qualifications—their election, in most states, and their susceptibility to override through constitutional amendment if they err").

²⁴⁴ That case ultimately culminated in *Gill v. Whitford*, 585 U.S. 48 (2018).

²⁴⁵ See Brief for Appellants at i, *Gill*, 585 U.S. 48 (No. 16-1161) ("Did the district court lack jurisdiction over this case because statewide partisan-gerrymandering claims are nonjusticiable?").

certainly by the time it was decided in June 2018, there were state-specific efforts to end gerrymandering across the country and a national messaging campaign that tried to coordinate state and national groups.²⁴⁶ There was a plan to win the campaign war, even if we lost the litigation battles. And, in many ways, that is what happened. After another of my cases resulted in partisan gerrymandering being declared nonjusticiable,²⁴⁷ the 2020 round of redistricting could have been a bloodbath for partisan fairness. In some places, it was.²⁴⁸ But overall, the U.S. House went from having one of the greatest partisan biases in modern history in the 2010s to having almost no bias at all in the 2020s.²⁴⁹ This occurred despite the huge litigation losses in both *Gill* and *Rucho*.²⁵⁰ We snatched victory from the jaws of defeat because we learned about “winning through losing.”

E. Losing Through Winning

1. Scholarship

“Losing through winning” is a concept I have developed as an extension of Douglas NeJaime’s scholarship on “winning through losing.”²⁵¹

There is a decent chance that a state that is willing to adopt a SVRA will have a highest court of appeal that is more favorable to claims of racial discrimination than the Supreme Court of the United States.²⁵² And so, we must think through how to build power through SVRAs in the face of

²⁴⁶ For more information about the many efforts to fight gerrymandering from 2015-2020, see generally DAVID DALEY, *UNRIGGED: HOW AMERICANS ARE BATTLING BACK TO SAVE DEMOCRACY* (2020).

²⁴⁷ See *Rucho v. Common Cause*, 588 U.S. 684, 721 (2019).

²⁴⁸ See, e.g., *Wisconsin 2022-2024 Redistricting Plan*, PLANSCORE, <https://planscore.org/wisconsin/#!2022-plan-ushouse-eg> [<https://perma.cc/4QGA-ZFX4>] (showing a pro-Republican efficiency gap of 22%); *Illinois 2022-2024 Redistricting Plan*, PLANSCORE, <https://planscore.org/illinois/#!2022-plan-ushouse-eg> [<https://perma.cc/XMD8-V39D>] (showing a pro-Democratic efficiency gap of 21%).

²⁴⁹ See Nicholas O. Stephanopoulos, Eric McGhee & Christopher Warsaw, *The House’s Republican Edge Is Gone. But The Gerrymander Lives*, WASH. POST (Mar. 3, 2025), <https://www.proquest.com/blogs-podcasts-websites/house-s-republican-edge-is-gone-gerrymander-lives/docview/3173166427/se-2> [<https://perma.cc/V2VT-JMBQ>] (“In the 2022 and 2024 elections, according to standard measures of partisan bias, the House exhibited no pro-Republican lean at all.”).

²⁵⁰ See *Gill*, 585 U.S. at 72 (holding plaintiffs did not have standing to make a claim as to the statewide harm of partisan gerrymandering); *Rucho v. Common Cause*, 588 U.S. 684, 721 (2019) (holding partisan gerrymandering claims to be nonjusticiable in federal courts).

²⁵¹ See generally NeJaime, *supra* note 234.

²⁵² States with a similar definition of SVRAs to that used in this article are collected at *State Voting Rights Acts*, LEGAL DEFENSE FUND, <https://naacpldf.org/state-voting-rights-acts/>. Currently each state with a SVRA, as I define it, has a majority liberal state supreme court. See *State Courts Hub*, ALLIANCE FOR JUSTICE, <https://afj.org/statecourts/> [<https://perma.cc/H6KC-MYPD>] (last visited, Apr. 1, 2026).

litigation victories. This may seem like a trick proposition: isn't winning litigation the goal of filing it? And, therefore, shouldn't winning necessarily fulfill some, if not all, of the goals of those filing the litigation? Sadly, this is not so.

