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An Uncertain Future for Section 5 of the Voting Rights Act: The Need for a Revised Bailout System

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AN UNCERTAIN FUTURE FOR SECTION 5 OF THE VOTING RIGHTS ACT: THE NEED FOR A REVISED BAILOUT SYSTEM

CHRISTOPHER B. SEAMAN*

ABSTRACT

In Northwest Austin Municipal Utility District Number One v. Holder (“NAMUDNO”), 129 S. Ct. 2504 (2009), the Supreme Court declined to decide one of the 2008 Term’s most prominent issues: the constitutionality of the 2006 renewal of Section 5 of the Voting Rights Act. Instead, the Court adopted an unexpected statutory construction permitting the plaintiff to seek an exemption called “bailout” from continued coverage under this provision. Even though the Court avoided directly ruling on its constitutionality, NAMUDNO left little doubt that Section 5 remains on uncertain constitutional ground.

A revised bailout system is likely the best approach for placing Section 5 on a more solid footing. To date, however, bailout has been little used; despite predictions made during the previous renewal of Section 5 in 1982, only a handful of the thousands of covered jurisdictions have sought and successfully obtained bailout. This article suggests that Congress should consider two major changes to the existing bailout system. First, Congress should implement an “automatic” bailout that would unilaterally remove from coverage all jurisdictions that have not violated the major provisions of the Voting Rights Act since the 1982 renewal. Second, the current requirements for obtaining bailout—which this Article calls “optional” bailout—should be revised to make it easier for jurisdictions to determine whether they are eligible. Adopting these changes will more narrowly tailor Section 5 to apply to jurisdictions with a recent history of discrimination in voting and thus make it more likely to survive constitutional scrutiny the next time the issue is before the Court.

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INTRODUCTION

In *Northwest Austin Municipal Utility District Number One v. Holder* (“*NAMUDNO*”),¹ the Supreme Court declined to decide one of the 2008 Term’s most prominent issues: the constitutionality of the 2006 renewal of Section 5 of the Voting Rights Act (“the Act”).² Instead, the Court adopted an unexpected statutory construction permitting the plaintiff—an obscure utility district in suburban Austin, Texas—to seek an exemption called bailout from continued coverage under Section 5.³ But the majority opinion in *NAMUDNO*, by eight members of the Court, left little doubt that the renewed Section 5 remains on uncertain ground, concluding it raised “serious constitutional questions” about the exercise of Congress’s enforcement power under the Fifteenth Amendment.⁴ In particular, the Court criticized Section 5’s geographically-targeted coverage formula—which encompasses mostly Southern jurisdictions with a lengthy history of *de jure* discrimination against minority voters—as unreflective of current political realities.⁵

A revised bailout system is likely the best approach for placing Section 5 on a more solid constitutional footing. To date, bailout has been little used; despite predictions made during the previous renewal of Section 5 in 1982, only a handful of the thousands of covered jurisdictions have sought and successfully obtained bailout. The rarity of bailout is attributable to several factors, including lack of awareness, the perceived complexity of the current bailout requirements, and the perception that bailout is expensive to pursue.

Part I of this article describes the requirements of Section 5, including its coverage formula and bailout provisions, from enactment in 1965 through 2006. Part II analyzes the effectiveness of the current bailout standard and concludes that it has been largely unsuccessful at removing jurisdictions without a recent history of discrimination from coverage under Section 5 for several reasons. Part III recounts the 2006 renewal of Section 5 in the Voting Rights Act Reauthorization Act (“*VRARA*”),⁶ with a focus on Congress’s decision to leave the coverage formula and bailout provisions intact, despite

1. 129 S. Ct. 2504 (2009).

2. 42 U.S.C. § 1973c (2006).

3. Relevant case law and scholarly articles tend to use different spelling of the word bailout, depending on its context. Typically, “bailout” is the noun form, “bail out” is the verb form, and variations—such as “bailed out jurisdictions”—are spelled as two words.

4. *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2513; *see also id.* at 2516 (“More than 40 years ago, this Court concluded that ‘exceptional conditions’ prevailing in certain parts of the county justified [Section 5]. . . . In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question that we do not answer today.”).

5. *Id.* at 2511–12.

6. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

testimony from voting rights scholars and others warning about the potential constitutional problem this presented under the “congruence and proportionality” test for Congress’s enforcement power under the Fifteenth Amendment.

Part IV critically examines the *NAMUDNO* litigation, including the three-judge district court decision concluding that VRARA was constitutional and the Supreme Court’s unexpected statutory construction decision that—at least temporarily—avoided a final ruling on Section 5’s constitutionality. In particular, it argues that the *NAMUDNO* Court gave Congress an opportunity to revise the scope of Section 5’s coverage to forestall a future successful challenge to its constitutionality.

Finally, Part V recommends several changes to the Act’s bailout system to create a more narrowly targeted Section 5 that is more likely be found constitutional. First, it proposes an “automatic” bailout—a unilateral removal from coverage—of all jurisdictions that have not received a Section 5 objection or been denied preclearance since the previous renewal of Section 5 in 1982 and that have not lost or settled any voting rights litigation under Sections 2⁷ or 203 of the Act during that time.⁸ Second, it suggests that Congress revise the current bailout system—which this article calls “optional” bailout—to make it easier to determine whether a jurisdiction is eligible. Specifically, it recommends that a covered jurisdiction should be allowed to bail out if it can establish (1) it has not violated Sections 2, 5, or 203 within the previous twenty years and (2) minority citizens in the covered jurisdiction have participated in the electoral process at rates substantially similar to non-Hispanic white voters. Third, Part V proposes that Congress require the Justice Department to identify and proactively notify jurisdictions that become eligible for optional bailout on a biannual basis. Finally, covered jurisdictions should be permitted to recover reasonable attorney’s fees if they successfully obtain bailout in court over the Justice Department’s opposition.

I. PRECLEARANCE, COVERAGE, AND BAILOUT UNDER THE VOTING RIGHTS ACT, 1965–2006

A. *The 1965 Voting Rights Act*

The Voting Rights Act⁹ is widely regarded as one of the most successful pieces of civil rights legislation.¹⁰ Enacted in 1965 in the wake of the “Bloody

7. 42 U.S.C. § 1973 (2006).

8. *Id.* § 1973aa–1a. Section 203 is one of the language minority provisions of the Act.

9. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

10. *See, e.g.*, H.R. REP. NO. 109-478, at 117 (2006) (statement of Rep. Sensenbrenner) (calling the Voting Rights Act “one of the most important pieces of civil rights legislation ever

Sunday” march in Selma, Alabama, where state and local police violently attacked hundreds of civil rights activists protesting the disenfranchisement of black voters,¹¹ the Voting Rights Act was intended to “banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century.”¹²

From Reconstruction through the mid-twentieth century, white Southerners devised and implemented numerous barriers—polls taxes, literary tests and other devices, and threats and the reality of outright violence—to prevent blacks from registering and voting.¹³ Starting in the late 1950s, civil rights advocates and the Justice Department began attacking these discriminatory tests and devices through case-by-case litigation.¹⁴ The Civil Rights Act of 1957 created a Civil Rights Division in the Department of Justice and vested it with the authority to bring constitutional challenges to barriers on minority voting.¹⁵ These efforts, however, were time-consuming, expensive, and

enacted.”); Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 736 (2008) (“[T]he Voting Rights Act . . . [is] widely regarded as the most successful intervention for racial minorities during the last century”); Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 2 (2007) (“The [Voting Rights] Act is rightly celebrated as the cornerstone of the ‘Second Reconstruction.’”).

11. At the time of “Bloody Sunday,” only 2.2% of black citizens in Dallas County, Alabama, where Selma is located, were registered to vote, despite repeated voter registration drives and efforts. *Williams v. Wallace*, 240 F. Supp. 100, 104 (M.D. Ala. 1965); see also Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 7, 14–17 (Bernard Grofman & Chandler Davidson eds. 1992) [hereinafter *CONTROVERSIES IN MINORITY VOTING*]. For a more detailed explanation of the role of Selma (and Alabama generally) in the enactment of the Voting Rights Act, see generally BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* (2007); see also DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 357–430 (1986); DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965* (1978).

12. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

13. See J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 22–38 (1999); RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 121–48 (2004); J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 11, at 135, 140–45.

14. See LANDSBERG, *supra* note 11, at 6 (explaining that the Civil Rights Act of 1957 “triggered an initially gradual, but later quickening, process of litigative action” against voting discrimination in the South). Landsberg’s book discusses in detail three voting-rights cases brought by the Justice Department in Sumter County, Elmore County, and Perry County, Alabama, in the early 1960s. *Id.* at 34–147.

15. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634; see also Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 545–47 (1973) (describing the 1957 Civil Rights Act); Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1, 4–5 (1965) (same).

generally ineffectual.¹⁶ The cases were tried before southern federal district court judges, many of whom were reluctant to order local officials to register black voters.¹⁷ And even when a discriminatory test was eliminated through litigation, state legislators or local officials instead implemented “newer, more subtle ways of minimizing black voter registration,” rendering the relief obtained practically meaningless.¹⁸

In response, civil rights groups sought a stronger voting rights law that would increase the Justice Department’s enforcement powers. This came to fruition with the Voting Rights Act of 1965, which directly involved the federal government in the mechanics of state and local elections. The Act contained numerous provisions designed to break down the barriers that had prevented minorities from participating in the electoral process for nearly a century. Section 4 automatically suspended the use of literacy tests and similar devices as a prerequisite to voting in covered jurisdictions.¹⁹ Sections 6 through 8 permitted the Justice Department to assign federal examiners to register voters and federal observers to monitor the conduct of federal, state,

16. Daniel P. Tokaji, *If It’s Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 791 (2006).

17. See, e.g., Richard M. Valelly, *Bureaucratic Learning and Statutory Design: The Governmental Origins of the 1965 Voting Rights Act*, 6 ELECTION L.J. 429, 429 (2007) (book review of LANDSBERG, *supra* note 11) (explaining that before the Voting Rights Act, “[t]oo many Southern federal judges, and certainly the vast majority of local elections officials in the Deep South, went through the motions of compliance while blocking the development of a new, bi-racial electorate.”). For example, in a lawsuit in Sumter County, Alabama, U.S. District Judge Hobart Grooms enjoined local registrars from imposing a “white witness requirement” on prospective black applicants. However, he stopped short of actually ordering local officials to register the applicants who had been discriminated against, requiring only that these applicants be informed they could reapply. LANDSBERG, *supra* note 11, at 70–71.

18. Peyton McCrary, *Bringing Equality To Power: How The Federal Courts Transformed The Electoral Structure of Southern Politics, 1960–1990*, 5 U. PA. J. CONST. L. 665, 685 (2003); see also Leading Cases, *Need for Preclearance*, 122 HARV. L. REV. 495, 495 (2008) (explaining the pattern of pre-1965 voting rights litigation was “well established: The states would find some apparently nonracial test by which to disenfranchise blacks, the restriction would be challenged in court, the plaintiffs would occasionally win, and the states would always devise a new restriction just as effective as the last one.”).

19. Voting Rights Act of 1965, *supra* note 9, at § 4 (codified as amended at 42 U.S.C. § 1973b (2006)). Section 4 defined a prohibited “test or device” as

any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

42 U.S.C. § 1973b(c) (2006). The suspension of prohibited tests and devices was made permanent in the Act’s 1975 revision and renewal. Tokaji, *supra* note 16, at 792.

and local elections in certain locations.²⁰ Section 10 found that the poll tax unlawfully had “the purpose or effect of denying persons the right to vote because of race or color” and directed the Attorney General to bring litigation against state and local governments that continued to use it.²¹ Section 2 restated the Fifteenth Amendment’s prohibition on practices that denied or abridged the right to vote on account of race,²² and Section 3 enhanced the Justice Department’s enforcement power through litigation.²³

In addition to these provisions, Congress sought an alternative to the “case-by-case litigation” that had proven to be “an unsatisfactory method” to remedy “discriminatory election practices in certain areas.”²⁴ “After enduring nearly a century of systematic resistance to the Fifteenth Amendment,” Congress instead decided to “shift the advantage of time and inertia from the perpetrators of the evil to its victims.”²⁵ The result was Section 5, which has become a key pillar of the Act.

