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AB 1301: An Attempt to Eliminate Persistent Voter Discrimination

Brian Russ

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Code Sections Affected
Elections Code §§ 400, 401, 402, 403, 404 (new).
AB 1301 (Jones-Sawyer); vetoed.

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I. INTRODUCTION

Residents of the City of Whittier hope to elect a Latino to the City Council in 2016.[1] In Whittier's 116-year history, only one Latino has served on the City Council, with a term from 1978 until 1990.[2] Viewed without more, the hope is commendable and the history is palatable, but the hope becomes urgent and the history suspect when viewed against a single demographic: since 2000, more than fifty-five percent of the city's population has been of Hispanic or Latino heritage.[3] In June 2014, to elect a more representative city council, Whittier voters approved a change to the city's charter to allow councilmember elections by geographic districts rather than at-large elections.[4]

A year before the citizens of Whittier ushered in their new electoral protection, the United States Supreme Court struck a key protection from the federal Voting Rights Act of 1965 (VRA).[5] In June 2013, the Supreme Court freed cities and counties across the United States—including three California counties—from the preclearance requirements of the VRA by finding those requirements unconstitutional in *Shelby County v. Holder*.[6] In California, reactions in the affected counties were mixed: Yuba County officials expressed relief because "counties were put into 'preclearance' for all the wrong reasons."[7] Monterey County remembered the impacts of preclearance with appreciation, "Today, the local election system, though far from perfect, is more inclusive."[8]

Assembly Member Jones-Sawyer introduced AB 1301 to restore some of the VRA protections, and its introduction was met with mixed reactions similar to

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1. Times Editorial Bd., *Whittier's Voting System Shift Is Better for Latinos, but Not Ideal*, L.A. TIMES (Oct. 20, 2014), http://www.latimes.com/opinion/editorials/la-ed-whittier-voting-rights-act-20141020-story.html (on file with *The University of the Pacific Law Review*).

2. Hector Becerra, *Upscale Latinos at Home in Whittier*, L.A. TIMES (Mar. 22, 2008), http://articles.latimes.com/2008/mar/22/local/mewhittier22/2 (on file with *The University of the Pacific Law Review*).

3. ACS DEMOGRAPHIC AND HOUSING STATISTICS: 2009-2013 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, WHITTIER CITY, U.S. CENSUS BUREAU, *available at* http://factfinder.census.gov/ (on file with *The University of the Pacific Law Review*); PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, WHITTIER CITY, U.S. CENSUS BUREAU, *available at* http://factfinder.census.gov/ (on file with *The University of the Pacific Law Review*).

4. Mike Sprague, *Whittier Latino Groups Gear up for April 2016 City Council Election*, WHITTIER DAILY NEWS (Aug. 6, 2015), http://www.whittierdailynews.com/governmentandpolitics/20150806/whittierlatinogroupsgearupforapril2016citycouncilelection (on file with *The University of the Pacific Law Review*).

5. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013).

6. *See Jurisdictions Previously Covered by Section 5 at the Time of the Shelby County Decision*, U.S. DEP'T OF J., http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Aug. 6, 2015) (on file with *The University of the Pacific Law Review*) (listing the jurisdictions no longer covered by Section 5 of the VRA as a result of *Shelby County*).

7. Eric Vodden, *Bills May Require Election 'Preclearance'*, APPEAL-DEMOCRAT (Mar. 31, 2015), *available at* http://www.appealdemocrat.com/news/billsmayrequireelectionpreclearance/article_f0049f72d76d11e481db6717de9feff.html (on file with *The University of the Pacific Law Review*).

8. Roberto M. Robledo, *County Has a Chapter in Voting Rights Act History*, SALINAS CALIFORNIAN (Aug. 7, 2015), http://www.thecalifornian.com/story/news/education/2015/08/06/county-chapter-voting-rights-act-history/31258995/ (on file with *The University of the Pacific Law Review*).

Shelby County: fear that the legislation would impose costly mandates[9] and hope that the bill would be more effective than the VRA.[10] The City of Whittier was not subject to the VRA's preclearance review, but it would have been subject to AB 1301 preclearance review.[11] With AB 1301 came hope that cities like Whittier would not have to wait another century for a representative government.[12]

II. LEGAL BACKGROUND

Signed in 1965, the VRA was trumpeted as the "the toughest, most studiously foolproof civil rights law ever devised."[13] President Lyndon B. Johnson symbolically chose to sign the VRA in the President's Room of the Capitol where, a century earlier, President Abraham Lincoln signed a measure freeing slaves from Confederate service.[14] In the 2013 decision *Shelby County v. Holder*, the Supreme Court declared Congress's 2006 renewal of VRA Section 4(b), a key element of the legislation, "irrational" and unconstitutional.[15] Chief Justice Roberts, writing for the 5–4 majority, concluded: "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[16]

A. The Voting Rights Act of 1965

The VRA aimed to subject potentially discriminatory state voting procedures to federal preclearance review before the procedures became effective.[17] Section 5 established the subject of the preclearance review: all new voting procedures must be reviewed by the U.S. Attorney General to confirm that they do "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[18] Section 4(b) established the preclearance review coverage formula: any state or political subdivision in a state was subject to preclearance if it (1) maintained a test or device to deny or abridge the right to

9. *June 2, 2015 Assembly Floor Session on AB 1301*, 2015 Leg., 2015–2016 Sess. (Cal. 2015), *available at* https://vimeo.com/129729574 (on file with *The University of the Pacific Law Review*).

10. ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING, COMMITTEE ANALYSIS OF AB 1301, at 7 (Apr. 29, 2015).

11. *Infra* Part IV.A.

12. Becerra, *supra* note 2.

13. James Harwood, *Voting Rights Act Closes Loopholes*, WALL ST. J., Aug. 9, 1965, at 8.

14. E.W. Kenworthy, *Johnson Signs Voting Rights Bill, Orders Immediate Enforcement*, N.Y. TIMES, Aug. 7, 1965, at 1.

15. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013).

16. *Id.*

17. Federal Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

18. *Id.* at 439.

vote on account of color, and (2) of its resident eligible voters, less than fifty percent were registered to vote as of November 1, 1964 or actually voted in the 1964 presidential election.[19] Neither California nor any political subdivisions in California were subject to the VRA under the coverage formula as originally enacted.[20]

B. California Becomes Subject to the VRA

Political subdivisions in California became subject to preclearance review as the VRA was amended and the Section 4(b) coverage formula was expanded.[21] Congress amended the VRA in 1970, updating the trigger dates in the Section 4(b) coverage formula from 1964 to 1968.[22] With the 1970 amendments, the counties of Monterey and Yuba became the first California political subdivisions subject to federal preclearance review.[23] These counties fell under the 1970 amendments because during the 1968 presidential election, less than fifty percent of the counties' eligible voters registered to vote or turned out to the elections.[24]

The VRA's Section 4(b) coverage formula was amended again in 1975, substantially expanding its scope and impact in California.[25] The 1975 amendment added protections for language minority groups, prohibiting the use of English-only election materials or ballots in a state or political subdivision where at least five percent of the voting age population belonged to a single language minority.[26] The counties of Kings, Merced, and Yuba fell under the 1975-amended Section 4(b) coverage formula because during the 1972 presidential election, they administered English-only ballots and less than fifty percent of the counties' eligible voters registered to vote or turned out to the elections.[27] No other California political subdivision fell under the Section 4(b) coverage formula after 1975.[28]

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19. *Id.* at 438.