In much public interest litigation, the remedy is obvious—don't build the pipeline; let the DREAMers stay in the country; keep voter registration open on the Sunday before voting. But in various areas of civil rights, including SVRA litigation, not only is the remedy not obvious, but it also is hard to identify what system a single person might want, let alone get a whole community to agree on a preferred alternative. Alan David Freeman saw this as a question of perspective—seen through the perpetrator's perspective, the imposition of a negative injunction is the whole ball game; but seen through the victim's perspective, the thing that matters is what a positive injunction includes.²⁵³ You can get rid of the at-large election system that allows a numerical majority to win all the seats and gives even a sizable minority no ability to elect candidates of choice. But, when it comes time for the remedy, it is very difficult, at least at the federal level, to have a court order a plan that is preferred by the plaintiffs (the "victims"). Instead, courts defer to the elected legislature (the "perpetrator") to offer a remedial redistricting plan.²⁵⁴ It is possible to defeat such an attempt by showing that the legislature's proposal insufficiently remedies the harm,²⁵⁵ but if the new plan scrapes through constitutional and federal statutory review, a court will approve it over the opposition of plaintiffs.²⁵⁶

²⁵³ See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053 (1978) ("The victim, or 'condition,' conception of racial discrimination suggests that the problem will not be solved until the conditions associated with it have been eliminated. To remedy the condition of racial discrimination would demand affirmative efforts to change the condition. The remedial dimension of the perpetrator perspective, however, is negative. The task is merely to neutralize the inappropriate conduct of the perpetrator.").

²⁵⁴ See *Covington v. North Carolina*, 283 F. Supp. 3d 410, 424 (M.D.N.C. 2018), *aff'd in part, rev'd in part*, 585 U.S. 969 (2018); see also *Upham v. Seamon*, 456 U.S. 37, 41 (1982) ("[R]eapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." (quoting *White v. Weiser*, 412 U.S. 783, 794-95 (1973))).

²⁵⁵ See, e.g., *Jacksonville Branch of NAACP v. City of Jacksonville*, No. 3:22-cv-493-MMH-LLL, 2022 WL 17751416, at *17 (M.D. Fla. Dec. 19, 2022) ("Plaintiffs' circumstantial evidence demonstrates that the effects of the prior racial gerrymandering . . . remain present in the Remedial Plan.").

²⁵⁶ See, e.g., *Harris v. McCrory*, No. 1:13-CV-949, 2016 WL 3129213, at *2 (M.D.N.C. June 2, 2016), *aff'd sub nom. Harris v. Cooper*, 585 U.S. 1027 (2018) ("While the Court may share the plaintiffs' skepticism about the General Assembly's process in drafting the Contingent Congressional Plan, including the exact criteria actually evaluated by the map drawer, Dr. Hofeller, the plaintiffs have not sufficiently proffered a theory on why this plan 'violates anew constitutional or statutory voting rights.'").

2. Application to Campaigns Using SVRAs

Provided a SVRA *does not* include a safe harbor, like that used in California,²⁵⁷ and *does* include a specific statement preventing deference to a legislature's proposed remedy, like that used in New York,²⁵⁸ victorious litigants should be in better shape to avoid losing their victory. Here again though, what might constitute a win is less linear than one might hope. First, the plaintiff group (and ideally, the broader community and allies involved in the movement, not just the litigation) will be able to agree on which remedy they would like. Savvy lawyers will have sought feedback from plaintiffs before agreeing to represent them on acceptable remedies to avoid conflicts at the remedial phase. To the extent conflicts arise, legal counsel will need to advise clients to seek outside counsel on whether to continue their representation with the same set of attorneys.²⁵⁹ If the conflict cannot be resolved, and if no party is willing to waive a conflict and allow the lawyers to continue to represent some but not all plaintiffs, then the attorneys who litigated through to a victory in terms of a negative injunction will have to hand the reins over to two (or more) new attorney teams.

Assuming that the plaintiffs agree, attorneys will need to work with them to socialize preferred remedies with community members, but without waiving attorney-client privilege. In practice, this means either having a publicly available preferred remedy from the outset of litigation or discussing what the plaintiffs have proposed after it has been filed with the court. There are pros and cons to each approach, and attorneys and plaintiffs will ideally make these determinations *ex ante*, alerting both those in and outside the plaintiff group in advance of litigation how they propose to share remedial ideas with the non-plaintiff movement members.

Even if a victory is won, including both a negative injunction and a positive injunction, and even if members of the movement roughly agree upon the terms of those injunctions, the real winning will be determined by the implementation process. Those litigating school desegregation cases knew the difficulties of implementation all too well. For example, Brown-Nagin highlighted the problem of white flight as a backlash response to *Swann v. Charlotte-Mecklenburgh Board of Education*,²⁶⁰ and Bell denounced the results of many post-Brown desegregation cases, noting that even though a

²⁵⁷ See *supra* section I.C.