Described as one of the most “novel”²⁶ and “inventive” remedies in federal law, Section 5 mandates federal scrutiny of all election laws implemented in certain jurisdictions.²⁷ Specifically, it requires these jurisdictions obtain approval—called preclearance—whenever they “enact or seek to administer” a change to any “standard, practice, or procedure with respect to voting.”²⁸ To receive preclearance, a jurisdiction must establish that the proposed change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color” or, since 1975, on account of membership in a “language minority group.”²⁹ The jurisdiction bears the burden of persuasion on these issues.³⁰ The proposed election change cannot be legally implemented until the jurisdiction receives preclearance.³¹

20. Voting Rights Act of 1965, *supra* note 9, at §§ 6–8 (codified at 42 U.S.C. § 1973d–f (2006)). For a more detailed discussion about the role of federal observers and examiners in voting rights enforcement, see James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. RACE & L. 227 (2007).

21. Voting Rights Act of 1965, *supra* note 9, at § 10 (codified at 42 U.S.C. § 1973h (2006)).

22. *Id.* § 2 (codified as amended at 42 U.S.C. § 1973 (2006)).

23. *Id.* § 3 (codified at 42 U.S.C. § 1973a (2006)).

24. *McCain v. Lybrand*, 465 U.S. 236, 243 (1984).

25. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

26. *McCrary*, *supra* note 18, at 686.

27. *Katzenbach*, 383 U.S. at 327; 42 U.S.C. § 1973c(a) (2006).

28. 42 U.S.C. § 1973c(a).

29. *Id.*; see *id.* at § 1973l(c)(3) (defining “language minority group” as “persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.”).

30. 28 C.F.R. § 51.52(a) (2009); *Georgia v. United States*, 411 U.S. 526, 538 (1973). Mark Posner, a former attorney in the Voting Section, has explained “Section 5 does not explicitly provide that covered jurisdictions have the burden of proof in section 5 preclearance lawsuits, but the Supreme Court has inferred such a burden from the statute.” Mark A. Posner, *Time Is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a*

Preclearance can be obtained by submitting the proposed change to either the Attorney General or a three-judge panel of the United States District Court for the District of Columbia.³² In practice, almost all (>99.9%) proposed changes are submitted to the Attorney General for preclearance because it is faster and less expensive.³³ Specifically, the Justice Department is required to make a preclearance determination within sixty days of receiving a submission,³⁴ and this administrative process is more informal and less costly than a declaratory judgment lawsuit in the District Court.³⁵ For example, in the *Georgia v. Ashcroft*³⁶ Section 5 litigation, the state of Georgia was estimated to have spent over \$1.4 million in attorney's fees.³⁷ If a jurisdiction does not

Congruent and Proportional Response to Our Nation's History of Discrimination in Voting, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 51, 62 n.44 (2006) (citing *Katzenbach*, 383 U.S. at 335).

31. *Clark v. Roemer*, 500 U.S. 646, 652 (1991); *Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam); see also *United States v. Bd. of Supervisors of Warren Cnty., Miss.*, 429 U.S. 642, 645 (1977) ("No new voting practice or procedure may be enforced unless the State or political subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object to a proposal submitted to him.").

32. 42 U.S.C. § 1973c(a); see also McCrary, *supra* note 18, at 686 (explaining that under Section 5, "either a three-judge panel in the federal courts of the District of Columbia or the Attorney General of the United States must 'preclear' voting changes before they can be legally enforced."). By regulation, the responsibility and authority for preclearance decisions have been delegated by the Attorney General to the Assistant Attorney General of the Civil Rights Division. 28 C.F.R. § 51.3 (2009). With the exception of objections and requests for reconsideration of objections, the Chief of the Voting Section may act on behalf of the Assistant Attorney General. *Id.*

33. From 1965 through mid-2004, jurisdictions submitted over 400,000 proposed voting changes to the Justice Department, while only 68 declaratory judgment actions were filed in the U.S. District Court—less than 0.02% of all proposed changes. U.S. COMM'N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT & REAUTHORIZATION: THE DEPARTMENT OF JUSTICE'S RECORD OF ENFORCING THE TEMPORARY VOTING RIGHTS ACT PROVISIONS 67–69 (2006), <http://www.usccr.gov/pubs/051006VRASatReport.pdf>.

34. 42 U.S.C. § 1973c(a); 28 C.F.R. § 51.9(a) (2009). If the information initially provided by the covered jurisdiction is insufficient for the Justice Department to make a determination within the sixty-day period, it may request additional information about the proposed change and extend the determination period by an additional sixty days. 28 C.F.R. § 51.37(a), (c) (2009). In addition, a covered jurisdiction may request expedited consideration of a change, although the Justice Department is under no obligation to do so. *Id.* at § 51.34(a), (b).

35. See Voting Section, U.S. Dep't of Justice Civil Rights Div., *Making Section 5 Submissions*, http://www.justice.gov/crt/about/vot/sec_5/making.php (last visited Dec. 20, 2010) ("The Section 5 administrative review process is designed to be an expeditious, cost-effective alternative to the Section 5 declaratory judgment process.").

36. 539 U.S. 461 (2003).

37. Anthony A. Peacock, *From Beer to Eternity: Why Race Will Always Predominate Under the Voting Rights Act*, in REDISTRICTING IN THE NEW MILLENNIUM 119, 145 (Peter F. Galderisi ed., 2005).

obtain preclearance from the Attorney General, the change cannot be legally implemented unless the jurisdiction obtains relief from the District Court.³⁸

The geographic reach of Section 5 is determined by the coverage formula contained in Section 4(b) of the Act. This formula was originally designed in 1965 as a “facially neutral tool for covering jurisdictions” with a “pervasive history of minority disenfranchisement.”³⁹ A jurisdiction automatically fell within the original coverage formula if it satisfied two requirements: (1) the use of a “test or device” for determining eligibility to register or vote⁴⁰ and (2) a rate of voter registration or turnout below 50% in the 1964 presidential election.⁴¹ Although denounced as “arbitrary” by its opponents at the time,⁴² Section 4(b)’s coverage formula effectively captured most areas that had a history of widespread race discrimination in voting: the entire states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, as well as forty counties in North Carolina.⁴³ It also included a handful of counties in Arizona, Hawaii, and Idaho.⁴⁴ However, the formula also omitted several jurisdictions with a history of discrimination, including Texas and Arkansas.⁴⁵ Nonetheless, most voting rights scholars agree the

38. See, e.g., *Morris v. Gressette*, 432 U.S. 491, 505 & n.21 (1977); Posner, *supra* note 30, at 72. However, there is no *direct* appeal of the Attorney General’s determination whether to grant or deny preclearance to the District Court under the Administrative Procedure Act. See *Morris*, 432 U.S. at 501 (“The nature of the § 5 remedy . . . strongly suggests that Congress did not intend the Attorney General’s actions under that provision to be subject to judicial review.” (citation omitted)).

39. Pamela S. Karlan, *Congressional Power to Extend Preclearance Under the Voting Rights Act*, AM. CONST. SOC’Y FOR L. & POL’Y 1, 17 (June 14, 2006), <http://www.acslaw.org/node/2964>.

40. For the definition of a “test or device” in Section 4, see *supra* note 19.

41. Voting Rights Act of 1965, *supra* note 9, at § 4(b). The national turnout rate of the voting age population in the 1964 presidential election was 61.9%. Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963, 966 (2001).

42. STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969* at 319 (1976). In the House floor debate for the Act, a Georgia representative sarcastically remarked that the formula might as well have selected

all states which have an average altitude of 100 to 900 feet, an average yearly temperature of 68° to 77° at 7 a.m., average humidity of 80 to 87%, and a coastline of 50 to 400 miles. With this formula, we encompass all the Southern states attacked by H.R. 6400, but have the added advantage of including all of North Carolina and excluding Alaska.

Id. (quoting 89 Cong. Rec. 15,723 (July 7, 1965) (statement of Rep. Howard Calloway)).

43. Michael P. McDonald, *Who’s Covered? Coverage Formula and Bailout*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 255, 256 (David L. Epstein et al. eds., 2006).

44. *Id.*

45. See Karlan, *supra* note 10, at 26. Some scholars have suggested that the omission of Texas and Arkansas from the original coverage formula was a strategic choice designed to “sidestep determined opposition by Texas’s and Arkansas’s powerful legislation.” SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 470 (3d. ed. 2007).

original coverage formula “did a reasonably good job of picking up most, if not all, of the places with a history of pervasive violations of the Fourteenth and Fifteenth Amendments.”⁴⁶

Recognizing that the coverage formula might be overinclusive in some situations, Section 4 also included a bailout provision permitting jurisdictions to request termination of coverage.⁴⁷ This provision “was aimed at correcting any instances of a ‘false positive’—i.e., any instances where the coverage formula wrongly identified a particular jurisdiction as having engaged in pervasive violation of the right to vote.”⁴⁸ As the House Judiciary Committee explained:

[T]here may be areas covered under the formula of section 4 where there has been no racial discrimination violating the 15th Amendment. The bill takes account of this possibility by a provision which affords any State or subdivision an opportunity to exempt itself, by obtaining an adjudication that such tests or devices have not been used by it to accomplish substantial discrimination in the preceding 5 years This provision for overturning the presumption or inference created by the determinations in section 4 provides assurance that no State or subdivision will be treated unfairly and that the suppression of tests and devices will be applied only to areas where it is necessary to enforce the rights guaranteed under the 15th amendment.⁴⁹

Thus, even from the Act’s inception, bailout was designed as a “safety valve” to release from coverage jurisdictions that could establish they had not discriminated against minority voters.⁵⁰

To obtain bailout, the jurisdiction had to establish that during the preceding five years, no “test or device” had been used “for the purpose or with the effect

46. Karlan, *supra* note 10, at 26; *see also* H.R. REP. NO. 89-439, at 14 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2445 (“Decisions of the Federal courts and the reports of the U.S. Civil Rights Commission persuasively indicate that many of the States and political subdivisions to which the formula applies have engaged in widespread violations of the [Fifteenth] [A]mendment over a period of time.”). Indeed, even opponents of the current Section 5 admit the original coverage formula was effective and appropriate because it “permitted the finding of vote denial by a simple formula, eliminating the need to ferret out Fifteenth Amendment violations in an unmanageably large number of counties in states with abominable records with respect to black voting rights.” ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 16 (1987).

47. Voting Rights Act of 1965, *supra* note 9, at § 4(a) (codified as amended at 42 U.S.C. § 1973b(a) (2006)).

48. Posner, *supra* note 30, at 63.

49. H.R. REP. NO. 89-439, at 14–15 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2445.

50. *See* S. REP. No. 89-162, at 45 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2552 (“Section 4(a) provides for an ‘escape clause’ under which a State or separate subdivision . . . may come into the District Court for the District of Columbia and show that no test or device has been used in a discriminatory manner.”).

of denying or abridging the right to vote on account of race or color.”⁵¹ Like a declaratory judgment action for preclearance, bailout suits would be heard by a three-judge panel in the United States District Court for the District of Columbia, with any appeal going directly to the Supreme Court.⁵² The 1965 Act “required that the bailout litigation be instituted by the political jurisdiction that had been designated for coverage”; no local jurisdiction could individually seek bailout if it was part of an entire state that was covered.⁵³

The constitutionality of the Act, including its coverage formula, was challenged almost immediately after the Act was signed into law. In *South Carolina v. Katzenbach*,⁵⁴ the Supreme Court upheld the challenged portions of the Act—including Section 5 and the coverage formula in Section 4(b)—as “valid means for carrying out the commands of the Fifteenth Amendment.”⁵⁵ Specifically, it concluded the coverage formula was constitutional because substantial evidence existed that many covered jurisdictions had engaged in “recent voting discrimination,” including use of “tests and devices” that served as one of the two requirements for coverage.⁵⁶ *Katzenbach* also pointed to the bailout provision as further support for the Act’s constitutionality, explaining that Congress “acknowledge[d] the possibility of overbreadth” in the coverage formula and “provide[d] for termination of coverage” when “the danger of substantial voting discrimination has not materialized.”⁵⁷ “In the event the formula is improperly applied,” the Court explained, the covered jurisdiction “can always go into court and obtain termination of coverage under § 4(b), provided it has not been guilty of voting discrimination in recent years.”⁵⁸

Between 1967 and 1969, a handful of covered jurisdictions—most notably Alaska—achieved bailout with the Attorney General’s consent.⁵⁹ However, in

51. Voting Rights Act of 1965, *supra* note 9, at § 4(a) (codified as amended at 42 U.S.C. § 1973b(a)(1)(A)).

52. *Id.*; Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 390 (1985).