20. 28 C.F.R., pt. 51 app. (2007).

21. *Jurisdictions Previously Covered by Section 5 at the Time of the Shelby County Decision*, *supra* note 6.

22. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315 (1970).

23. 28 C.F.R., pt. 51 app. (2007).

24. *See* SENATE COMMITTEE ON ELECTIONS AND CONSTITUTIONAL AMENDMENTS, COMMITTEE ANALYSIS OF AB 1301, at 4 (May 12, 2015) (noting that the counties also fell under federal preclearance "because of compliance with certain state laws in effect at the time").

25. Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975) (amending the Voting Rights Act of 1965).

26. *Id.* at 401–02.

27. SENATE COMMITTEE ON ELECTIONS AND CONSTITUTIONAL AMENDMENTS, *supra* note 24, at 4; JOAQUIN G. AVILA ET AL., VOTING RIGHTS IN CALIFORNIA: 1982–2006, 17 S. CAL. REV. L. & SOC. JUST. 131, 163–164 (2008).

28. *Cases Raising Claims under the Language of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/cases-raising-claims-under-language-minority-provisions-voting-rights-act (last

1982 VRA amendments enacted strict standards for covered jurisdiction to receive a "bailout"[29] from preclearance review under Section 5 of the VRA.[30] A covered jurisdiction is eligible for bailout when, among other requirements, the covered entity has fully complied with the VRA for a period of ten years preceding the bailout request.[31] Once the bailout is granted, the jurisdiction must not violate of the VRA for another ten years lest they would become a covered jurisdiction again.[32] In 2011, the Alta Irrigation District in Kings County became the first political subdivision in California to receive a VRA bailout.[33] In 2012, Merced became the first California County to receive a VRA bailout.[34] And, finally, the Browns Valley Irrigation District and the City of Wheatland, both in Yuba County, received VRA bailouts in 2013.[35]

C. Shelby *and the VRA Today*

Less than a year later, the Supreme Court found the Section 4 coverage formula unconstitutional because it was not based on current conditions, effectively freeing all covered state or political subdivisions from Section 5 preclearance review.[36] The Court explained that the coverage formula could satisfy the Fifteenth Amendment only if "jurisdictions [are] singled out on a basis that makes sense in light of current conditions."[37] The coverage formula could not be constitutionally-justified because it was derived from "decades-old data and eradicated practices."[38] Due to *Shelby*, the California counties of Monterey, Kings, and Yuba, and any other subdivision, no longer must submit new voting procedures to the U.S. Attorney General for preclearance review.[39]

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updated Oct. 16, 2015) (on file with *The University of the Pacific Law Review*); AVILA ET AL., *supra* note 27, at 163–64.

29. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 199 (2009) (explaining the purpose and availability of the bailout procedure).

30. Act of Jun. 29, 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (1982) (amending the Voting Rights Act of 1965 to extend certain provisions).

31. 52 U.S.C. § 10303(a) (2015).

32. *Id.* § 10303(a).

33. Consent Judgment and Decree at 13, Alta Irrigation Dist. v. Holder, No. 1:11-cv-00758 (D.C. Cir. July 15, 2011).

34. Consent Judgment and Decree at 2, Merced Cnty. v. Holder, No. 1:12-cv-00354 (D.C. Cir. July 27, 2012).

35. Consent Judgment and Decree at 5, Browns Valley Irrigation District v. Holder, No. 1:12-cv-01597 (D.C. Cir. Feb. 4, 2013); Consent Judgment and Decree, at 5–6, City of Wheatland v. Holder, No. 1:13-cv-00054 (D.C. Cir. Apr. 25, 2013).

36. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (inviting Congress to draft a new Section 4 coverage formula based on current needs).

37. *Id.* at 2629.

38. *Id.* at 2628.

39. *See Jurisdictions Previously Covered by Section 5 at the Time of the Shelby County Decision*, *supra* note 6 (listing the jurisdictions no longer covered by Section 5 of the VRA as a result of Shelby County).

1. Responses to Shelby *Across the U.S.*

Shelby spurred legislative reactions across the nation: Colorado's legislature urged Congress to update the coverage requirements of the VRA,[40] and Maryland's legislature considered resolutions to encourage amending the U.S. Constitution "to affirm every citizen's freedom to vote."[41] The legislatures of Florida and New York considered establishing statewide preclearance reviews similar to AB 1301, but did not enact either program.[42] In 2015 alone, Congress introduced four bills to reestablish preclearance review, but all of the bills failed.[43]

2. California's Response to Shelby

California's legislature responded to *Shelby* in 2013 when Assembly Member Luis Alejo introduced preclearance legislation in AB 280.[44] AB 280 died when it was held on the Senate Appropriations Committee's suspense file.[45] AB 280 was the precursor to AB 1301; the policy prescriptions are nearly identical.[46] The major difference between the two bills is that AB 1301 would not have required preclearance approval for the relocation or reduction of polling places in census tracts with high proportions of protected class voters.[47]

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40. H.R.J. Res. 14–1009, 69th Gen. Assemb., Reg. Sess. (Colo. 2014).

41. S.J.R. 6, 2014 Gen. Assemb., Reg. Sess. (Md. 2014); H.R.J. Res. 2, 2015 Gen. Assemb., Reg. Sess. (Md. 2015).

42. H.B. 1139, 2015 Leg., Reg. Sess. (Fla. 2015) (died in April 2015); A.B. 05922, 2015-2016 Leg., Reg. Sess. (N.Y. 2015) (has not progressed since it was introduced and referred to committee in March 2015).

43. *All Bill Information (Except Text) for H.R. 885*, LIBRARY OF CONG., https://www.congress.gov/bill/114th-congress/house-bill/885/all-info (last visited Aug. 25, 2015) (on file with *The University of the Pacific Law Review*); *All Bill Information (Except Text) for H.R. 934*, LIBRARY OF CONG., https://www.congress.gov/bill/114th-congress/house-bill/934/all-info (last visited Aug. 25, 2015) (on file with *The University of the Pacific Law Review*); *All Bill Information (Except Text) for H.R. 2867*, LIBRARY OF CONG., https://www.congress.gov/bill/114th-congress/house-bill/2867/all-info (last visited Aug. 25, 2015) (on file with *The University of the Pacific Law Review*); *All Bill Information (Except Text) for S.B. 1659*, LIBRARY OF CONG., https://www.congress.gov/bill/114th-congress/senate-bill/1659/all-info (last visited Aug. 25, 2015) (on file with *The University of the Pacific Law Review*). The last action on H.R. 885 was assignment to subcommittee on March 16, 2015. H.R. 885, 114th Cong. (2015). The last action on H.R. 934 was assignment to subcommittee on March 16, 2015. H.R. 934, 114th Cong. (2015). The last action on H.R. 2867 was assignment to subcommittee on July 9, 2015. H.R. 2867, 114th Cong. (2015). The last action on S.B. 1659 was assignment to committee on June 24, 2015. S.B. 1659, 114th Cong. (2015).

