

The California Voting Rights Act and Local Governments

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Abstract

On July 9, 2002, Governor Gray Davis signed the California Voting Rights Act (CVRA) into law. The intent of the CVRA was to build upon the voting rights protections embodied in the Federal Voting Rights Act (FVRA) by enhancing the influence of minority populations in local government elections. The CVRA has led to multiple legal challenges of at-large electoral systems in dozens of governments in California. This paper explores the impacts of the CVRA on local governments as well as potential impacts of recent changes to the CVRA.

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On July 9, 2002, Governor Gray Davis signed the California Voting Rights Act (CVRA) into law. The intent of the CVRA was to build upon the voting rights protections embodied in the Federal Voting Rights Act (FVRA) by enhancing the influence of minority populations in local government elections. As Latino populations have increased in California in recent years, Latino representation in elected local government positions does not seem to be keeping pace (California Latino Legislative Caucus 2015). The CVRA was designed to address this disconnect.

California Voting Rights Act of 2002

Prior to the adoption of the California Voting Rights Act (CVRA) of 2002, the controlling legislation for the extension of voting rights to underrepresented groups was the Federal Voting Rights Act (FVRA) of 1965. While the CVRA shares some of the same elements and intentions of the FVRA, there are some elements of the CVRA that makes it distinctive.

The CVRA covers only at-large or from district governments. At-large systems elect members of the governing board/council from all voters in the jurisdiction. From district governments are similar, but representatives must live within a certain district. Both of these types of governments may be subject to a CVRA claim. The impetus for most CVRA claims against these types of systems is the alleged presence of racially polarized voting. Racially polarized voting exists when different groups exhibit different preferences in elections. There is no intent criterion in defining racially polarized voting. Under the provisions of the CVRA, racially polarized voting exists if preferences differ between groups. Since white voters typically outnumber minority voters in at-large voting systems, minority voters typically do not see their preferences demonstrated in election results in racially polarized situations.

A common approach for determining racially polarized voting is a simple correlation coefficient between the percentage of votes won by each candidate in an election and the percentage of Latinos in the voting age population (VAP). The Latino VAP is then frequently used to develop districts in later redistricting efforts to resolve claims of racially polarized voting. McCue (1985) highlighted some of the deficiencies of this approach but the approach still persists in many local governments.

One distinctive feature of the CVRA is that plaintiffs merely need to demonstrate the existence of racially polarized voting to prevail in a CVRA lawsuit. It is not necessary for plaintiffs to demonstrate that minority populations are unable to elect their preferred candidates. A demonstration of the inability to influence electoral outcomes is sufficient for the finding of a CVRA violation. Unfortunately for defendants, the CVRA does not define the term “influence.” While federal courts have been hesitant to find in favor of plaintiffs on the subject of influence, California courts do not have the same reservations. No defendant has ever prevailed in a CVRA case due primarily to the legislation’s more permissive language and streamlined burden of proof.

Another important difference between the CVRA and FVRA lies in Section 2 of the FVRA. The FVRA includes a “totality of circumstances” provision in which prevailing plaintiffs must demonstrate the following: (1) the ability to form a majority/minority district, (2) the presence of racially polarized voting, or (3) a large enough bloc of white voters that prevents minority voters from electing candidates of their choice. This is a much higher burden of proof than what is found in the CVRA. For the CVRA, demonstration of racially polarized voting is solely sufficient to substantiate a CVRA claim (Leoni and Skinnell 2003). This again helps to explain why there has never been a successful defense for a CVRA claim.

Bringing a CVRA case is also a low/no-cost proposition for plaintiffs. Even in the event of a successful defense, defendants do not recover any legal fees. By contrast, prevailing plaintiffs recover attorney fees and court costs. A cottage industry of sorts has developed with attorneys initiating CVRA claims and recovering attorney’s fees through settlements prior to cases being heard in the courts.

Recent Changes to the CVRA

Over the past several years, numerous attempts have been made in the state legislature to modify aspects of the CVRA. One recent attempt that was successful was Assembly Bill 350. AB 350 altered the CVRA in a variety of ways. First, it increased the number of public hearings required during the transition period from at-large to district-based elections. Previously, most governments employed a total of five opportunities for public input in the districting process. Members of the public were typically invited to participate in two public hearings and three “town hall” outreach meetings in which feedback would be solicited on the district maps created by the local government. From personal experience, most local governments employ demographers to create multiple manifestations of district maps for public consumption. The number of maps provided for public consumption typically ranges from two to five. Under AB 350, governments are now required to hold at least two public meetings within a 30-day period prior to the creation of the draft district maps. After the creation of the draft district maps, two additional public meetings are then required at least 45 days prior to the adoption of the chosen map.