²⁵⁸ See N.Y. ELEC. LAW § 17-206(5)(b).

²⁵⁹ Rules of professional conduct are governed at the state level, but many rely on the American Bar Association's Model Rules of Professional Conduct Rules 1.7 to 1.10 govern client conflicts.

²⁶⁰ See Brown-Nagin, *supra* note 191, at 1518-19 ("[The decision] precipitated a wide-ranging backlash, as has school desegregation litigation generally. The resistance was evinced by white flight from the cities into the suburbs, where fewer minorities live, and minority resistance to the goal of integrated schooling. As a consequence of these dynamics, black and Hispanic students attend overwhelmingly segregated schools." (citations omitted)).

variety of measures were tried across multiple cases, these “racial balance measures [] often altered the racial appearance of dual school systems without eliminating racial discrimination.”²⁶¹

A slightly different problem faces those who litigate voting rights cases. Once a new electoral system is adopted—whether it be a new district plan or an entirely new voting system—there will need to be candidates who are the choice of the community represented by the plaintiff group. Public interest lawyers usually cannot engage in partisan political activity,²⁶² so the community will be left to determine who might run, what resources they need to run, and how to campaign under a new system. Activists in California have described exactly this problem following California VRA cases.²⁶³

A second problem of implementation is encouraging a community to participate in elections when all they have known to date is that their votes never matter. They may, fairly reasonably, have stopped bothering to vote in local elections altogether. Re-enfranchising a community like this will involve organizing and public education. It could also involve those who have utilized a similar electoral system sharing their experiences to help the community believe that their votes might actually matter in a new system. Further, it may be at this stage that irregularities in the voter registration system are identified, and additional legal action will need to be taken to help victorious litigants fully realize the changes they have helped install.

Assuming many of the eligible voters in the systemically marginalized community can register to vote, then a get-out-the-vote campaign and education on the candidate options will be necessary. Perhaps organizers will need to establish an election protection program to ensure that this community of new voters can vote and have those votes count.²⁶⁴ Lawyers can help with aspects of this implementation. To begin, they can include a requirement of a certain level of funding for public education for the first election after implementation of a new system. The DOJ included this in their settlement agreement with the Town of Port Chester upon the adoption of cumulative voting, and that settlement could provide a worthy guide to

²⁶¹ Bell, *supra* note 188, at 530-31.

²⁶² This assumes the public interest firm has a tax exemption under 26 U.S.C. § 501(c)(3).

²⁶³ See Phil Willon, *A Voting Law Meant to Increase Minority Representation Has Generated Many More Lawsuits Than Seats for People of Color*, L.A. TIMES (Apr. 9, 2017), <https://www.latimes.com/politics/la-pol-ca-voting-rights-minorities-california-20170409-story.html> [<https://perma.cc/Z8QP-UL68>] (“Of course, simply changing to district elections under threat of legal action doesn’t guarantee that Latinos will be elected. For that to happen, there must voter registration, strong candidates and robust participation by the electorate.”).

²⁶⁴ See, e.g., *About Election Protection: What We Do*, ELECTION PROTECTION, <https://866our-vote.org/about/> [<https://perma.cc/9QVY-G3FY>] (last visited Feb. 28, 2026) (“We provide Americans from coast to coast with comprehensive information and assistance at all stages of voting – from registration to absentee and early voting, to casting a vote at the polls, to overcoming obstacles to their participation. Election Protection helps voters make sure their vote is counted through a number of resources.”).

those seeking these types of remedies.²⁶⁵ Beyond this, attorneys should take every implementation step with a view to self-sufficiency of the movement and the organizers on the ground. Making a change for a single election is helpful, but to really say the community that litigated “won,” they should be able to remain competitive in elections beyond the first one.

Without attention to all the steps of implementation after a litigation victory, attorneys risk letting their client experience “winning as losing.” Once you have the new system, the cause of action is (presumably) moot even for other possible plaintiffs, and so you don’t get another shot at using SVRA litigation to build local power. Attorneys should plan, even before filing a suit, for how they will genuinely win any litigation victory.