44. Press Release, Assembly Member Luis Alejo, Legislative Proposal to Protect California Voting Rights (Sept. 16, 2013), *available at* http://asmdc.org/members/a30/news-room/press-resleases/legislative-proposal-to-protect-california-voting-rights (on file with *The University of the Pacific Law Review*).

45. *AB 280 Voting Preclearance Bill History*, TOTAL CAPITOL (June 18, 2014) http://totalcapitol.com/?bill_id=201320140AB280 (on file with *The University of Pacific Law Review*).

46. Cal. State Ass'n of Cntys., *Elections Bill Amends out Unworkable Polling Place Provisions*, CSAC BULLETIN (May 1, 2015), http://bulletin.counties.org/sec.aspx?id=5C697DFD#8A24BC4A39F7BB33 1FB9F83 (on file with *The University of the Pacific Law Review*).

47. *Id.*

III. AB 1301

AB 1301 would have required covered political subdivisions to receive Secretary of State approval before enacting or administering specific changes to four categories of voting-related laws, regulations, or policies.[48] The political subdivision would have had the burden to establish the non-discriminatory nature of the change submitted for the Secretary's approval.[49] If the Secretary of State denied the specified changes, the political subdivision could have sought review by filing an action against the Secretary in Sacramento County Superior Court.[50]

A. Voting-Related Policy Changes Subject to Review

AB 1301 identified four categories of voting-related laws, regulations, and policies subject to the Secretary of State's approval.[51] The first category provided oversight to changes to an at-large method of election that "adds offices elected at-large or converts offices elected by single-member districts to one or more at-large or multimember districts."[52] The second category scrutinized changes to an electoral jurisdiction's boundaries that reduce the relative size of a protected class of voters by five percent or more within the jurisdiction.[53] The third category addressed changes to district boundaries within an electoral jurisdiction that experienced a significant population increase of a single protected class.[54] Finally, the fourth category monitored changes to non-English language voting materials that did not apply to English language voting materials or that reduced the availability of non-English language voting materials.[55]

B. Secretary of State's Preclearance Review

Under AB 1301, covered political subdivisions would have been required to submit the voting-related law, regulation, or policy to the Secretary of State for approval before it became effective.[56] Once submitted, the Secretary would have

48. AB 1301 § 402(a), 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted). Covered political subdivisions are lawfully-organized "geographic area[s] of representation created for the provision of government services" in which more than one "racial or ethnic groups each represent at least twenty percent of the citizen voting-age population in the political subdivision." *Id.* § 402(c), (f).

49. *Id.* § 402(c).

50. *Id.* § 402(d), (f).

51. *Id.* § 402(a).

52. *Id*.

53. *Id.* § 402(b). Protected voters are "voters who are members of a race, color, or language minority group as [the] class is referenced and defined in the federal Voting Rights Act of 1965." *Id.* at § 400(g).

54. *Id.* § 401(c).

55. *Id.* § 401(d).

56. *Id.* § 402(a).

had to issue a written decision to the subdivision within sixty days.[57] The subdivision could have implemented the law, regulation, or policy if the Secretary failed to issue a written decision within sixty days.[58] A political subdivision may have requested an expedited initial review by the Secretary if there was "a demonstrated need to implement the proposed change before the end of the [sixty]-day review period."[59] Additionally, a covered political subdivision may have enacted a voting-related law, regulation, or policy without submitting it for the Secretary's approval if enactment "is necessary because of an unexpected circumstance that occurred during the [thirty] days immediately preceding an election."[60] However, immediately after the election, the voting-related law, regulation, or policy would have been required to be submitted for Secretary approval.[61]

C. Actions to Challenge the Secretary's Determination

The covered political subdivision would have born the burden of establishing the propriety of any voting-related law, regulation, or policy submitted for approval.[62] Whether challenged by the Secretary or questioned in litigation, the subdivision would have been required to show "objective and compelling evidence" that the law, policy, or regulation would not have a discriminatory effect on a protected class of voters, and that it was not motivated "in whole or substantially in part by an intent to reduce the participation" of those voters.[63] If the Secretary denied a covered political subdivision's request, the subdivision could have filed an action in the Sacramento County Superior Court to review the Secretary's decision.[64] Similarly, if a covered political subdivision failed to submit a voting-related law, regulation, or policy to the Secretary under AB 1301, the Attorney General or a registered voter residing in the subdivision where the change occurred could have filed an action in any superior court to compel the submission.[65]

IV. ANALYSIS

AB 1301 would have created a review system to ensure that California citizens are not denied the right to vote on account of race, color, or language

57. *Id.* § 402(b).
58. *Id.* § 402(a).
59. *Id.*
60. *Id.* § 402(g).
61. *Id.*
62. *Id.* § 402(c).
63. *Id.* § 402(c)(1), (2).
64. *Id.* § 402(d), (f).
65. *Id.* § 403(a).

minority status.[66] AB 1301's provisions followed a policy proposal published by the National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund that highlighted voting practices that the Department of Justice most commonly objected to during preclearance reviews.[67] Despite significant evidence to the contrary, much of the opposition to AB 1301 was premised on the idea that systemic voter discrimination in California is anecdotal or nonexistent.[68] Opponents raised concerns regarding the policy's necessity, applicability to charter cities, and potential costliness.[69]

A. The Necessity of AB 1301

According to Assembly Member Jones-Sawyer, author of AB 1301, the legislation attempted to remedy the effects of the U.S. Supreme Court "shamefully" holding Section 4(b) of the VRA to be unconstitutional.[70] But AB 1301's protections would have reached further than simply reinstituting the unenforceable provisions of VRA.[71] AB 1301 would have applied to more diverse subdivisions regardless of whether there were histories of discriminatory practices in those subdivisions.[72] Critics rebuked AB 1301 as an unnecessary legislative overreach.[73] Sadly, however, California's recent history is replete with discriminatory practices that have negatively affected racial and ethnic groups'

66. *Id.* § 401.

67. NALEO EDUC. FUND, LATINOS AND THE VOTING RIGHTS ACT: PROTECTING OUR NATION'S DEMOCRACY THEN AND NOW 14 (2014).

68. *See* Letter from Alicia Lewis, Legislative Representative, League of California Cities, to Jerry Brown, Governor, State of California (Sept. 17, 2015) (on file with *The University of the Pacific Law Review*) (arguing that "[n]o recent, relevant California problem has been put forward that demonstrates the need for such overreaching legislation"). *But see* LAWYER'S COMM. FOR CIVIL RIGHTS OF THE S.F. BAY AREA, VOTING RIGHTS BARRIERS & DISCRIMINATION IN TWENTY-FIRST CENTURY CALIFORNIA: 2000–2013 17 (2014) (exhaustively detailing instances and practices of voter discrimination in California since 2000).