A second important change initiated by AB 350 provides more protection for local government finances. Plaintiffs are now required to submit a “demand letter” to the local government

prior to initiating a CVRA lawsuit. Plaintiffs may not initiate a lawsuit until at least 45 days after the presentation of the demand letter. If governments adopt a resolution authorizing the transition from at-large to district-based elections within this 45-day period, they are insulated from a CVRA suit. This resolution of intent must specify the steps that will be followed in establishing districts and the anticipated timeline for completion. Prospective plaintiffs are then precluded from initiating litigation for 90 days after the adoption of this resolution. Plaintiff attorneys may receive reimbursement for the work completed in preparing the demand letter. However, this reimbursement is limited to a maximum of \$30,000. By contrast, there is no cap on attorney's fees under a CVRA lawsuit.

A final change that was initiated as a result of AB 350 involves the inclusion of the public in determining the sequencing of terms for board/council members. AB 350 requires that governments must take into account input from members of the public in determining how to stagger terms especially when the government moves from odd- to even-year elections. The movement to even-year elections is a common additional aspect of some CVRA settlements. Some governments will agree not only to move to district-based elections but will also shift to even-year elections to increase voter turnout. Voter turnout does indeed appear to be significantly higher in even-year as opposed to odd-year elections. For example, three measures that were on the ballot in Los Angeles County during 2012 garnered turnout rates of 62 percent, 58 percent, and 58 percent respectively. By contrast, two similar measures that were on the Los Angeles City ballot in 2013 saw turnout rates of 17 percent and 16 percent respectively (Greenlining Institute 2013).

This movement toward even-year elections will continue to accelerate as a result of Senate Bill 415. Beginning in January 2018, a school district that holds its elections in odd-numbered years may be subject to a CVRA lawsuit if turnout at its regular election was 25 percent or more lower than the average of turnout during the last four statewide elections (which occur in even years). The calculation is based upon the voter turnout within the jurisdiction itself. For example, if a school district had a turnout of 10 percent in 2015 and the average turnout in that district during the four preceding statewide elections was 35 percent or higher, the district could be subject to a lawsuit to force it to change to even-year elections. The purpose of SB 415 is to increase minority representation in the electorate by forcing districts to hold elections during years where more offices are on the ballot. SB 415 affects many districts across the state and will result in much higher levels of ballot density in future years. It is important to note that there is a gradual implementation aspect of this legislation as districts only need to pass a resolution to authorize even-year elections by January 2018. The actual transition does not need to occur until 2020.

One complicating factor for school districts in this regard is their status as special purpose governments. Unlike larger cities (populations in excess of 100,000), districts may not transition to even-year elections or district based elections unilaterally (California Department of Education 2016). Districts must either put the issue of transitioning to district-based elections before voters or seek a waiver from the state board of education. Districts must also have their maps approved by the county committee on school district organization. Any requests to move to even-year elections must also be approved by the county board of supervisors. Most county boards will receive recommendations from the county registrar-recorder's office prior to authorizing any move to even-year elections. The Los Angeles County Registrar has already expressed concerns over ballot saturation as a result of SB 415, and it is unclear if the board will continue to approve future requests.

Impacts of the CVRA

The only “safe harbor” from CVRA lawsuits for local governments is the transition to district-based elections. As a result, we have seen many local governments initiate this change over the past several years. Prior to the passage of the CVRA, only 29 California cities used district-based elections (Heidorn 2016). As of November 2016, district-based elections are now used by 59 cities. A similar pattern is apparent in school districts as well.

In order to transition from at-large to district-based elections, school districts must either seek the approval of voters or receive a waiver from the state board of education. With very few exceptions, districts seek waivers rather than initiating elections. Between 2005 and 2015, 79 districts have requested waivers from the state board of education (Fensterwald 2013). Of these, 59 of the waivers were requested in 2015 alone. It is also important to note that all of these waivers were approved by the state board. It certainly appears that the progression toward district-based elections among school districts is accelerating.

SB 415 also continues to have an influence on school districts. In 2016, 140 of the largest 185 school districts in the state held elections comprising 381 seats. This is in comparison to only 46 of the largest 185 districts holding elections in 2015 (with 122 seats up for election). Only 41 of the largest school districts held elections in 2017.

In total, approximately 195 governments have transitioned to district-based elections as a result of the CVRA. It will be interesting to see if AB 350 will affect this trend.