53. Hancock & Tredway, *supra* note 52, at 390–91.

54. 383 U.S. 301 (1966).

55. *Id.* at 337.

56. *Id.* at 329–30.

57. *Id.* at 331.

58. *Id.* at 333.

59. These locations apparently were inadvertent “casualties” of the neutral trigger formula. For example, in Alaska, cold weather and geographical isolation of parts of the state, rather than race discrimination, was responsible for turnout falling below the 50% threshold. See LAWSON, *supra* note 42, at 423 n.117. Alaska obtained bailout in 1966, *Alaska v. United States*, No. 101-66 (D.D.C. Aug. 17, 1966), but was covered again under the 1975 amendment to the Act. Several covered jurisdictions in Arizona, Idaho, and North Carolina also successfully obtained bailout. See Hancock & Tredway, *supra* note 52, at 392, 412–15 (describing bailout of Apache, Coconino, and Navajo Counties, Arizona; Elmore County, Idaho; and Wake County, North Carolina).

Gaston County v. United States,⁶⁰ the Court essentially closed the door (at least until after the 1982 amendments⁶¹) to future bailout attempts by jurisdictions with a history of *de jure* segregation in public schools.⁶² Gaston County, North Carolina, was one of the covered jurisdictions in North Carolina because it had used a literacy test and fell below the 50% threshold for the 1964 election.⁶³ In August 1966, the county brought a bailout suit in the United States District Court for the District of Columbia, asserting the literacy test had not been used for the prohibited purpose or effect of “denying or abridging the right to vote” due to race.⁶⁴ The Justice Department opposed the request on the basis that Gaston County’s “separate and inferior” school system had the discriminatory effect of making it more difficult for black voters to pass the required literacy test.⁶⁵ The District Court agreed, finding “the Negro schools were of inferior quality in fact as well as in law,” and thus Gaston County could not carry its burden of proving the test’s nondiscrimination.⁶⁶ On appeal, the Supreme Court affirmed, finding that all persons of voting age who were educated in the county “attended racially separate and unequal schools.”⁶⁷ As a result, Gaston County had “deprived its black residents of equal educational opportunities, which in turn deprived them of an equal chance to pass the literacy test.”⁶⁸

Although disclaiming “any *per se* rule” that a history of segregated schools in a covered jurisdiction—as nearly all locations in the South had—made it impossible to achieve bailout, that was the practical effect of the *Gaston County* decision as no Southern jurisdiction was able to achieve bailout until the 1990s. For example, in 1974 the state of Virginia attempted to bail out from coverage. Relying on *Gaston County*, the District Court rejected its claim, holding that Virginia’s use of a literacy test, coupled with its history of segregated schools, had a discriminatory effect due to “the causal connection between the maintenance of inferior schools for blacks and their lesser ability to pass Virginia’s literacy requirement.”⁶⁹ As a result, the bailout provision was practically a dead letter for most covered jurisdictions.

60. 395 U.S. 285 (1969).

61. *See infra* Part I.C.

62. *Gaston Cnty.*, 395 U.S. at 288.

63. *Id.* at 286–87.

64. *Id.* at 287.

65. *Id.*

66. *Id.* at 288 (quoting *Gaston Cnty. v. United States*, 288 F. Supp. 678, 689 n.23 (D.D.C. 1968)).

67. *Id.* at 293–94.

68. *Gaston Cnty.*, 395 U.S. at 291.

69. *Virginia v. United States*, 386 F. Supp. 1319, 1324 (D.D.C. 1974), *aff’d*, 420 U.S. 901 (1975).

B. 1970 and 1975 Renewals

In 1970 and again in 1975, Congress reauthorized the temporary remedial provisions of the Act, including Section 5, for additional five and seven-year periods, respectively.⁷⁰ This was accomplished by lengthening the period during which a covered jurisdiction could not have used a prohibited “test or device” with a discriminatory purpose or effect to be eligible for bailout.⁷¹ This had the effect of “freezing” the beginning of the compliance period at 1965, meaning jurisdictions that used a discriminatory “test or device” then would remain covered.⁷²

In both 1970 and 1975, Congress extended Section 4(b)’s coverage formula to include any locations that used a “test or device” for voting and had voter registration or turnout of less than 50% for the most recent presidential elections in 1968 and 1972.⁷³ In addition, during the 1975 renewal, Section 5 protection was extended to “language minorities” by amending the definition of a prohibited “test and device” to include jurisdictions where a language minority group was at least five percent (5%) of the citizen voting-age population and where election materials were provided only in English.⁷⁴ Examining voter registration and participation rates, along with other evidence presented by the U.S. Civil Rights Commission, the House and Senate Judiciary Committees found there was “a systematic pattern of voting discrimination and exclusion against minority group citizens who are from environments in which the dominant language is other than English.”⁷⁵ For example, the Senate explained:

The State of Texas . . . has a substantial minority population, comprised primarily of Mexican Americans and blacks. Evidence before the subcommittee documented that Texas also has a long history of discriminating against members of both minority groups in ways similar to the myriad forms of discrimination practiced against blacks in the South.⁷⁶

Congress concluded that “[p]ersons of Spanish heritage” were the “most severely affected by discriminatory [voting] practices, while the documentation

70. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 2–6, 84 Stat. 314, 314–15; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400.

71. Voting Rights Act Amendments of 1970, *supra* note 70, at § 3; Voting Rights Act Amendments of 1975, *supra* note 70, at § 101; *see also* Timothy O’Rourke, *Voting Rights Act Amendments of 1982: The New Bailout Provision and Virginia*, 69 VA. L. REV. 765, 775 (1983).

72. O’Rourke, *supra* note 71, at 775.

73. *Id.*; *see also* McDonald, *supra* note 43, at 257–59 (describing the 1970 and 1975 reauthorizations).

74. Voting Rights Act Amendments of 1975, *supra* note 70, at § 203.

75. S. REP. NO. 94-295, at 24 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 790; H.R. REP. NO. 94-196, at 16 (1975). *See generally* David H. Hunter, *The 1975 Voting Rights Act and Language Minorities*, 25 CATH. U. L. REV. 250 (1976).

76. S. REP. NO. 94-295, at 25 (1975).

concerning Asian Americans, American Indians, and Alaskan Natives was also substantial.”⁷⁷ As a result, it extended Section 5 coverage to these areas as well.

The revised coverage formulas in 1970 and 1975 added the entire states of Alaska, Arizona, and Texas; the boroughs of Manhattan, Brooklyn, and the Bronx in New York City; and a small number of local municipalities in California, Colorado, Connecticut, Florida, Idaho, Michigan, Maine, New Hampshire, New Mexico, Oklahoma, and South Dakota.⁷⁸ A number of these newly added, non-Southern jurisdictions—which often had few minority voters—subsequently were able to bail out of coverage between 1975 and 1982.⁷⁹ In Maine, eighteen municipalities covered under the 1970 renewal were bailed out with the Attorney General’s consent.⁸⁰ Similarly, the three covered counties in New Mexico and the two covered counties in Oklahoma covered under the 1975 language minority amendment achieved bailout because the members of the affected language group were found to be fluent in English.⁸¹

Other jurisdictions, however, received less favorable results in bailout litigation. The Supreme Court denied bailout for the City of Rome, Georgia, because it was ineligible for bailout as a subdivision of a state that was separately covered under Section 5.⁸² The Attorney General also successfully opposed bailouts sought by the state of Alaska (which had been re-covered by the 1975 language amendments); Yuba County, California; and El Paso County, Colorado.⁸³ And in 1972, the federal government initially consented to the bailout of the three boroughs of New York City—Manhattan, Brooklyn, and the Bronx—covered under the 1970 renewal; but in 1973, this litigation was reopened on the Attorney General’s motion after finding these counties had used a discriminatory test or device, and they were re-covered in 1974.⁸⁴

77. *Id.* at 31.

78. McDonald, *supra* note 43, at 257–59.

79. Hancock & Tredway, *supra* note 52, at 403.

80. *Maine v. United States*, No. 75-2125 (D.D.C. Sept. 17, 1976), *referenced in* Hancock & Tredway, *supra* note 52, at 403.

81. *New Mexico v. United States*, No. 76-0067 (D.D.C. July 30, 1976); *Choctaw & McCurtain Cntys. (Okla.) v. United States*, No. 76-1250 (D.D.C. May 12, 1976), *referenced in* Hancock & Tredway, *supra* note 52, at 403.

82. *City of Rome v. United States*, 446 U.S. 156, 168 (1980).

83. Hancock & Tredway, *supra* note 52, at 403.

84. *New York v. United States*, No. 2419-71 (D.D.C. Apr. 3, 1972), *aff’d*, 419 U.S. 888 (1974). Subsequently, in 1975, Bronx County and Kings County (Brooklyn) were declared subject to preclearance on the separate “language minority” grounds because over 5% of the voting-age citizens in those counties were persons of Spanish heritage as of 1972, but registration and election materials were provided only in English. *Ravitch v. City of New York*, No. 90 Civ. 5752, 1992 WL 196735, at *1 (S.D.N.Y. Aug. 3, 1992).

C. 1982 Amendments

In 1982, Congress again considered potential amendments to the Voting Rights Act and the renewal of its temporary provisions. A primary focus of the 1982 legislation was the addition of the so-called “effects test” to Section 2⁸⁵—which is permanent and has nationwide reach—in response to *City of Mobile v. Bolden*.⁸⁶ But Congress was also compelled to revisit Section 5 because without a modification of the bailout criteria, most covered jurisdictions could demonstrate they had not used a prohibited “test or device in a discriminatory manner” after 1965 and thus be released from coverage.⁸⁷

During hearings in 1981 and 1982, committees in the House and Senate heard extensive testimony regarding the continuing need for Section 5 coverage. Although conceding there had been vast improvements in the ability of minority voters to register and cast ballots in the covered jurisdictions, Congress concluded “the nation’s task in securing voting rights is not finished.”⁸⁸ Section 5 objections interposed from 1975 to 1981 demonstrated that “covered jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength,” such as annexations, the use of at-large elections, majority vote requirements and/or numbered posts, and redistricting.⁸⁹ As a result, Congress declared there was “virtual unanimity” that Section 5’s preclearance requirement should be extended in some fashion.⁹⁰

Congress considered but ultimately rejected a straight ten-year extension of Act’s temporary provisions, including the existing bailout standard tied to pre-

85. See, e.g., Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1352–57 (1983).

86. 446 U.S. 55 (1980).

87. As the Senate Judiciary Committee report explained:

If no further action is taken by Congress . . . virtually all of the remaining jurisdictions which came under Section 5 with the original passage of the Voting Rights Act in 1965 will be able to show that they have not used a test or device in a discriminatory manner for 17 years, that is, since August 6, 1965. This would constitute a virtual automatic termination of Section 5 coverage as to those jurisdictions.