69. *See, e.g.*, Sharon M. Tso, City of L.A., *Report of the Chief Legislative Analyst: AB 1301 - Preclearance of Local Voting-Related Changes* (June 2015) (analyzing why a diverse political subdivision like the City of Los Angeles should be allowed to effect voting-related policies without state interference).

70. SENATE COMMITTEE ON ELECTIONS AND CONSTITUTIONAL AMENDMENTS, *supra* note 24, at 5.

71. *See id.* at 6 (contrasting the VRA review of all voting-related changes and the AB 1301 review of a few voting-related changes).

72. *Id.*

73. *See* Letter from Scott O. Konopasek, Corresponding Sec'y, Cal. Ass'n of Clerks & Election Officials, to Reginald Jones-Sawyer, Assemb. Member, Cal. State Assemb. (Apr. 22, 2015) (on file with *The University of the Pacific Law Review*) ("We are deeply supportive of the rights of all citizens to vote, but we can only question the need for such a drastic, sweeping change."); *see also* Tso, *supra* note 69 ("Additionally, while this [preclearance] process may have once been needed for such counties identified in the Voting Rights Act of 1965, the City of Los Angeles was not included in this list, and should not be subject to its provisions."); Letter from Alicia Lewis, Legis. Rep., League of Cal Cities, to Reginald Jones-Sawyer, Assemb. Member, Cal. State Assemb. (May 6, 2015) (on file with *The University of the Pacific Law Review*) (detailing lack of necessity for AB 1301).

electoral prospects.[74] AB 1301's "known practices coverage" design targeted the most common discriminatory practices, thereby minimizing state interference in subdivision affairs.[75]

1. No Political Subdivisions Would Have Been Exempt from AB 1301

California's legislative response to *Shelby* would have reached further than reinstituting the VRA provisions.[76] Whereas the VRA preclearance requirements applied to only three California counties, AB 1301 would have subjected approximately twenty-five counties, 240 cities, and 490 school districts to its preclearance requirements.[77] Unlike the VRA, AB 1301 would have applied to political subdivisions without regard to discriminatory history.[78] Further, AB 1301 would have provided no exemptions from preclearance review.[79] A political subdivision could have been exempted from preclearance review only if its population changed such that no more than one racial or ethnic group represented at least twenty percent of the citizen voting-age population.[80] The coverage formula's singular emphasis on demographics ignored *Shelby*'s holding that preclearance remedies must be justified by current needs, like eradicating discriminatory practices.[81] A diverse population alone is not sufficient to justify a preclearance remedy.[82]

A NALEO Education Fund report highlighted the four voting-related procedures that would have been subject to AB 1301 preclearance review as

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74. *See generally* Yishaiya Absoch et al., *An Assessment of Racially Polarized Voting for and Against Latino Candidates in California*, *in* VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 107 (Ana Henderson ed., 2007) (presenting evidence of racially polarized voting by non-Latinos in Los Angeles County elections); ASIAN AM. ADVANCING J., VOICES OF DEMOCRACY: ASIAN AMERICANS AND LANGUAGE ACCESS DURING THE 2012 ELECTIONS (2013) (explaining the ongoing need to engage election officials and monitor polls to protect non-English voters despite extensive legislative protections for such voters).

75. SENATE COMMITTEE ON ELECTIONS AND CONSTITUTIONAL AMENDMENTS, *supra* note 24, at 6.

76. *See id.* at 5 (explaining how AB 1301 would have applied to more diverse subdivisions regardless of whether there were histories of discriminatory practices in those subdivisions).

77. AB 1301 § 402(a), 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted).

78. *Compare* 52 U.S.C. § 10303(b) (2015) (showing application of the VRA is contingent upon a political subdivision's use of a prerequisite, discriminatory test or device for voter registration), *with* AB 1301 § 402(a) (as amended on May 12, 2015, but not enacted) (applying § 402(a) based on the political subdivision's demographics alone).

79. *Compare* 52 U.S.C. § 10303(a)(1) (allowing a political subdivision to be excused from VRA coverage after complying with preclearance requirements ten years), *with* AB 1301 §§ 400–404 (as amended on May 12, 2015, but not enacted) (not allowing covered political subdivision a way to be excused from preclearance review).

80. AB 1301 § 400(c), 2015 Leg., 2015–2016 Sess. (Cal. 2015).

81. Shelby Cnty. V. Holder, 133 S. Ct. 2612, 2627 (2013).

82. *Id.* at 2627–28.

"known practices" that perpetuate voter discrimination.[83] The "known practice" designations are based on an analysis of VRA objections nationwide and do not purport to be representative of discriminatory practices in California.[84] Opponents of AB 1301 expressed sympathy for disenfranchised racial and ethnic groups, but they were hesitant to welcome state intervention.[85]

2. Voter Discrimination Exists in California

Urging his fellow assembly members to vote no on AB 1301, Assembly Member James Gallagher summarized the effect of preclearance review: "We're sort of saying jurisdictions are guilty before they're proven innocent. We're putting the burden on them to prove a negative, that they don't have discriminatory practices."[86] Critics were concerned with AB 1301's evidentiary standard of proof because it would have required political subdivisions to prove "by objective and compelling evidence" that a voting-related procedure was *not* motivated by discriminatory intent.[87] AB 1301 preclearance reviews purportedly would have "eliminate[d] the inordinate amount of time and effort" expended on voting discrimination lawsuits, but the sophisticated standard of proof may have had the opposite effect.[88] However, in challenges to a similar standard under the VRA, the Supreme Court found that political subdivisions can establish that discriminatory intent does not motivate changes to voting-related procedures.[89]

AB 1301 opponents questioned the necessity for state intervention in local affairs.[90] According to the League of California Cities, "[n]o recent, relevant

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83. NALEO EDUC. FUND, *supra* note 67, at 14.

84. *Id.*

85. *See, e.g.*, Tso, *supra* note 69 ("[T]he intent of the bill is to prevent discriminatory election procedures and to shield protected classes of voters, which is a concept that the City supports. However . . . the bill would increase the amount of time and work needed to pass new voting-related laws.")

86. *June 2, 2015 Assembly Floor Session on AB 1301, supra* note 9.

87. Memorandum from Sachi A. Hamai, Interim Chief Executive Officer, County of Los Angeles, to Board of Supervisors, County of Los Angeles, at 7 (Mar. 26, 2015) (on file with *The University of the Pacific Law Review*); *see also* AB 1301 § 402(c), 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted); Letter from Scott O. Konopasek, *supra* note 73 ("The unreasonable burden of proof this bill places on local jurisdictions is also unworkable as it requires election official to attempt to prove a negative.").

88. SENATE COMMITTEE ON ELECTIONS AND CONSTITUTIONAL AMENDMENTS, *supra* note 24, at 6; *see* Memorandum from Hamai, *supra* note 87 (noting the Los Angeles County Counsel believes AB 1301's ambiguous standard of proof could result in costly litigation).

89. *See, e.g.*, Reno v. Bossier Parish School Bd., 528 U.S. 320, 334 (2000) ("[T]he baseline is the status quo that is proposed to be changed: If the change 'abridges the right to vote' relative to the status quo, preclearance is denied, and the status quo (however discriminatory *it* may be) remains in effect.").