Impact on Representation

The primary purpose of the CVRA was to enhance the influence of minority populations in local elections. Therefore, it is important to examine if Latino representation has indeed increased in the wake of the CVRA. Levitt et al. (2016) report representation changes for 10 cities that transitioned from at-large to district-based elections. These 10 cities combined experienced a net increase of 11 Latino members after the transition to district-based elections. Levitt et al. (2016) also analyzed 21 cities that transitioned to district-based elections in 2016 and found an increase in Latino representation on city council for 12 cities, no change for six cities, and a decline in Latino representation for three cities. Therefore, from this small sample, it does seem that Latino representation on these councils has increased after transitioning to district-based elections.

Fiscal Impacts of the CVRA

As discussed earlier in this paper, CVRA plaintiff attorneys may recover attorney costs and legal fees while prevailing defendants may not. From an anecdotal perspective, there are many high profile instances of cities settling CVRA claims for large sums of money. One of the largest CVRA settlements in recent history was Palmdale, California. A CVRA lawsuit was initiated against the city in 2012. Despite losing the case, the city appealed many times and held an intervening election using its at-large system that was later vacated by a court. The city finally settled the lawsuit by transitioning to district-based elections and paying in excess of \$4.5 million (Aguilar 2015). In essence, the city settled for \$4.5 million and the result was to transition to district-based elections anyway. The city held its first district-based election for city council in 2016.

In two of the four districts, Latino candidates ran unsuccessfully for seats. In only one of the four districts did a Latino member win a seat. Interestingly, Palmdale school district elections remained at-large.

The city of Palmdale is not alone in terms of large CVRA settlements. The city of Anaheim settled its CVRA case for \$2 million (McNary 2014) and Modesto settled its case for \$3.5 million (Ashton 2008). Multiple governments have settled their cases for between \$100,000 and \$1 million. It is relatively unusual to see a city settle for less than \$100,000. It should also be noted that these settlement costs are for the plaintiff's attorney and do not include legal fees for in-house attorneys. One exception to these large settlements was the Ceres School District that settled its case for only \$3,000 (Ceres 2017). However, part of the settlement allowed the plaintiff's attorneys to formulate the district map. A small settlement came at the cost of autonomy over map creation.

Fiscal Benefits

One somewhat surprising impact of the CVRA that has not received much attention is the presence of cost savings associated with district-based, even-year elections. AB 350 promises cost savings to districts by providing a 30-day period from the receipt of a demand letter to pass a resolution of intent to transition to district-based elections. As discussed earlier, this type of intent resolution then provides the government with 90 days to engage in this transition without the threat of litigation. One of the most important features of this legislation is the cap of \$30,000 on plaintiff attorney fees. In comparison to the settlements and in-house attorney fees that many districts have paid, \$30,000 is a small price to pay. The League of California Cities estimates that local agencies have paid over \$20 million in plaintiff attorney fees in recent years as part of CVRA settlements. Therefore, AB 350 promises some significant cost savings for districts that have not yet transitioned to district-based elections.

Another potential area of savings for districts involves the transition to even-year elections. SB 415 will require the vast majority of local governments to move their elections from odd to even years. Holding elections in even-numbered years will consolidate a local agency's election with a variety of other agencies. Election costs tend to be shared across governments so it is fiscally advantageous for districts that participate in consolidated elections. According to the Los Angeles County Registrar-Recorder's Office, for one district in Los Angeles County, the total cost for a three-seat election in November 2013 was \$105,000 or \$35,000 per seat on the ballot. An election for three seats in November 2015 would have cost the district \$385,000 due to the lack of other races on the ballot (\$128,000 per seat). When the district transitioned to November 2016 elections, it paid \$22,400 per seat or \$67,200 for three seats. These savings are obviously ongoing and will have a cumulative effect over the years. As more local governments transition to even-year elections, economies of scale will result in even lower election-related costs. However, this does not consider the potential for ballot oversaturation. As more governments move toward even-year elections, the capacity of recorders' offices will certainly be tested.

The California Voting Rights Act (CVRA) has the potential for affecting local governments both in terms of representation as well as cost. Cities and districts will continue to transition to both district-based and even-year elections through 2020, and November 2018 will serve as another measure of both representative and fiscal impacts on local governments. While recent changes to the CVRA ensure that local governments will be protected from the large costs that

the CVRA imposed in previous years, the rush of local governments toward even-year elections will provide an interesting “stress test” for county election offices. It will be interesting to see how counties accommodate these lengthy ballots and, most importantly, what impact these lengthy ballots will have on voter information and efficacy. It is quite likely that as ballot density increases, voters will struggle to acquire the requisite information necessary for voting in an informed fashion. Increased ballot density may have a negative impact upon voters’ internal efficacy and, in turn, may have profound impacts upon the principles of deliberative democracy. November 2018 will contribute greatly to our understanding of the true impacts of the CVRA on voters and governments alike.

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