S. REP. NO. 97-417, at 43–44 (1982), *reprinted in* 1982 U.S.C.C.A.N. 178, 222.

88. *Id.* at 9–10, *reprinted in* 1982 U.S.C.C.A.N. at 186–87.

89. *Id.* at 10, *reprinted in* 1982 U.S.C.C.A.N. at 187. For a more detailed explanation of how these devices acted to dilute minority voting strength, see Peyton McCrary, Christopher Seaman & Richard Valelly, *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 292–99 (2006).

90. S. REP. NO. 97-417, at 9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 178, 186. See generally Laughlin McDonald, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*, 51 TENN. L. REV. 1 (1983).

1965 use of discriminatory tests or devices,⁹¹ because it would provide no incentive for covered jurisdictions to take affirmative steps to remedy past and present discrimination against minority voters.⁹² Instead, it enacted a twenty-five year extension of the preclearance requirement and the existing coverage formula and combined it with a new bailout mechanism that was designed to “permit an effective and orderly transition to the time when such exceptional remedies as preclearance are no longer necessary.”⁹³ The Senate Judiciary Committee’s report explained:

The revised bailout mechanism is geared to the actual record of conduct in each jurisdiction. Those [jurisdictions] with a record of compliance with the law in recent years and a commitment to full opportunity for minority participation in the political process could bail out. Other jurisdictions would have to compile such a record in order to become eligible. Only those jurisdictions that insist on retaining discriminatory procedures or otherwise inhibit full minority participation would remain subject to preclearance.⁹⁴

Thus, the preclearance provision was intended to “work[] in tandem with the bailout provision to create a meaningful incentive for jurisdictions to undertake the affirmative inclusion efforts bailout demands in order to avoid remaining under the coverage regime.”⁹⁵

The revised bailout standard adopted in 1982 had two major changes. First, it substantially broadened eligibility by permitting a “political subdivision” within a covered state to separately seek bailout.⁹⁶ The 1982 amendments modified the term “political subdivision” in Section 4(a)’s bailout provision by adding the phrase “though such [coverage] determinations were not made with respect to such subdivision as a separate unit.”⁹⁷ As a result of this change, “political subdivisions” previously designated for coverage only as part of a larger state (e.g., counties in Virginia or Texas) were permitted to bail out.

This change, however, was not intended to expand the scope of what constituted a “political subdivision” for purposes of bailout eligibility. Since 1965, section 14(c)(2) of the Act defined a “political subdivision” as “any

91. See, e.g., Boyd & Markman, *supra* note 85, at 1381 (explaining that Senate Majority Leader Howard Baker (R-TN) “wished to avoid prolonged and bitter debate on extension” by proposing “a simple ten-year extension of the existing Act”).

92. Hancock & Tredway, *supra* note 52, at 408; see also S. REP. NO. 97-417, at 44 (1982), reprinted in 1982 U.S.C.C.A.N. 178, 222 (stating that the purpose of the revised bailout section was to “provide incentives to jurisdictions to attain compliance with the law and increas[e] participation by minority citizens in the political process of their community.”).

93. S. REP. NO. 97-417, at 44 (1982), reprinted in 1982 U.S.C.C.A.N. 178, 222.

94. *Id.* at 43, reprinted in 1982 U.S.C.C.A.N. at 221.

95. Karlan, *supra* note 10, at 26–27.

96. 42 U.S.C. § 1973b(a)(1) (2006).

97. *Id.*

county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.”⁹⁸ Thus, political subdivisions—such as townships or villages—within counties, parishes, or other governmental bodies that registered voters (such as independent cities in Virginia) were not permitted to seek bailout, even after 1982, because they were not considered a “political subdivision.”⁹⁹ The legislative history for the 1982 amendments confirmed Congress’s intent. The House Judiciary Committee report explained “the standard for bail-out is broadened to permit political subdivisions, as defined in Section 14(c)(2), in covered states to seek bail out although the state itself may remain covered.”¹⁰⁰ Similarly, the Senate Judiciary Committee explained “[t]owns and cities within [covered] counties may not bailout separately” because, “[a]s a practical matter . . . [Congress] could not expect that the Justice Department or private groups could remotely hope to monitor and to defend the bailout suits.”¹⁰¹

The second major change to bailout adopted by Congress in 1982 was the elimination of the categorical prohibition on bailout for jurisdictions that used a discriminatory “test or device” before 1965. Instead, the new bailout standard required the covered jurisdiction demonstrate a record of compliance with the Act for the previous ten years.¹⁰² Specifically, to obtain bailout, the jurisdiction must prove that for the ten-year period immediately preceding action:

- (1) it has not used a discriminatory “test or device” with the purpose or effect of denying or abridging the right to vote;
- (2) no final court judgments, consent decrees, or settlements have been entered against it for discriminatory voting practices;
- (3) no federal examiners have been sent to the jurisdiction;
- (4) the jurisdiction, and all governmental units within its territory, have complied with Section 5, including the submission of all election changes for preclearance and the repeal of all changes to which objections were issued; and

98. *Id.* at § 1973k(c)(2) (2006).

99. See Richard A. Williamson, *The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provision*, 62 WASH. U. L.Q. 1, 40 (1984) (“For purposes of both coverage and bailout, the term ‘political subdivision’ meant any county or parish except when registration and voting were conducted by independent cities.”).

100. H.R. REP. NO. 97-227, at 2 (1981) (emphasis added).

101. S. REP. NO. 97-417, at 57 n.192 (1982), reprinted in 1982 U.S.C.C.A.N. 178, 236 n.192.

102. O’Rourke, *supra* note 71, at 782; J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 262–63 (Ana Hernandez ed., 2006).

- (5) no objection has been entered by the Department of Justice or the U.S. District Court to any change submitted by the jurisdiction and any governmental unit within its territory.¹⁰³

In addition, the jurisdiction was required to demonstrate it had taken affirmative steps to expand minority participation in the electoral process. Under the statute, these steps include:

- (1) the elimination of any dilutive voting or election procedures;
- (2) making constructive efforts to eliminate intimidation and harassment toward minority voters; and
- (3) other constructive efforts towards increasing minority voter participation have been made, “such as expanded opportunities for convenient registration and voting” and the appointment of minority election officials, at all stages of the election and registration process.¹⁰⁴

Finally, bailout would be unavailable if the jurisdiction had “engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color” or membership in a minority language group.¹⁰⁵ Trivial violations that were promptly corrected and not repeated, however, would not prevent bailout.¹⁰⁶

The amended bailout provision permitted the Attorney General to consent to the requested relief if he or she is “satisfied that the State or political subdivision has complied with the requirements [for bailout].”¹⁰⁷ If bailout is granted, the District Court of the District of Columbia retains jurisdiction for a ten-year period and “shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred during the ten-year period[] . . . [which] would have precluded the issuance of a [bailout] judgment.”¹⁰⁸ Finally, the new bailout standard was set to come into effect in August 1984 to permit the Justice Department to prepare for the large number of expected bailout requests.¹⁰⁹

D. Bailout After the 1982 Amendments

There was significant disagreement during legislative debates about whether covered jurisdictions would pursue bailout under the new standard.

103. 42 U.S.C. § 1973b(a)(1)(A)–(E) (2006).

104. *Id.* at § 1973b(a)(1)(F)(i)–(iii).

105. *Id.* at § 1973b(a)(3).

106. *Id.*

107. *Id.* at § 1973b(a)(9).

108. *Id.*

109. *See Williamson, supra* note 99, at 33 (“[T]he effective date of the new bailout provision has been deferred until August 6, 1984, in order to allow the [Justice] Department to develop standards and regulations for the new system.”).

Proponents of the new bailout provision, such as the Senate Judiciary Committee, asserted it “provide[s] a reasonable avenue for jurisdictions to bail out of preclearance at a time appropriate for them.”¹¹⁰ They pointed to an analysis by the Joint Center for Political Studies, which examined 808 counties in seven southern states wholly covered by Section 5 and estimated approximately 25% of covered jurisdictions could bail out in 1984, when the new standard took effect.¹¹¹ Another contemporary study of the state of Virginia concluded that about half of the state’s counties and a fifth of its independent cities could achieve bailout under the new standard.¹¹² Opponents such as Rep. Henry Hyde (R-IL), however, argued the new standard made bailout “highly unlikely, as a practical matter, thereby changing the temporary status of the Act to a more constitutionally suspect permanent condition.”¹¹³ Others, such as Rep. M. Caldwell Butler (R-VA), went even further, blasting the 1982 amendment as making “a mockery of the idea of reasonable bailout by crafting legislation which would establish requirements impossible to achieve.”¹¹⁴

Ultimately, “the flood of expected bailout litigation . . . never materialized.”¹¹⁵ From 1982 to 1984, when the new standard came into effect, six bailout suits were filed. The Attorney General consented to bailouts by Campbell County, Wyoming; Elmore County, Idaho; three towns in Connecticut; El Paso County, Colorado; and Honolulu County, Hawaii.¹¹⁶ In the first three cases, the covered jurisdictions had low minority populations and no history of discrimination against black voters.¹¹⁷ The latter two jurisdictions were covered under the “language minority” provision of the 1975 renewal. El Paso County established to the Justice Department’s satisfaction that English-language elections did not have the purpose or effect of discriminating against minority voters, while Honolulu County successfully demonstrated the English or Hawaiian language literacy test in the Hawaii Constitution was not applied in Honolulu prior to its 1968 repeal, and thus

110. S. REP. NO. 97-417, at 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 183.

111. *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992 and H.R. 3112 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 97th Cong.* 826-28, 830-32 (1982), *discussed in* O’Rourke, *supra* note 71, at 785-86 & n.130; *see also* S. REP. NO. 97-417, at 60 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 238 (citing presentation by Armand Derfner, Joint Center for Political Studies, that “showed a reasonable projection of 25 percent of the counties in the major covered states being eligible to file for bailout on the basis of their compliance with the objective criteria in the compromise bill.”).

112. O’Rourke, *supra* note 71, at 792-800.

113. H.R. REP. NO. 97-227, at 57 (1981) (supplemental views of Reps. Henry J. Hyde and Dan Lundgren).

114. *Id.* at 64 (dissenting views of Rep. M. Caldwell Butler).

115. McDonald, *supra* note 43, at 261.

116. Hancock & Tredway, *supra* note 52, at 412-15.

117. *Id.* at 412-14.

Asian-Americans who were not literate in English could register and vote in 1965.¹¹⁸ Finally, in 1984, Alaska petitioned for bailout under the minority language provisions, but the Justice Department opposed the state's claim that its English-only elections did not have a discriminatory purpose or effect.¹¹⁹ After the new standard came into effect in August 1984, Alaska sought bailout under the new standard, but its petition was unsuccessful, and it presently remains covered.¹²⁰

No other covered jurisdictions pursued bailout until 1997, when the City of Fairfax, Virginia, became the first jurisdiction in a Southern state to bail out under the new standard adopted in the 1982 amendments.¹²¹ The City of Fairfax—which is a suburb of Washington, D.C.—explained it had sought bailout “because it was proud of its record of equal registration and voting opportunities, and the bailout gave the City a public and official declaration that all aspects of the City's political process were equally open to all its citizens.”¹²² From 1997 through 2008, an additional 16 jurisdictions—all counties or independent cities located in Virginia—obtained bailout, all with the Attorney General's consent.¹²³ Most recently, two municipalities in North Carolina and Georgia were granted bailout in 2010.¹²⁴ Notably, no jurisdiction has filed a bailout lawsuit since 1984 and been rejected.¹²⁵

118. *Id.* at 414–15.

119. *Id.* at 415 (referencing *Alaska v. United States*, No. 84–1362 (D.D.C. 1984)).

120. *Id.* at 415; Voting Section, U.S. Dep't of Justice Civil Rights Div., *Section 5 Covered Jurisdictions*, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Dec. 20, 2010).