90. *See* Letter from Scott O. Konopasek, *supra* note 73 ("We are deeply supportive of the rights of all citizens to vote, but we can only question the need for such a drastic, sweeping change."); *see also* Tso, *supra* note 69 ("Additionally, while this [preclearance] process may have once been needed for such counties identified in the Voting Rights Act of 1965, the City of Los Angeles was not included in this list, and should not be subject to its provisions.").

California problem has been put forward that demonstrates the need for such overreaching legislation."[91] Although none of the AB 1301 bill analyses note the discriminatory use of known practices in California, the Department of Justice publicly identified dozens of instances where California political subdivisions failed to comply with the VRA.[92]

a. Discriminatory Animus in Chualar

The Chualar Union Elementary School District (Chualar) is located in Monterey County and was subject to preclearance review under Section 5 of the VRA until *Shelby*.[93] In 2002, Chualar attempted to convert offices elected by both single-member and multimember trustee districts into an at-large district.[94] Petition materials questioning and degrading certain trustees' language skills and preferences evidenced that a "discriminatory animus" motivated the conversion.[95] The U.S. Attorney General objected to the conversion because Chualar failed to establish that the conversion would not have a retrogressive effect on a racial or minority group.[96] Chualar could not establish that the conversion would "offer the same ability to Hispanic voters to exercise the electoral franchise that they enjoy currently."[97]

Under AB 1301, Chualar's conversion likely would not receive preclearance approval for the same reasons it failed under Section 5 of the VRA.[98] Chualar's conversion would be subject to the Secretary of State's preclearance approval under Section 401(a) of AB 1301.[99] Under Section 402(c), Chualar would have to establish that the conversion would likely not "result in a discriminatory effect" on the participation of Hispanic voters and that it was substantially motivated "by

91. Letter from Alicia Lewis, *supra* note 68.

92. *Voting Determination Letters For California*, CIVIL RIGHTS DIV., DEP'T OF JUSTICE, http://www.justice.gov/crt/voting-determination-letters-california (last visited Aug. 25, 2015) (on file with *The University of the Pacific Law Review*); *Voting Section Litigation*, CIVIL RIGHTS DIV., DEP'T OF JUSTICE, http://www.justice.gov/crt/voting-section-litigation (last visited Aug. 25, 2015) (on file with *The University of the Pacific Law Review*).

93. *Jurisdictions Previously Covered by Section 5 at the Time of the Shelby County Decision*, *supra* note 6.

94. Letter from Ralph F. Boyd, Jr., Asst. Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to William D. Barr, Superintendent of Schools, Monterey Cnty. Office of Educ. (Mar. 29, 2002) (on file with *The University of the Pacific Law Review*).

95. *Id.*

96. *See id.* (explaining that, under the VRA, a retrogressive effect is found when a change causes a racial or minority group to less effectively exercise their electoral franchise).

97. *Id.*

98. *Cf.* 52 U.S.C. § 10304 (2015); AB 1301 § 402(c)(1)–(2), 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted) (retrogressive effect would preclude enforcement under the VRA and AB 1301).

99. The conversion would qualify as "[a] change to an at-large method of election that . . . converts offices elected by single-member districts to one or more at-large or multimember districts." AB 1301 § 402(a), 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted).

an intent to reduce the participation of [Hispanic] voters."[100] The retrogressive effects and the discriminatory animus motivating Chualar's conversion probably would have precluded compliance with Section 402(c).[101]

b. Compromised Multilingual Voting Materials in Alameda, Riverside, and Monterey Counties

Under AB 1301, multilingual voting materials in covered political subdivisions could not have been altered or reduced unless the same alterations or reductions also occurred for materials provided in English.[102] Contrary to the League of California Cities' position that no "recent, relevant California problem[s]" demonstrate a need for AB 1301,[103] repeated violations of Section 203 demonstrate the lack of required multilingual voting materials throughout California.[104] Section 203 and AB 1301 both regulate the availability of multilingual voting materials, but the two have different application formulas, so a violation of one is not necessarily a violation of the other.[105] Recent violations of Section 203 by California counties are exemplified by actions against the Counties of Alameda, Riverside, and Monterey.[106]

In 2011, the United States filed a complaint against Alameda County for allegedly "failing to provide limited-English proficient Spanish- and Chinese-speaking citizens of Alameda County with minority language election information" in violation of the VRA."[107] The parties ultimately entered a consent decree requiring Alameda County to disseminate "all information relating to the electoral process . . . in the Spanish language and the Chinese language."[108] In

100. *Id.* at § 402(c)(1)–(2) (as amended on May 12, 2015, but not enacted).

101. *See* Letter from Ralph F. Boyd, Jr. *supra* note 94 (explaining why retrogressive effects preclude preclearance approval).

102. AB 1301 at § 401(d) (as amended on May 12, 2015, but not enacted). "Multilingual voting materials" is defined as "registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, provided in the language of one or more language minority groups." AB 1301 § 400(e), 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted).

103. Letter from Alicia Lewis, *supra* note 68.

104. *Cases Raising Claims Under the Language Minority Provisions of the Voting Rights Act*, U.S. DEP'T OF J., https://www.justice.gov/crt/cases-raising-claims-under-language-minority-provisions-voting-rights-act (last visited Mar. 30, 2016) (on file with *The University of the Pacific Law Review*). Section 203 of the VRA requires states and political subdivisions that meet demographic benchmarks to provide election and voting materials "in the language of the applicable minority group as well as in the English language." 52 U.S.C. § 10503(c) (2015).

105. *Compare* 52 U.S.C. § 10503(b)(2) (2015) (covers communities with a designated percentage of voting age citizens who are limited-English proficient), *with* AB 1301 § 401 (as amended on May 12, 2015, but not enacted) (would have covered communities where the proportion of the language minority group's voting-age population grew or reduced by a certain percentage).

106. *Infra* Part IV.A.2.c.

107. Complaint at 5, United States v. Alameda Cnty., No. 3:11-cv-03262 (N.D. Cal. 2011)

108. Consent Decree at 4, United States v. Alameda Cnty., No. 3:11-cv-03262 (N.D. Cal. 2011).

2010, a similar complaint was filed against Riverside County for allegedly "failing to provide certain election-related information . . . in a manner that ensures that Spanish-speaking voters throughout the County have an opportunity to be informed about election-related activities."[109] Riverside County entered into a memorandum of agreement with the U.S. Attorney General that required, among other things, "all [voting] information disseminated by the County in English . . . be provided in the Spanish language."[110] In 2006, despite having "a legacy of discrimination that had affected Hispanic citizens' right to vote,"[111] the Monterey County Elections Department reviewed and approved English-only petition materials for a citizen-proposed ballot initiative.[112] The petition materials were found to be in violation of the VRA and Monterey County was permanently enjoined from certifying the ballot initiative.[113]

c. Vote Dilution in the Central Valley

Changing the boundaries of an electoral jurisdiction is a delicate balancing act between avoiding "unnecessary dilution of minority voters among too many districts, and overconcentration or 'packing' minority voters into too few such districts."[114] In the 1990s, Section 5 of the VRA was employed to quell attempted vote dilution in the County of Merced and the City of Hanford.[115] If attempted under AB 1301, the vote dilutions likely would not have received preclearance approval.[116]

In 1992, the County of Merced sought to adopt a redistricting plan for its Board of Supervisors that fragmented the Hispanic voting population across several districts to protect incumbent supervisors from electoral challengers.[117] The Hispanic voting population grew significantly during the preceding decade and nearly comprised a majority in many of the county's districts.[118] Noting that incumbent protection alone was not prohibited, the United States Attorney General did not preclear the redistricting plan because the incumbents' protection

109. Complaint at 3, United States v. Riverside Cnty., No. 2:10-cv-01059 (C.D. Cal. 2010).

110. Memorandum of Agreement between the United States and the County of Riverside et al., at 3 (Jan. 21, 2010) (on file with *The University of the Pacific Law Review*).