3. Illustration

The Department of Justice sued the Town of Eastpointe, Michigan in 2017, alleging vote dilution in violation of the federal VRA. In June of 2019, the DOJ entered an agreement to settle the case, with the Town adopting ranked choice voting for multiple representatives with voting on a city-wide basis (what today we would call proportional ranked choice voting or “PRCV”).²⁶⁶ That new system was used in the November 2019 elections. This gave the voters of the Town very little time to learn about the new system; the election administrators had very little time to implement the new system, and candidates had to learn a new way to campaign on the fly. Though an evaluation suggested that the two candidates elected in that first election included a candidate of choice of the minority community,²⁶⁷ that same evaluation found that the preferred candidate of the minority Black community was not elected.²⁶⁸ The PRCV system was only used in 2019 and 2020, and without the Town, or the DOJ, taking any action to use PRCV for elections beyond the initial trial, the Eastpointe City Council has returned to its original at-large election system.²⁶⁹

²⁶⁵ See Consent Decree, *United States v. Village of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010).

²⁶⁶ Press Release, U.S. Dep’t of Just., Justice Department Reaches Agreement with City of Eastpointe, Michigan, Under the Voting Rights Act (June 5, 2019), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-eastpointe-michigan-under-voting-rights-act> [<https://perma.cc/M2VZ-CSGE>].

²⁶⁷ See Nora Dell, *Ranked Choice Voting and Proportional Representation Successes from Eastpointe, Michigan*, FAIRVOTE (Jun. 22, 2021), https://fairvote.org/ranked_choice_voting_and_proportional_representation_successes_from_eastpointe_michigan/ [<https://perma.cc/Y2LR-MBH9>] (“African American voters had an influence in the outcome of the election”).

²⁶⁸ *Id.* (chart showing Mary Hall-Rayford with the plurality of support, 46%, amongst African American voters).

²⁶⁹ Alyssa Burr, *What is ranked choice voting? The ballot initiative Michigan voters could decide in 2026*, THE MICH. INDEP. (Jul. 14, 2025) (“The city used ranked choice voting in 2019 and 2020 in local elections as part of the settlement.”), <https://michiganindependent.com/politics/ranked-choice-voting-ballot-initiative-2026/> [<https://perma.cc/8VW3-G6QN>].

Though there was value in setting the precedent that a federal VRA suit could be settled with a PRCV remedy, without anyone on the ground to maintain the remedy it simply vanished.

CONCLUSION

The movement to adopt and use SVRAs has gained momentum in recent years. It is crucial that attorneys who seek to use the new statutes to build local power for systemically marginalized communities understand and accept that SVRAs have not yet been the engines of change that the federal VRA became after its amendment in 1982. Legislative advocates have learned from the strategic errors of the language of the California VRA, with newer acts not including perverse incentives such as safe harbors that undermine them. But litigators would do well to learn from the long history of using litigation as a tool to advance social justice movements. This article proposes that we look to movement law, which crucially for the type of litigation I discuss here, incorporates critical race theory to turn these potentially game-changing statutes into actual change.

To build local power through SVRA litigation, attorneys should learn five lessons from the movement law literature. *First*, litigators should look to the bottom—highlight the plight of the fixed “outs” and garner sympathy with the “ins” for these experiences. *Second*, litigators should identify unusual allies—show how even those in the fixed “in” category may have policy issues where they agree with a minority of the community. *Third*, litigators should choose the right clients—not merely those who align with the attorney’s ability to represent but rather based on the clients’ needs and lawyer’s future plans. *Fourth*, litigators must have a plan to win through losing—litigation is but one avenue of change, and if it does not succeed, there must be plans in place to make change through other avenues. And *finally*, litigators must not let themselves lose despite a court victory—a court order for the plaintiffs is neither necessary nor sufficient for local power to be built, and there must be both a plan to win in the event of a litigation loss, and a multi-faceted plan to implement any victory and use it to grow local power.

Guinier and Torres challenged a new generation to use their organizing and litigation to “chang[e] the wind.”²⁷⁰ They warned that too much focus in past impact litigation campaigns on “doctrine and rules deflected time, energy, and resources from the harder work of changing the culture.”²⁷¹ It is easy to feel that such momentous activity—changing the culture—is far beyond the reach of an attorney filing suit against a small jurisdiction in a state court. Perhaps it is beyond the reach of many of us. But even if we cannot change the wind ourselves, I urge us to at least build the circumstances under which it can happen.

²⁷⁰ Guinier & Torres, *supra* note 20.

²⁷¹ *Id.* at 2748.