121. Hebert, *supra* note 102, at Appendix A; *see also* Brief of *Amici Curiae* Jurisdictions That Have Bailed Out Under the Voting Rights Act in Support of Appellees at 6, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) (No. 08–322) [hereinafter *Amici Brief of Bailed Out Jurisdictions*].

122. *Amici Brief of Bailed Out Jurisdictions*, *supra* note 121, at 6–7.

123. *See id.* at 7 & Ex. B (identifying the additional bailed-out jurisdictions in Virginia as Frederick, Shenandoah, Roanoke, Rockingham, Warren, Greene, Augusta, Botetourt, Essex, Page, Washington, Middlesex, and Amherst Counties, and Winchester, Harrisonburg, and Salem Cities).

124. Consent Judgment and Decree, *City of Kings Mountain v. Holder*, No. 1:10-CV-01153, 2010 WL 4228358 (D.D.C. Oct. 22, 2010) (awarding bailout to City of Kings Mountain, North Carolina); Consent Judgment and Decree, *City of Sandy Springs v. Holder*, No. 1:10-CV-01502 (D.D.C. Oct. 26, 2010), *available at* http://www.justice.gov/crt/about/vot/misc/sandy_springs_cd.pdf.

125. *Amici Brief of Bailed Out Jurisdictions*, *supra* note 121, at 7.

II. THE FLAWS OF THE CURRENT BAILOUT SYSTEM

Why, then, have initial projections of widespread bailout proven inaccurate?¹²⁶ Although not entirely clear, this article suggests five likely reasons why more covered jurisdictions have not pursued bailout.

First, many eligible jurisdictions simply may be unaware that bailout is an alternative to continued coverage.¹²⁷ For example, the fact that all but two jurisdictions that have achieved bailout since 1984 are located in Virginia appears related to the City of Fairfax's successful bailout, which eventually led other local governments to follow suit.¹²⁸ In addition, Virginia attorney and former Voting Section official J. Gerald Hebert has developed a specialty of representing political subdivisions seeking bailout, and he has helped increase awareness of its availability through presentations at statewide meetings of Virginia's local government attorney associations and local election officials.¹²⁹ Thus, rather than some "anomaly" specific to Virginia, as Justice Thomas has claimed,¹³⁰ the reason that most recent bailouts have occurred there is probably due to increased awareness within the state.

Second, even if a jurisdiction knows bailout is a possibility, it may be perceived as prohibitively expensive to pursue.¹³¹ For example, Hans von Spakovsky, a former political appointee in the Justice Department during the George W. Bush administration, has claimed "[b]ailout can be an extremely expensive ordeal, particularly for cash-strapped municipalities and counties," requiring the hiring of "expert witnesses" and "a voting-law attorney" that could "easily run into the tens and hundreds of thousands of dollars."¹³² In reality, however, the actual cost of bailout appears to be much lower. When a jurisdiction is willing to gather the required data, "the legal fees for the entire

126. *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2519 (Thomas, J., concurring in part & dissenting in part) (asserting the "promise of a bailout opportunity has, in the great majority of cases, turned out to be no more than a mirage.").

127. See Amici Brief of Bailed Out Jurisdictions, *supra* note 121, at 8 ("[M]any local officials are unaware of the bailout option." (internal quotations and citation omitted)); Hancock & Tredway, *supra* note 52, at 422 ("Individual counties within covered states may be unaware of the opportunity for an independent bailout action under the [1982] standard.").

128. See Amici Brief of Bailed Out Jurisdictions, *supra* note 121, at 8 ("News of Fairfax's bailout . . . became a topic of conversation at meetings of Virginia's local government attorney association and annual meetings of Virginia local election officials.").

129. *Id.* at 8-9.

130. *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2519 (Thomas, J., concurring in part & dissenting in part).

131. See Amici Brief of Bailed Out Jurisdictions, *supra* note 121, at 11 ("Local officials may mistakenly believe that bailing out is not cost-effective . . ." (internal quotations and citation omitted)).

132. Hans A. von Spakovsky, *Voting Rights and the Other Bailouts*, NATIONAL REVIEW ONLINE (May 5, 2009), <http://www.nationalreview.com/corner/181399/voting-rights-and-other-bailouts/hans-von-spakovsky>.

process of obtaining a bailout are less than \$5000.”¹³³ In addition, no successful bailout case has required a jurisdiction to hire an expert witness.¹³⁴

Nonetheless, the cost of bailout still may be perceived as high compared to continued coverage under Section 5, particularly since many jurisdictions have routinized the process of administrative preclearance through the Justice Department. As explained in an *amici* brief submitted in *NAMUDNO* by six states covered in whole or in part under Section 5, the procedure for making a preclearance submission to the Justice Department is “the most streamlined administrative process known to the federal government.”¹³⁵ Only a limited amount of data is required in connection with the submission.

The covered jurisdiction must provide: a copy of the statute, ordinance, or procedure being changed; a copy of the proposed statute, ordinance or procedure; an explanation of the differences between the two if not readily apparent from the face of the documents; contact information for the person making the submission; the statute or other authority that provides the authority for making the change; the date of adoption; the effective date of the change; a statement that the change has not yet been enforced; the reasons for the change; the anticipated effect on minority voters; identification of all litigation concerning the change; and a statement that the prior practice has been precleared.¹³⁶

According to these covered jurisdictions, “[t]he time and cost to make a preclearance submission is relatively small”—the average submission, excluding complex changes like redistricting and municipal annexations, “requires less than one hour of personnel time to prepare.”¹³⁷ The average cost for preparation of a submission has been estimated as \$500.¹³⁸ Finally, this information can be submitted to the Justice Department electronically through the Internet.¹³⁹ As a result, for most changes, “[t]he task of preparing the submission is usually a fraction of the work involved in making the voting

133. Amici Brief of Bailed Out Jurisdictions, *supra* note 121, at 11–12 (quoting *The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 90 (2005) [hereinafter *Hearing on Scope and Criteria for Coverage*] (statement of J. Gerald Hebert, Esq.)).

134. J. Gerald Hebert, *Facts: 1 Spakovsky Speculation: 0*, CAMPAIGN LEGAL CTR. BLOG (May 6, 2009), http://www.clcblog.org/blog_item-284.html.

135. Brief for the States of North Carolina, Arizona, California, Louisiana, Mississippi, and New York as Amici Curiae in Support of Eric H. Holder, Jr., et al. at 6, *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. 2504 (No. 08–322) [hereinafter Amici Brief of Covered States] (internal quotations and citation omitted).

136. *Id.* at 7–8 (citing 28 C.F.R. § 51.27 (2008)).

137. *Id.* at 8.

138. Hebert, *supra* note 102, at 271.

139. Amici Brief of Covered States, *supra* note 135, at 6.

change” itself.¹⁴⁰ Thus, the ease of preclearance may create a perverse incentive regarding bailout: “covered jurisdictions that could bail out most easily may find coverage to be least burdensome.”¹⁴¹ For example, the covered political subdivisions in Michigan and New Hampshire have few minority voters and have never received a preclearance objection, but these jurisdictions have never (at least to the author’s knowledge) attempted to bail out.¹⁴²

Third, the benefits of continued compliance with Section 5 may serve as a disincentive to pursue bailout for some otherwise-eligible jurisdictions. In return for the low cost of coverage, covered jurisdictions obtain several valuable benefits. First, as Professor Nathaniel Persily has explained, a grant of preclearance by the Justice Department provides “a certain signal as to the legality of a voting change.”¹⁴³ While preclearance does not prevent a subsequent challenge to the change in court, a failure to object after an objective review by federal authorities may “deter litigation that otherwise would have materialized if the voting change had not been vetted.”¹⁴⁴ Preclearance also helps “prevent covered jurisdictions from implementing discriminatory changes” that can be challenged in expensive and lengthy litigation under Section 2 of the Act, and thus serves as a “cost-effective means of preventing litigation.”¹⁴⁵ In addition, preclearance can serve as a federal “stamp of approval” for the covered jurisdiction to help establish it is not discriminating against minority voters.¹⁴⁶ Finally, some covered jurisdictions assert “the preclearance process substantially benefits [them] by encouraging the input of minority voters at an early stage of a State’s efforts to change its election practices and procedures.”¹⁴⁷ Thus, some jurisdictions likely have concluded the benefits of continued Section 5 coverage outweigh even the relatively low costs of bailout.

Fourth, some jurisdictions may have failed to pursue bailout because they were unsure about their eligibility under the current complex, multi-requirement test. As explained above, the current bailout standard has “numerous objective criteria,”¹⁴⁸ including that the jurisdiction has not been

140. *Understanding the Costs and Benefits of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 81 (2006).

141. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *YALE L.J.* 174, 213 (2007).

142. *Id.*

143. *Id.*

144. *Id.* at 213–14.

145. Amici Brief of Covered Jurisdictions, *supra* note 121, at 16.

146. *Id.* at 15 (testimony of J. Gerald Hebert).

147. *Id.* at 13.

148. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2518 (2009) (Thomas, J., concurring in part & dissenting in part).

subject to any final judgments or consent decrees in Section 2 litigation regarding a discriminatory denial or abridgement of the right to vote and that the covered jurisdiction—including all jurisdictions within its borders—has fully complied with its Section 5 obligations for the past ten years.¹⁴⁹ The latter requirement is often cited as the most difficult because bailout opponents may be able to “find one or more changes, however small, that were not precleared,” by either the jurisdiction itself or another governmental entity within its borders, such as a township or local school district.¹⁵⁰

In addition, the bailout provisions contain several “subjective criteria”¹⁵¹ requiring equal access and participation in the electoral process by minority voters.¹⁵² But based on the statutory language, it may be unclear precisely what steps, if any, a covered jurisdiction must take to satisfy these requirements. Although proponents of the current bailout system insist its requirements are not difficult to satisfy,¹⁵³ from a covered jurisdiction’s perspective, the current standard could be viewed as a high bar to clear, even if it has a clean record on vote discrimination.¹⁵⁴ This uncertainty may have served—and continues to serve—as a deterrent for numerous eligible jurisdictions.

Finally, some covered jurisdictions may not have pursued bailout because, although they have fully complied with their responsibilities under the Voting Rights Act, one (or more) governmental subdivision(s) within their boundaries have not. As mentioned above, before *NAMUDNO*,¹⁵⁵ a covered jurisdiction had to establish it, “and *all governmental units within that jurisdiction*,” satisfied all of its obligations under Section 5, including timely submitting all changes for preclearance review and repealing all changes that have prompted

149. 42 U.S.C. § 1973b(a)(1)(A)–(E) (2006).

150. Hebert, *supra* note 102, at 272.

151. *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2518 (Thomas, J., concurring in part & dissenting in part).

152. 42 U.S.C. § 1973b(a)(1)(F)(i)–(iii) (2006).

153. Hebert, *supra* note 102, at 272 (“[I]n my view, . . . the requirements for bailing out are not too onerous . . .”); *see also id.* at 275.

154. *See, e.g.*, Brief of Amicus Curiae Georgia Governor Sonny Perdue in Support of Appellant at 20–26, *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. 2504 (No. 08–322).