111. Lopez v. Monterey Cnty., 519 U.S. 9, 17 (1996).

112. *In re* Monterey Initiative Matter, 27 F. Supp. 2d 958, 959 (N.D. Cal. 2006).

113. *Id.* at 964.

114. Wilson v. Eu, 823 P. 2d 545, 724 (Cal. 1992).

115. Letter from John R. Dunne, Asst. Att'y Gen., Civil Rts. Div., U.S. Dep't of J., to Kenneth L. Randol, Cnty. Clerk, Merced Cnty. (Apr. 3, 1992) (on file with *The University of the Pacific Law Review*); Letter from James P. Turner, Acting Asst. Att'y Gen., Civil Rts. Div., U.S. Dep't of J., to Michael J. Noland, City of Hanford (Apr. 5, 1993) (on file with *The University of the Pacific Law Review*).

116. *Infra* Part IV.A.2.c.

117. Letter from John R. Dunne, *supra* note 115.

118. *Id.*

would come at the expense of minority voters.[119] Under AB 1301, a similar dilutive redistricting plan would probably be subject to the Secretary of State's preclearance review under Section 401(c) and would presumably not receive preclearance approval because of the plan's likely discriminatory effect.[120]

In 1993, the United States Attorney General did not preclear proposed annexations for the City of Hanford because the annexations significantly decreased the strength of minority voters in the city.[121] The annexations were not approved partly because members of the city's governing body were elected at-large, rather than by single or multi-member districts.[122] If attempted under AB 1301, similar dilutive annexations would probably be subject to the Secretary of State's preclearance review under Section 401(b) and would presumably not receive preclearance approval because of the annexations' likely discriminatory effect.[123]

B. AB 1301 and the Sovereignty Principles of Home Rule

When the Court found the coverage formula in Section 4(b) of the VRA to be unconstitutional, it emphasized the VRA's extraordinary incursion on states' equal sovereignty from the federal government.[124] The Court cautioned against the VRA's infringement of sovereignty: "The Voting Rights Act sharply departs from [basic principles of sovereignty]. It suspends "*all* changes to state election law—however innocuous—until they have been precleared by federal authorities."[125] Similarly, AB 1301's preclearance requirements may be an extraordinary incursion on the "home rule" autonomy of chartered cities.[126]

Under Article XI of the California Constitution, cities and counties may adopt a charter that allows local government "home rule," or greater autonomy from the state legislature.[127] However, the powers granted to a charter city are far

119. *Id.* (citing Garza v. Los Angeles, 918 F. 2d 763, 771 (9th Cir. 1990)).

120. AB 1301 §§ 401(c), 402(a), 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted).

121. Letter from James P. Turner, *supra* note 115.

122. *Id.*

123. AB 1301 §§ 401(b), 402(a), 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted).

124. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2624 (2013) (explaining that "[s]tates must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own . . . . And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties).").

125. *Id.* (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009)) (emphasis in original).

126. Tso, *supra* note 69. "The principle of home rule involves, essentially, the ability of local government (technically, chartered cities, counties, and cities and counties) to control and finance local affairs without undue interference by the Legislature." Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 583 P. 2d 1281, 224–25 (Cal. 1978).

127. CAL. CONST., art. XI, §§ 3–5.

broader than those granted to a charter county.[128] Charter cities have granted authority to "make and enforce all ordinances and regulations in respect to municipal affairs," and such ordinances and regulations supersede inconsistent state laws.[129] Charter counties are not granted any similar exhaustive authority over county affairs.[130]

If AB 1301 preclearance review is not considered a "statewide concern,"[131] then charter cities likely would have been immune from its effects.[132] The Chief Legislative Analyst for Los Angeles, a charter city,[133] contends that AB 1301 may violate home rule principles by circumventing "the local autonomy of voting-related decisions."[134] In *Jauregui v. City of Palmdale*¸ a four-step analysis was presented to determine whether a charter city's electoral ordinance supersedes state law:

> First, we determine whether the city ordinance at issue regulates an activity that can be characterized as a 'municipal affair.' Second, we must determine whether the case presents an actual conflict between local and state law. Third, we decide whether the state law . . . addresses a matter of 'statewide concern.' Fourth, we must decide whether [the state law] is 'reasonably related to . . . resolution' of that issue of that statewide concern. And in connection with this fourth matter for determination, we must decide whether [the state law] is 'narrowly tailored' to avoid unnecessary interference in municipal governance.[135]

Following the *Jauregui* four-step analysis, it is plausible that certain voting-regulated procedures enacted by charter cities could be exempt from the provisions of AB 1301.[136]

The first step is easily settled: conducting a municipal election is a municipal affair.[137] The California Constitution explicitly articulates "conduct of city

128. Dibb v. San Diego, 884 P.2d 1003, 1008 (Cal. 1994).

129. CAL. CONST., art. XI, § 5.

130. Dibb v. San Diego, 884 P.2d 1003, 1008 (Cal. 1994).

131. Cal. Fed. Sav. & Loan Ass'n v. Los Angeles, 812 P.2d 916, 926 (Cal. 1991) ("In cases presenting a true conflict between a charter city measure—whether tax or regulatory—and a state statute, therefore, the hinge of the decision is the identification of a convincing basis for legislative action originating in extramunicipal concerns, one justifying legislative supersession based on sensible, pragmatic considerations").

132. *See* San Mateo v. R.R. Comm'n of Cal., 68 P.2d 713, 717 (Cal. 1937) (noting that charter cities are the only municipalities which have immunity from the legislature, but such immunity is necessarily limited).

133. *See* LOS ANGELES, CAL., CHARTER & ADMIN. CODE, art. 1, § 101 (2015) (providing that "[t]he City of Los Angeles shall have all powers possible for a charter City to have under the constitution and laws of this state as fully and completely as though they were specifically enumerated in the Charter, subject only to the limitations contained in the Charter").

134. Tso, *supra* note 69.

135. Jauregui v. Palmdale, 172 Cal. Rptr. 333, 341–42 (Cal. Ct. App. 2014).

136. *Infra* Part IV.B.