155. As explained in Part IV, *infra*, after *NAMUDNO*, covered jurisdictions are eligible for bailout on a “piecemeal” basis—that is, a covered local governmental body (e.g., a county) may achieve bailout even if it is part of a larger political body (e.g., a state) that remains covered under Section 5. While not expressly addressing this issue, the logic of the “symmetry” principle articulated in *NAMUDNO*—that bailout and preclearance should be addressed separately for each covered “political subdivision”—makes it appear likely that, going forward, a covered jurisdiction (e.g., a county) would not need to establish that all political subdivisions located within its borders (e.g., a township or village) have also separately complied with Section 5. *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2516.

an objection.¹⁵⁶ For example, in 1999, Kings County, California, informed the Justice Department it intended to pursue bailout, but upon learning political subdivisions within the county's boundaries had enacted a number of voting changes without obtaining preclearance, it subsequently withdrew its bailout request.¹⁵⁷

III. A MISSED OPPORTUNITY: COVERAGE AND BAILOUT IN THE 2006 VOTING RIGHTS ACT REAUTHORIZATION ACT

*“The Voting Rights Act must continue to exist—and exist in its current form.”*¹⁵⁸

Rep. James Sensenbrenner
Chairman, House Judiciary Committee (2005)

A. *The Debate Regarding Reauthorization*

As the Act's temporary provisions, including Section 5, approached expiration in 2007, scholars, voting rights advocates, and other interested parties debated whether, and in what form, Section 5 coverage and preclearance should be continued. Proponents of reauthorizing Section 5 argued that while it had “accomplished much during its first forty years,” it should be renewed because “more remain[ed] to be done in order to protect the rights of racial and ethnic minorities to fully and equally participate in the electoral process.”¹⁵⁹ In particular, they pointed to the record of Section 5 objections by the Justice Department and litigation under Section 2 of the Act since the 1982 renewal as evidence of continued discrimination against minority voters in covered jurisdictions.¹⁶⁰ Proponents also asserted renewal

156. 42 U.S.C. § 1973b(a)(1)(D) (2006) (emphasis added); Hebert, *supra* note 102, at 264.

157. Hebert, *supra* note 102, at 267–68.

158. *Rep. Sensenbrenner to Introduce 25-Year Voting Rights Extension Legislation, Calls for Bipartisan Approach to Civil Rights Issues*, U.S. FED. NEWS, July 10, 2005, available at 2005 WLNR 10836466 (emphasis added), quoted in James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 217 (2007).

159. NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005, at 103 (2006), http://www.lawyerscommittee.org/admin/voting_rights/documents/files/0023.pdf [hereinafter THE VOTING RIGHTS ACT AT WORK]; see also *Hearing on Scope and Criteria for Coverage*, *supra* note 133, at 4 (statement of Rep. Bobby Scott (D-VA)) (explaining that while the Act “has guaranteed millions of minority voters a chance to have their voices heard and their votes counted” and led to the election of thousands of minority officials, the Act's temporary provisions should be renewed because they are “essential to ensure fairness in our political process and equal opportunity for minorities in American politics.”).

160. THE VOTING RIGHTS ACT AT WORK, *supra* note 159, at 54–88, 98–102; Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting*

was important because of the “deterrent function” of Section 5: the preclearance requirement itself effectively prevented many covered jurisdictions from attempting changes that might discriminate against minority voters.¹⁶¹

In contrast, renewal opponents argued that while Section 5 had been “amazingly effective” at increasing minority participation in the political process, Congress should permit it to expire as scheduled for several reasons.¹⁶² First, they pointed to evidence that black voters now registered and voted at levels comparable to whites in covered jurisdictions,¹⁶³ as well as the low percentage of objections under Section 5 in recent years,¹⁶⁴ as evidence conditions in the covered jurisdictions had changed so dramatically that special remedial treatment was no longer warranted.¹⁶⁵ In other words, as Samuel

Rights Act Since 1982, 39 U. MICH. J. L. REFORM 643 (2006) (study investigating findings in 331 lawsuits under Section 2 since 1982).

161. See, e.g., Karlan, *supra* note 10, at 22–24.

162. Abigail Thernstrom & Edward Blum, *Do the Right Thing*, WALL ST. J., July 15, 2005, at A10.

163. See, e.g., EDWARD BLUM & LAUREN CAMPBELL, AM. ENTERPRISE INST., ASSESSMENT OF VOTING RIGHTS PROGRESS IN JURISDICTIONS COVERED UNDER SECTION FIVE OF THE VOTING RIGHTS ACT 3–5, tbl. 1 (2006) (asserting that “by 2000, the gaps between white and blacks in [voter registration and turnout] had virtually been eliminated” and that “in some section 5 jurisdictions, minority registration and turnout rates exceed those of whites.”). However, as Nate Persily has explained, this study erred in one prominent respect by including Hispanics—some of whom are not citizens and thus ineligible to be registered to vote—as part of “whites” in the comparison. Persily, *supra* note 141, at 197.

164. See Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 192–93 (2005) (finding that preclearance objections dropped from 4.06% of submissions in 1968–1972 to 0.05% of submissions in 1998–2002). As I have previously argued, however, at least part of this decrease in objections is likely due to the Supreme Court’s decision in *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (“*Bossier II*”), which dramatically reduced the scope of the “purpose” prong of Section 5, rather than a change in the level of discriminatory behavior by covered jurisdictions. See McCrary, Seaman & Valelly, *supra* note 89, at 313–15, 322–23. In addition, other scholars have attempted to assess whether the low number of Section 5 objections since 2000 is partly the result of political considerations by appointees in the Justice Department in the George W. Bush administration. See generally Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *The Politics of Preclearance*, 12 MICH. J. RACE & L. 513 (2007); MARK A. POSNER, *THE POLITICIZATION OF JUSTICE DEPARTMENT DECISIONMAKING UNDER SECTION 5 OF THE VOTING RIGHTS ACT: IS IT A PROBLEM AND WHAT SHOULD CONGRESS DO?* (2006), available at <http://www.acslaw.org/node/2176>.

165. See Thernstrom & Blum, *supra* note 162, at A10 (asserting that “[t]imes have changed” and “[t]he emergency that justified the [Act’s] temporary provisions is long over”); see also *Voting Rights Act: Section 5—Preclearance Standards, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 38 (2005) [hereinafter *Hearing on Section 5 Preclearance Standards*] (statement of Roger Clegg, Vice Pres. and Gen. Counsel, Ctr. for Equal Opportunity).

Issacharoff has explained, they questioned “whether the successes of the VRA have compromised its mission.”¹⁶⁶ Second, opponents argued in light of these changed conditions, there was serious doubt whether the reauthorization of Section 5 in its current form could satisfy the “congruence and proportionality” test articulated in *City of Boerne v. Flores*¹⁶⁷ for determining the constitutionality of legislation enacted pursuant to Congress’s remedial power in the Fifteenth Amendment.¹⁶⁸ Third, they asserted the continued designation of certain states for special treatment under Section 5 impermissibly interfered with their sovereignty¹⁶⁹ by forcing them “to continue to wear the badge of shame that is preclearance.”¹⁷⁰ Fourth, some opponents of Section 5 claimed continuing preclearance promoted “racial classifications” and “political apartheid.”¹⁷¹

Despite these objections, congressional renewal of Section 5 in some form was widely expected.¹⁷² In addition to unanimous support among congressional Democrats, supporters of renewing Section 5 included House Judiciary Chairman James Sensenbrenner (R-WI) as well as Senate Majority

166. Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its Own Success?*, 104 COLUM. L. REV. 1710, 1714 (2004).

167. 521 U.S. 507, 520 (1997).

168. *Hearing on Section 5 Preclearance Standards*, *supra* note 165, at 39 (2006) (statement of Roger Clegg, Vice Pres. and Gen. Counsel, Ctr. for Equal Opportunity); *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 22–24 (2006) (testimony of Gregory S. Coleman).

169. *See, e.g., Lopez v. Monterey Cnty.*, 525 U.S. 266, 294 (1999) (Thomas, J., dissenting) (“The section’s interference with state sovereignty is quite drastic—covered States and political subdivisions may not give effect to their policy choices affecting voting without first obtaining the Federal Government’s approval.”).

170. Plaintiff’s Motion for Summary Judgment with Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 1, *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) (No. 06-1384).

171. *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 11–13 (2006) (testimony of Abigail Thernstrom, Senior Fellow, The Manhattan Inst.); *see also Hearing on Section 5 Preclearance Standards*, *supra* note 165, at 31 (testimony of Roger Clegg, Vice Pres. and Gen. Counsel, Ctr. for Equal Opportunity).

172. *See* J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667, 746 (2008) (asserting that “almost everyone expected Congress to renew Section 5 in some form”); *see also* Rick Lyman, *Extension of Voting Act Is Likely Despite Criticism*, N.Y. TIMES, Mar. 29, 2006, at A14 (describing the law as in “little danger of expiring”); Jeffrey McMurray, *Georgia Republicans Challenging Voting Rights Act Renewal, Likely in Vain*, MOBILE REGISTER, Nov. 20, 2005, at B6 (“Although it doesn’t expire until 2007, continuation of Section 5—the provision involving federal preclearance of voting laws—seems a foregone conclusion.”); *Voting Rights Act to Get Review*, CINCINNATI ENQUIRER, Oct. 17, 2005, at B2 (quoting Rep. Steve Chabot (R-OH), Chairman of the House Subcomm. on the Constitution, as stating it was “quite likely” the temporary provisions of the Act “will be reauthorized either in the same or similar form.”).

Leader Bill Frist (R-TN).¹⁷³ In 2005 and early 2006, President George W. Bush also made supportive, if vague, statements regarding the Act's renewal.¹⁷⁴ Nevertheless, rank-and-file Republicans, particularly in the House, were divided over some of the key temporary provisions, including Section 5 and the language minority provisions.¹⁷⁵

B. *VRARA in the House*

It was also widely recognized that although all previous renewals of Section 5 had been found constitutional,¹⁷⁶ another reauthorization for an additional twenty-five years could be vulnerable to challenge under *City of Boerne*.¹⁷⁷ Thus, starting in 2005, congressional committees held a series of hearings in both the House and the Senate to “assemble a record demonstrating the persistence of discrimination in voting in the covered jurisdictions”¹⁷⁸ in preparation for the almost-inevitable litigation following renewal.¹⁷⁹

Between October 2005 and April 2006, the House Subcommittee on the Constitution received testimony from forty-six witnesses, “including State and local elected officials, scholars, attorneys, and other representatives from the

173. Kousser, *supra* note 172, at 752; Tucker, *supra* note 158, at 211–12.

174. Tucker, *supra* note 158, at 211.

175. *Id.* at 207–08; *see also id.* at 210 (“[S]ome conservatives were at best skeptical, and at worst hostile, towards Justice Department oversight of voting changes under Section 5 of the Act.”).

176. *Lopez v. Monterey Cnty.*, 525 U.S. 266, 287 (1999) (1982 reauthorization); *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (1975 renewal); *Georgia v. United States*, 411 U.S. 526, 541 (1973) (1970 renewal).

177. *See* Hasen, *supra* note 164, at 206–07 (asserting that “it is far from clear whether Congress will be able to make the case to satisfy the Supreme Court that the ‘uncommon’ preclearance rationale is ‘congruent and proportional’” and supporters of renewing Section 5 “need to consider making the strongest evidentiary record of intentional discriminatory conduct in voting by states to justify preclearance provision”); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 226–37 (2003) (focusing on “the basic question of whether another extension of Section 5 will pass muster” under *City of Boerne* and subsequent cases); Posner, *supra* note 30, at 123–24 (arguing that the evidence demonstrates “Congress has full authority to reauthorize section 5” under the Fourteenth and Fifteenth Amendments); Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69, 74–75 (2003).

178. Persily, *supra* note 141, at 182; *see also Hearing on Section 5 Preclearance Standards*, *supra* note 160, at 4 (2006) (statement of Rep. Robert C. Scott (D-VA)) (“The purpose of these hearings is to establish a record to justify the reauthorization of section 5 of the Voting Rights Act.”); *Hearing on Scope and Criteria for Coverage*, *supra* note 133, at 3 (statement of Rep. Jerrold Nadler (D-NY)) (“Congress needs to make a strong factual record supporting [Section 5’s] remedies, given recent Supreme Court decisions.”).