137. *Jauregui*, 172 Cal. Rptr. at 342 ("Common sense tells us how city council members are elected is the essence of a municipal affair.").

elections" as a category of municipal affairs.[138] The second step is case-specific and requires a determination of whether the state law and the charter city's voting-related procedure are in "genuine and irresolvable" actual conflict.[139] If the state law and city's procedure are not squarely at odds, then the charter city may implement its procedure.[140] If an actual conflict exists, the final two steps are addressed: the city's procedure may be preempted if the state law was enacted as a matter of statewide concern and narrowly tailored with a "convincing basis for legislative action originating in extramunicipal concerns."[141] In the context of home rule, statewide concern is not a static, compartmentalized characteristic of a state law.[142]

A statewide concern exists where, "under the historical circumstances presented, the state has a more substantial interest in the subject than the charter city."[143] Relying on public interest concerns, the *Jauregui* court decided that "the integrity of the electoral process, at both the state and local level, is undoubtedly a statewide concern."[144] Following the court's reasoning, AB 1301 preclearance review would likely also have qualified as a matter of statewide concern, because its purpose would have been to ensure discrimination does not circumvent the right to vote and the integrity of elections.[145] To trump home rule, a matter of statewide concern must be narrowly tailored to resolve the problem that is the subject of statewide concern.[146]

AB 1301, however, may not have been narrowly tailored by the legislature to resolve the objective problem of disenfranchisement of racial and ethnic groups.[147] The coverage formula of AB 1301 was not tailored to address voting concerns where they lie; rather, the formula relied solely on demographic data "without any necessity to demonstrate that the political subdivision in question has engaged in discriminatory practices."[148] AB 1301 would have applied equally

138. CAL. CONST., art. XI, § 5(b).

139. *Jauregui*, 172 Cal. Rptr. at 342–43.

140. Cal. Fed. Sav. & Loan Ass'n v. Los Angeles, 812 P.2d 916, 916–17 (Cal. 1991) ("To the extent difficult choices between competing claims of municipal and state governments can be forestalled in this sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices by carefully insuring that the purported conflict is in fact a genuine one, unresolvable short of choosing between one enactment and the other."); *see also* Ainsworth v. Bryant, 211 P. 2d 564, 571 (1949) (finding a charter city's excise tax on liquor was not in conflict with the state's preemptive regulatory authority over liquor).

141. *Cal. Fed. Sav. & Loan Ass'n*, 812 P.2d at 918.

142. *Id.*

143. *Id.*

144. *Jauregui*, 172 Cal. Rptr. at 346.

145. AB 1301 § 401, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted).

146. *Cal. Fed. Sav. & Loan Ass'n*, 812 P.2d at 924.

147. Letter from Alicia Lewis, *supra* note 68; *see also* Letter from Scott O. Konopasek, *supra* note 73 ("We are deeply supportive of the rights of all citizens to vote, but we can only question the need for such a drastic, sweeping change.").

148. SENATE COMMITTEE ON ELECTIONS AND CONSTITUTIONAL AMENDMENTS, *supra* note 24, at 6.

to political subdivisions with a legacy of voting discrimination,[149] those that remedied past discrimination, and those with no history of discrimination.[150] Although some charter cities' voting procedures may be immune from AB 1301 under home rule, other covered political subdivisions, like counties, school districts, and community colleges, would have still had to comply with AB 1301.[151]

C. Would AB 1301 Compliance Have Been Feasible?

Under AB 1301, covered political subdivisions would have been responsible for thoroughly reviewing population data and the potential effects of new voting-related procedures in the subdivision.[152] The preclearance system was characterized as an "administrative nightmare" in materials released by the Municipal Management Association of Northern California.[153] Additionally, covered political subdivisions would have been required to submit new or revised voting-related procedures for preclearance review,[154] but the subdivision may not have been the governmental body administering the new voting-related procedures.[155]

1. Political Subdivision Boundaries Do Not Follow Census Tracts

AB 1301 determinations would have used population data from the United States Census Bureau's most recent decennial data and the five-year estimates of the United States Census American Community Survey.[156] Accurate population data is the crux of determining which political subdivisions would have been subject to AB 1301 and which voting procedures the subdivision would have had

149. For example, electoral discrimination in Monterey County is persistent. Lopez v. Monterey Cnty., 519 U.S. 9, 17 (1996); *In re* Monterey Initiative Matter, 427 F. Supp. 958, 959 (N.D. Cal. 2006).

150. Four political subdivisions in California have bailed out of VRA preclearance review. Consent Judgment and Decree at 13, Alta Irrigation Dist. v. Holder, No. 1:11-cv-00758 (D.C. Cir. July 15, 2011); Consent Judgment and Decree at 2, Merced Cnty. v. Holder, No. 1:12-cv-00354 (D.C. Cir. July 27, 2012); Consent Judgment and Decree at 5, Browns Valley Irrigation District v. Holder, No. 1:12-cv-01597 (D.C. Cir. Feb. 4, 2013); Consent Judgment and Decree at 5–6, City of Wheatland v. Holder, No. 1:13-cv-00054 (D.C. Cir. Apr. 25, 2013).

151. AB 1301 § 402(a), 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted).

152. *Id.* at § 400 (as amended on May 12, 2015, but not enacted).

153. Meeting Agenda, 2015 MMANC Board of Directors (July 24, 2015) (on file with *The University of the Pacific Law Review*).

154. AB 1301 § 402(a), 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted).

155. Letter from Rural County Representatives of California & Urban Counties Caucus, to Reginald Jones-Sawyer, Assembly Member, California State Assembly (Apr. 22, 2015) (on file with *The University of the Pacific Law Review*).

156. AB 1301 §§ 400(b), 401(c), 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted).

to submit for preclearance.[157] But the census data is necessarily an incomplete account of a political subdivision's population.[158]

California's political subdivision boundaries may be drawn without regard for census tracts,[159] "small, relatively permanent statistical subdivisions of a county or equivalent entity."[160] While census tract boundaries must follow state and county boundaries, they do not have to follow the boundaries of any smaller subdivision.[161] Furthermore, unlike census tracts, political subdivision boundaries do not have to follow county boundaries.[162] Determining which subdivisions would have had to submit voting-related changes to preclearance may have been a difficult endeavor for small political subdivisions because neither the boundaries of census tracts nor those of most political subdivisions must correspond.[163]

The Secretary of State estimates $600,000 for start-up costs would have been needed to implement AB 1301, and another $200,000 would be needed for redistricting statistical analysis once per decade after the decennial census, and for occasional redistricting proposals.[164] However, AB 1301 would have placed no obligation on the Secretary of State to inform a political subdivision of whether they may have had to comply with a provision of AB 1301.[165] Small and large political subdivisions alike would have been responsible for complying with AB 1301, regardless of whether they had adequate resources to do so.[166] For example, both the Alpine Village-Sequoia Crest Community Services District—with an annual revenue of $30,000—and the Parking Authority of the City of Beverly Hills—with an annual revenue of $30,000,000—would have been

157. *Id.*

158. *See* CAL. ELEC. CODE § 12222 (West 2015) (repealing the requirement that subdivision boundaries could not cross census tracts).