179. *See* Pitts, *supra* note 177, at 226 (“[I]f Congress chooses to extend Section 5, it will almost certainly be subjected to another challenge as an inappropriate exercise of congressional enforcement power—a challenge it may not survive.”).

voting and civil rights communities.”¹⁸⁰ These hearings produced over 12,000 pages of testimony and evidence,¹⁸¹ including reports from the National Commission on the Voting Rights Act,¹⁸² the American Civil Liberties Union,¹⁸³ and the Leadership Conference on Civil Rights, regarding discrimination in the covered jurisdictions and other evidence and arguments that these organizations argued weighed in favor of renewal.¹⁸⁴ Based in part on this evidence, the House Judiciary Committee concluded “reauthorization of [the temporary] provisions is both justified and necessary.”¹⁸⁵ Specifically, the Committee’s report pointed to numerous objections to covered jurisdictions in the states of Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia since 1982 as evidence of Section 5’s “effectiveness in addressing efforts to discriminate.”¹⁸⁶

Most legislators and witnesses in House committee hearings did not believe Congress should alter the existing coverage formula or bailout standard.¹⁸⁷ For example, Rep. Mel Watt, Chairman of the Congressional Black Caucus and a leader of the Democrat’s efforts to renew the Act, contended:

There are obviously those who contend that the coverage formula of the Voting Rights Act is outdated and unfair, insofar as it covers certain jurisdictions but not others. There is no doubt that there are any number of inventive triggers that Congress could have enacted. I believe, however that the central question before us during this process is not what Congress could have done, but whether what we have established as the coverage mechanism in the Voting Rights Act is justified by the facts. Covered jurisdictions, simply

180. H.R. REP. NO. 109-478, at 5, 11–12 (2006), *quoted in* Tucker, *supra* note 158, at 218.

181. *Id.*

182. THE VOTING RIGHTS ACT AT WORK, *supra* note 159, *reprinted in* *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 104 (2006) [hereinafter *Hearing on Evidence of Continued Need*].

183. LAUGHLIN McDONALD & DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT: VOTING RIGHTS LITIGATION 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION (2006), *reprinted in* *Hearing on Evidence of Continued Need*, *supra* note 182, at 378.

184. *See* Tucker, *supra* note 158, at 218.

185. H.R. REP. NO. 109-478, at 12 (2006).

186. *Id.* at 22–25, 36–40.

187. *But see* *Voting Rights Act: The Continuing Need For Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 41–42 (2005) [hereinafter *Hearing on Continuing Need For Section 5*] (statement of Prof. Ronald Keith Gaddie, Univ. of Okla.) (arguing there was a need to reevaluate the existing coverage formula in light of evidence of “voting rights progress in the last decade”); *id.* at 101–48 (statement of Laughlin McDonald, Dir., ACLU Voting Rights Panel) (arguing that Section 5 should be extended to cover areas where there has been discrimination in voting against Native Americans).

put, are covered because they have not only a history of discriminatory practices, but have a history of ongoing discrimination as well.¹⁸⁸

Likewise, Armand Derfner, a voting rights attorney from South Carolina, testified that although “there has been speculation about whether continuing the section 4 trigger [formula] will still be constitutional,” he believed there was no need for change:

I litigate in other covered states as well as South Carolina, and am familiar enough with some of those states to be confident that the record presented to you in these hearings will show that the types of problems I have outlined here are widespread in the covered jurisdictions. Based on the record I expect you will see, there will be ample justification for continuing to provide special remedies in the covered jurisdictions, based on the eminently rational and well-tailored coverage formula of the section 4 trigger.¹⁸⁹

In addition, he did not favor altering the existing bailout standard:

[S]ection 4 also contains a carefully tailored bailout [provision] . . . which is essentially a “reverse trigger” that a covered jurisdiction can use to end coverage. With a rational coverage formula, with a record continuing to justify that formula, and with a nuanced bailout in place, the Voting Rights Act is exactly the kind of congruent and proportional remedy that satisfies the Constitution.¹⁹⁰

Similarly, J. Gerald Hebert, the attorney from Virginia who represented most covered jurisdictions that have successfully bailed out since 1982, asserted the current bailout standard is “perfectly tailored” to address “the issues that Congress was concerned about when it enacted the Voting Rights Act in the first place.”¹⁹¹

During floor debate, a group of conservative Republican House members—mainly from covered jurisdictions in the South—attempted to dramatically modify Section 5’s scope. Rep. Charlie Norwood (R-GA) argued Georgia had been unfairly “put in the penalty box of section 5.”¹⁹² As an alternative, he offered an amendment that would “update” the Section 5 coverage formula using voter registration and turnout rates from a “rolling test

188. *Hearing on Scope and Criteria for Coverage*, *supra* note 133, at 5.

189. *Id.* at 85.

190. *Id.*; *see also id.* at 104 (claiming that “jurisdiction[s] can bail out effectively” under the current standard and that it “seems to be working”).

191. *Id.* at 88–89, 104 (testimony of J. Gerald Hebert). In his testimony, Hebert argued the main shortcoming with the current bailout standards was the lack of awareness about its availability by many covered jurisdictions. *Id.* at 90. However, Hebert did suggest that Congress should consider revising the coverage formula to target “potentially discriminatory conduct in a more direct way than a formula based on the results of a presidential election conducted thirty years ago.” *Id.* at 92 (statement of J. Gerald Hebert).

192. 152 CONG. REC. H5140 (daily ed. July 13, 2006), *quoted in* Tucker, *supra* note 158, at 254.

based off of the last three presidential elections.¹⁹³ Under the Norwood amendment, a jurisdiction would be covered under Section 5 only if it used a discriminatory test or had voter turnout of less than fifty percent (50%) in any of these elections.¹⁹⁴ According to Rep. Norwood, his amendment would cover 1,010 jurisdictions in thirty-nine states.¹⁹⁵ However, it was widely recognized this “update” would likely make Section 5 *more* vulnerable to a constitutional challenge, because many of the covered jurisdictions had no history of voting discrimination.¹⁹⁶ For example, the state of Hawaii—which does not have a history of voting discrimination—would be the only state entirely covered by Section 5 under Norwood’s proposal.¹⁹⁷ The House defeated the amendment 318 to 96.¹⁹⁸

Rep. Lynn Westmoreland (R-GA) offered another amendment for an “expedited, proactive” procedure for bailout that would “requir[e] the Department of Justice to assemble a list of all jurisdictions eligible for bailout” and notify them of eligibility.¹⁹⁹ The Westmoreland amendment would also require the Attorney General to consent to the entry of a declaratory judgment for bailout if a jurisdiction appeared on this list.²⁰⁰ Rep. Westmoreland—who was highly critical of a “straight” reauthorization of Section 5²⁰¹—had some unlikely allies, including Richard Hasen, a professor and election law expert, who argued the amendment would “strengthen[] the act by helping to insulate the renewed VRA against [the] inevitable constitutional challenge.”²⁰² Chairman Sensenbrenner, however, asserted the bailout amendment would “redirect limited resources away from voting rights enforcement” and “give the executive branch unprecedented and unfettered authority to remove crucial voting rights protections.”²⁰³ The House defeated the Westmoreland amendment, 302 to 118.²⁰⁴ After rejecting several other proposed

193. H.R. REP. NO. 109-554, at 2 (2006).

194. *Id.*

195. 152 CONG. REC. H5179–81 (daily ed. July 13, 2006).

196. Tucker, *supra* note 158, at 254–55.

197. *See, e.g.*, Richard Hasen, *Pass the VRA Bailout Amendment*, ROLL CALL, (July 11, 2006), available at <http://electionlawblog.org/archives/bailout.pdf>.

198. 152 CONG. REC. H5204 (daily ed. July 13, 2006).

199. H.R. REP. NO. 109-554, at 2 (2006); *see also* Tucker, *supra* note 158, at 243, 257–58.

200. Tucker, *supra* note 158, at 243, 257–58.

201. *See, e.g.*, Press Release, Rep. Lynn Westmoreland, Statement on House Passage of Voting Rights Act (July 13, 2006) (after House approval of Section 5’s reauthorization, decrying “lingering prejudice towards Southerners” and stating that “we’ll only need five votes on the Supreme Court” to overturn it), *quoted in* Persily, *supra* note 141, at 181 n.19.

202. Hasen, *supra* note 197.

203. 152 CONG. REC. H5200 (daily ed. July 13, 2006), *quoted in* Tucker, *supra* note 158, at 258.

204. 152 CONG. REC. H5206–07 (daily ed. July 13, 2006).

amendments,²⁰⁵ the House reauthorized Section 5 for an additional twenty-five years (until July 2031) on a 390 to 33 vote, leaving both the coverage formula and the bailout standard unchanged.²⁰⁶

C. *VRARA in the Senate*

The Senate Judiciary Committee, chaired by Sen. Arlen Specter (R-PA), held nine hearings between April 27 and July 13, 2006. Senator Specter explained while it was “clear that the Voting Rights Act of 1965 has been effective in combating State-sponsored discrimination against minority voters,” he argued reauthorization of Section 5 was justified because “there is still some discrimination which persists, and any [discrimination] is too much on the important right to vote.”²⁰⁷ Like in the House, members of the Senate Judiciary Committee who favored renewal understood the committee needed to develop a record of continued discrimination sufficient to withstand the expected constitutional challenge.²⁰⁸

The Senate committee hearings “featured heated debates concerning the constitutionality and desirability” of renewing Section 5 without amending either the coverage formula or the bailout criteria.²⁰⁹ For example, Laughlin McDonald, the Director of the ACLU’s Voting Rights Project, contended the current coverage formula was constitutional after *City of Boerne*, pointing in part to the Supreme Court’s 1999 decision in *Lopez v. Monterey County*,²¹⁰ which held Congress did not violate any rights constitutionally reserved to states by requiring submission of a proposed voting change by a covered political subdivision when the change was required by state law and the state itself was not separately covered under Section 5.²¹¹ Theodore Shaw of the NAACP Legal Defense Fund also argued the existing coverage formula “served the purpose of identifying the jurisdictions where the problems originally existed,” and the record developed in the House supported continuation of the formula because of the “continuing problems in those jurisdictions.”²¹² Similarly, Professor Pamela Karlan testified the existing

205. These amendments would have reduced the length of the reauthorization to nine years and repealed the minority language provisions in Sections 7 and 8 of the Act. H.R. REP. NO. 109-554, at 2 (2006); Tucker, *supra* note 158, at 255–57.

206. 152 CONG. REC. H5207 (daily ed. July 13, 2006).

207. *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 1 (2006) [hereinafter *Hearing on Expiring Provisions*] (statement of Sen. Arlen Specter).

208. *Id.* at 1–2 (statement of Sen. Edward Kennedy).

209. Persily, *supra* note 141, at 183.

210. 525 U.S. 266 (1999).

211. *Hearing on Expiring Provisions*, *supra* note 207, at 11 (statement of Laughlin McDonald).

212. *Id.* at 25 (statement of Theodore Shaw, Pres., NAACP Legal Def. & Educ. Fund).

coverage formula was appropriate because it captured many (but not all) jurisdictions with a “long history of racial disenfranchisement and dilution,” as well as a record of “contemporary voting discrimination.”²¹³ Where current coverage was overinclusive, Karlan concluded the current bailout requirements struck “precisely the right balance regarding when covered jurisdictions should be relieved of such coverage.”²¹⁴

In contrast, Professor Samuel Issacharoff contended “a major source of constitutional tension arises with the coverage formula for jurisdictions under Section 5 of the Voting Rights Act.”²¹⁵ He explained most jurisdictions were covered under the 1964 presidential election—over forty years ago—and if Section 5 was extended for an additional twenty-five years, the youngest eligible voter from 1964 would be 86 years old.²¹⁶ Issacharoff offered several suggestions for tailoring the Act that would make it “more likely to withstand constitutional challenge.”²¹⁷ First, he proposed the basic unit of coverage be moved from the states to political subdivisions of the states, since the vast majority of Section 5 objections in recent years dealt with local election, not statewide, changes.²¹⁸ Second, he advocated a “liberalized bailout provision” based on a more objective standard, such as lack of Section 5 objections by the Justice Department or the absence of litigation under Section 2 of the Act.²¹⁹ In particular, he criticized bailout’s subjective criteria requiring affirmative steps toward minority participation in the political process as “ill-defined and hard to quantify.”²²⁰ Third, Issacharoff suggested consideration of a more dramatic change, the implementation of an “intermediate regulatory status less onerous than preclearance,” which would mandate public disclosure of voting changes, but require Section 2 or other litigation to invalidate it.²²¹ Fourth, he advocated removing statewide redistricting from Section 5 coverage, in part because redistricting plans had become “a major partisan battleground,” opening the door to “partisan temptations” in enforcement by the Justice Department.²²²

213. *The Continuing Need for Section 5 Preclearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 103 (2006) [hereinafter *Hearing on Continuing Need for Section 5*] (testimony of Prof. Pamela S. Karlan, Stanford Univ.).