159. *See id.*

160. *Geographic Terms and Concepts—Census Tract*, U.S. CENSUS BUREAU, https://www.census.gov/geo/reference/gtc/gtc_ct.html (last visited July 28, 2015) (on file with *The University of the Pacific Law Review*).

161. *Id.*

162. *See* CAL. ELEC. CODE § 10517 (West) (providing instructions to county officials for the administration of subdivision elections when the subdivision spans multiple counties).

163. Community college districts are indicative of the potential quagmire: of California's seventy-one community college districts, only eight are completely within the boundaries of one county. Yuba Community College District falls within the boundaries of fifteen different counties. And of California's fifty-eight counties, only Mariposa County has one community college district within its boundaries. Los Angeles County has eighteen different community college districts within its boundaries. *See generally* John Roach, *Land Area Overlap of College Districts and State Counties*, CCCGIS COLLABORATIVE, http://cccgis.org/Documents/tabid/151/Default.aspx?EntryId=245 (last visited on July 28, 2015) (on file with *The University of the Pacific Law Review*).

164. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1301, at 1 (Aug. 17, 2015).

165. AB 1301 § 403, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted).

166. *Id.*

expected to have adequate resources for determining when to submit measures for preclearance review.[167]

2. Consolidated Elections Allow Counties to Conduct Elections on Behalf of Subdivisions

Had AB 1301 not been vetoed, its preclearance determinations would have been further complicated because elections are generally not administered by the political subdivision requiring an election.[168] Counties generally administer elections, but cities may administer elections too.[169] The City of Los Angeles administers its own elections, and those for the Los Angeles Unified School District and the Los Angeles Community College District.[170] AB 1301 would have provided a cause of action against a covered political subdivision for the enactment or attempted enactment of a voting-related procedure not submitted for preclearance review.[171] But, AB 1301 would not have provided a defense for the covered political subdivision when a third party enacted the unreviewed voting-related procedure.[172]

In *Lopez v. Merced County*, residents of the City of Los Banos alleged violations of the VRA against the County of Merced and several of its political subdivisions, including the cities of Los Banos, Dos Palos, and Atwater.[173] The court held that the plaintiffs had no standing to bring suit against a municipality in which they did not reside, because "plaintiffs must be injured by a challenged policy or election to have standing, and injury is established by domicile in the underrepresented district."[174] The *Lopez* precedent could be troubling where, for example, certain changes to multilingual voting materials must be submitted for preclearance review but the covered political subdivision is not the party changing the multilingual voting materials.[175] If courts follow the *Lopez* precedent, it is unclear if standing would be found where a covered political

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167. CAL. STATE CONTROLLER'S OFFICE, GOVERNMENT FINANCIAL REPORTS, SPECIAL DISTRICTS DATA: CREATE A REPORT, *available at* https://bythenumbers.sco.ca.gov/finance-explorer/view-by-special-district (select "Alpine Village - Sequoia Crest Community Services District", "Parking Authority of the City of Beverly Hills", "Total Revenue", and "Total Expenses") (last visited July 28, 2015) (on file with *The University of the Pacific Law Review*).

168. *Frequently Asked Questions,* ELECTION ADMIN. RES. CTR., http://earc.berkeley.edu/faq.php (last visited July 28, 2015) (on file with *The University of the Pacific Law Review*).

169. *Id.*

170. OFFICE OF THE CITY CLERK, CITY OF L.A., MEDIA KIT 2015 GENERAL MUNICIPAL ELECTION 4 (2015).

171. AB 1301 § 403, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted).

172. *Id.*

173. Lopez v. Merced Cnty., 473 F. Supp. 2d 1072, 1072 (E.D. Cal. 2007).

174. *Id.* at 1080.

175. *See* Letter from Scott O. Konopasek *supra* note 73 (explaining how third-party liability could arise when the administering subdivision is not subject to preclearance review).

subdivision contracts the administration of its election to a political subdivision not covered by AB 1301.[176]

D. Governor Brown Vetoed AB 1301

Governor Brown vetoed AB 1301 on October 10, 2015.[177] He penned a simple veto message: "While I agree that the impairment of key provisions in the federal Voting Rights Act deserves a national remedy, I am unconvinced that a California-only pre-clearance system is needed."[178] Governor Brown's veto message does not signal what would necessitate a California-only preclearance system.[179] But other veto messages provide hint at his hesitation.[180] In 2014, Governor Brown vetoed SB 1365, an amendment to the California Voting Rights Act, and wrote that there are already "important safeguards to ensure that the voting strength of minority communities is not diluted."[181] Brown also vowed, however, to "jealously protect" voting rights.[182] In his veto message for AB 182 (a redux of SB 1365), Governor Brown again wrote that there are "important and sufficient safeguards to ensure that the electoral strength of minority voters is protected."[183]

V. CONCLUSION

Shelby's judicial impediment of Section 5 of the VRA spurred AB 1301.[184] But, AB 1301 would have been more than a reenactment of the Section 5 voting rights protections.[185] AB 1301 would have been a new solution to a persistent problem; it would have been a refusal to deny that voter discrimination continually mars California's electoral landscape.[186]

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176. AB 1301 §§ 401(d), 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted).

177. Letter from Edmund G. Brown Jr., Governor, State of Cal., to Members of the Cal. State Assemb. (Oct. 10, 2015), *available at* http://gov.ca.gov/docs/AB_1301_Veto_Message.pdf (on file with *The University of the Pacific Law Review*) [hereinafter AB 182 Veto Message].

178. *Id.*

179. *Id.*

180. *Id.*; Letter from Edmund G. Brown Jr., Governor, State of Cal. to Members of the Cal. State S. (Sept. 30, 2014), available at http://gov.ca.gov/docs/SB_ 1365_Veto_Message.pdf (on file with *The University of the Pacific Law Review*) [hereinafter SB 1365 Veto Message].

181. SB 1365 Veto Message, *supra* note 180.

182. *Id.*

183. AB 182 Veto Message, *supra* note 177.

184. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1301, at 3 (May 20, 2015).

185. *Id.*

186. *Id.*

AB 1301's regulatory reach would have extended to political subdivisions with or without a legacy of voter discrimination.[187] If it had been enacted, AB 1301's reach may have been limited by home rule in some cases.[188] And in other cases, its application would have been unclear, like when a covered subdivision's elections are conducted by a subdivision not covered by AB 1301.[189] While the VRA did not end discriminatory practices against ethnic and minority voters, it did curtail some practices.[190] AB 1301 would not have ended voter discrimination, but, as the citizens of Whittier exemplified, a step forward is a step forward.[191]

187. AB 1301 § 400(c), 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 12, 2015, but not enacted).

188. *Supra* Part IV.B.

189. *Supra* Part IV.C.

190. *See, e.g.*, Consent Judgment and Decree at 13, Alta Irrigation Dist. v. Holder, No. 1:11-cv-00758 (D.C. Cir. July 15, 2011) (showing that the VRA ended some practices).

191. *See* Times Editorial Bd.*, supra* note 1 (illustrating how progress delayed is still progress).