214. *Id.* at 101.

215. *Hearing on Expiring Provisions*, *supra* note 207, at 13 (statement of Prof. Samuel Issacharoff, New York Univ. Sch. of Law).

216. *Id.* at 13–14.

217. *Id.* at 223.

218. *Id.* at 14, 223.

219. *Id.* at 14, 223–24.

220. *Id.* at 26.

221. *Hearing on Expiring Provisions*, *supra* note 207, at 224.

222. *Id.* at 224–25.

Professor Richard Hasen also expressed concern about the constitutionality of renewing Section 5 without any alterations in its scope of coverage.²²³ He argued “Congress should update the coverage formula based on data indicating where intentional state discrimination in voting on the basis of race is now a problem or likely to be one in the near future.”²²⁴ One method of accomplishing this, Hasen suggested, was for Congress to “make it easier for covered jurisdictions to bail out from coverage under [S]ection 5 upon a showing that the jurisdiction has taken steps to fully enfranchise and include minority voters.”²²⁵ He suggested bailout would be more effective if the Justice Department proactively identified and contacted jurisdictions that would likely be eligible for bailout:

One thing that I think would go a long way toward helping the constitutional case and also take off some of the burden in a lot of these jurisdictions is to ease the bailout requirements. For example, if the Department of Justice was required to proactively go through, pick out those jurisdictions that meet the bailout criteria, and say, you know what, you have no history of discrimination, you have taken steps to increase minority voter turnout and participation, we think that you should apply for bailout. If the burden was put on the Department of Justice rather than on the States, the States just—they are used to—the covered States are used to preclearance. They know how to do that. Bailout could be made a lot easier, and this would actually also help the constitutional case showing that the law is going to then be focused on places that continue to have a history of discrimination.²²⁶

D. Congress’s Failure to Amend Coverage or Bailout in VRARA

Ultimately, the Senate did not adopt any of these proposals and instead passed the House bill (H.R. 9), which retained the existing coverage formula and bailout criteria, unanimously.²²⁷ In part, this may have been because adoption of the engrossed House bill would, as James Tucker has suggested, “avoid[] the possibility of a protracted battle” in conference committee over any differences.²²⁸ But more likely, any dramatic change to Section 5’s scope—no matter how effective or well-intentioned—probably was politically unfeasible because it could have caused an unraveling of the bipartisan

223. *See id.* at 18–19 (statement of Prof. Richard Hasen, Loyola Law School - Los Angeles) (“I think it is Congress’s obligation now to decide whether that strong medicine [of Section 5] should continue in the same form as it has or whether changes are necessary given changes that have occurred on the ground.”); *id.* at 216.

224. *Id.* at 217 (emphasis omitted).

225. *Id.* at 217–18 (emphasis omitted).

226. *Id.* at 19–20; *see also id.* at 37 (proposing revisions to the language of 42 U.S.C. § 1973(a)(1)(9) to accomplish these objectives).

227. 152 CONG. REC. S7949, S8012 (daily ed. July 20, 2006).

228. Tucker, *supra* note 158, at 234.

coalition that shepherded the bill to passage. As Professor Nathaniel Persily has explained, if Congress had seriously attempted to update the coverage formula by “add[ing] or subtract[ing] jurisdictions based on some new criteria[,] then the justification for those criteria would [have] become the central political and constitutional question underlying the bill.”²²⁹ An expansion of coverage would have needed to encompass locations with a recent record of discrimination in voting—some of which were located outside the South²³⁰—but not sweep so broadly that it would appear politically motivated or create significant political opposition.²³¹ In addition, the removal of a significant number of covered jurisdictions might have resulted in accusations by voting rights advocates that Congress was attempting to “gut” Section 5.

There is also a history of Congress making significant amendments to the Voting Rights Act only *after* the Supreme Court has limited existing protections for minority voting rights in some way. For example, after the Court’s decision in *Mobile v. Bolden*, which held the Fifteenth Amendment only prohibited intentional racial discrimination in voting,²³² Congress amended Section 2 in 1982 to supersede this decision and “allow[] plaintiffs to establish a Section 2 violation by proving that an electoral practice has a discriminatory result.”²³³ Similarly, in the 2006 amendments, Congress overturned both the Court’s 2000 decision in *Reno v. Bossier Parish School Board*²³⁴ regarding the intent requirement of Section 5 and the Court’s 2003 decision in *Georgia v. Ashcroft*²³⁵ regarding the meaning of a “retrogressive” effect.²³⁶ Indeed, the phenomenon of Congress as a reactive entity to judicial decisions, rather than a proactive one that seeks to correct flaws in statutes

229. Persily, *supra* note 141, at 209.

230. For example, expansion of coverage might include locations like Berks County, Pennsylvania; Euclid, Ohio; and Port Chester, New York, where there have been stipulations or judicial findings of voting discrimination. See, e.g., Voting Section, U.S. Dep’t of Justice Civil Rights Div., *Cases Raising Claims Under Section 2 of the Voting Rights Act*, <http://www.justice.gov/crt/about/vot/litigation/caselist.php> (last visited Dec. 20, 2010).

231. See Persily, *supra* note 141, at 209, 211 (“In other words, the new coverage formula would have to be both politically fair and justifiable as preventing or remedying violations of voting rights.”).

232. 446 U.S. 55, 62 (1980) (explaining that “racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.”).

233. See, e.g., Heather K. Way, Note, *A Shield or A Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1465 (1996).

234. 528 U.S. 320 (2000).

235. 539 U.S. 461 (2003).

236. Persily, *supra* note 141, at 207–08, 217 n.165.

before the Court can rule upon them, is well-recognized by both political scientists and legislative scholars.²³⁷

Finally, supporters in Congress of maintaining the existing coverage formula took some comfort in the fact the Supreme Court had previously upheld the constitutionality of the existing Section 5 on three separate occasions, most recently in 1999.²³⁸ Thus, “[i]nertia and familiarity, as well as the inherent political difficulties in crafting any election law with partisan consequences,” ultimately led to no change of Section 5’s coverage formula.²³⁹

The prospect of amending the bailout provision appeared somewhat more promising, however. Unlike changes to the coverage formula, amending the bailout standard would not have necessarily upset “settled expectations” about Section 5’s ability to protect minority voting rights.²⁴⁰ Rather, a liberalized bailout provision could have facilitated the removal of many “good” jurisdictions from coverage, while maintaining it for “bad” ones. Such a change would have made “the constitutionality of the coverage formula easier to defend” by making it less overinclusive.²⁴¹ In addition, Professor Hasen’s proposal that the Justice Department identify and contact bailout-eligible jurisdictions would have been a straightforward (although potentially resource-intensive) method to narrow the scope of Section 5 coverage.²⁴² Nonetheless, supporters of renewal “were steadfast in their opposition to an altered bailout regime.”²⁴³ Thus, Congress missed an opportunity to alter the bailout regime and increase the likelihood the reauthorized Section 5 would be found constitutional.

IV. THE *NAMUDNO* LITIGATION AND ITS AFTERMATH

Less than a month after President George W. Bush signed the VRARA into law, the constitutionality of Section 5’s renewal was challenged in court.²⁴⁴ In

237. See, e.g., JEB BARNES, *OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS* (2004); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 333 (1991).

238. Persily, *supra* note 141, at 211 & n.150 (“While the coverage formula might be outdated, advocates for the law at least would have stare decisis on their side and could force the Court into the position of explaining why a previously constitutional law was now unconstitutional.”).

239. Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 *HOW. L.J.* 717, 727 (2006).

240. Persily, *supra* note 141, at 208.

241. *Id.* at 212.

242. In fact, separate legislation may not even be required for this—the Justice Department could simply launch its own investigation to determine likely eligible jurisdictions and indicate that it would probably consent to bailout.

243. Persily, *supra* note 141, at 214 & n.158.

244. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, *supra* note 6.

August 2006, an unlikely plaintiff—a small municipal utility district in suburban Austin, Texas—filed suit in the United States District Court for the District of Columbia, seeking bailout from coverage under Section 5 or, in the alternative, a declaratory judgment that Section 5 was unconstitutional.²⁴⁵ The plaintiff, Northwest Austin Municipal Utility District Number One (“NAMUDNO”), was formed in the late 1980s to provide water, sewage, and other services to local residents.²⁴⁶ It was required to comply with Section 5 because the state of Texas had been designated for statewide coverage under the 1975 renewal.²⁴⁷ The district did not register voters, but handled its own elections and submitted its election changes, such as the movement of a polling place, for preclearance.²⁴⁸

In its complaint, NAMUDNO launched a full-throated attack against Section 5’s constitutionality. It asserted “[t]he § 5 preclearance process is costly and burdensome” and represented a “vast waste of public monies and resources”²⁴⁹—even though the district later admitted it incurred an annual average cost of only \$223 for preclearance submissions.²⁵⁰ It also argued the preclearance requirement was “a badge of shame that Congress, without any cognizable justification, has chosen to continue . . . under a now ancient formula” and it “infringes on the rights of an entire generation of voters who were not even alive when those practices ended.”²⁵¹ During litigation, NAMUDNO was represented *pro bono* by Gregory S. Coleman, a conservative lawyer who testified against the renewal of Section 5.²⁵² As a result, many observers believed the lawsuit’s ultimate objective was to strike down Section 5 rather than bail out the district.²⁵³

In a lengthy opinion, the District Court rejected both of NAMUDNO’s claims.²⁵⁴ Regarding bailout, it explained the text and legislative history of Section 4 suggested Congress intended a “political subdivision” eligible for bailout “to refer to only section 14(c)(2) political subdivisions—that is,

245. Complaint at ¶ 1, *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) (No. 06-1384).

246. *Id.* at ¶ 6.

247. *Id.* at ¶¶ 8, 11.

248. *Id.* at ¶ 20; *see also Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2510.

249. Complaint, *supra* note 245, at ¶¶ 12–13.

250. Joint Appendix at 269, *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. 2504 (No. 08-322).

251. Complaint, *supra* note 245, at ¶¶ 22, 24.

252. *See, e.g.*, Jess Bravin, *A Showdown on Voting Rights*, WALL ST. J., Mar. 28, 2009, at A1; Chuck Lindell, *Star Lawyer Gets 2 High Court Wins*, AUSTIN AMERICAN-STATESMAN, July 5, 2009, at A1, A8.

253. *See Bravin, supra* note 252, at A1 (“Conservative legal activists, looking to strike down Section 5, recruited . . . the Northwest Austin Municipal Utility District No. 1 as plaintiff in a suit to challenge it.”).

254. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008).

counties, parishes, and voter registering subunits.”²⁵⁵ Because NAMUDNO did not register voters, it was unable to pursue bailout.²⁵⁶

Turning to NAMUDNO’s primary argument, the District Court also rejected the claim Section 5 was an unconstitutional exercise of Congress’s power under the Fifteenth Amendment. Treating NAMUDNO’s claim as a facial challenge to Section 5’s constitutionality, the court held its renewal satisfied both the more permissive “rational basis” test applied by the Supreme Court in *South Carolina v. Katzenbach* and the more stringent “congruence and proportionality” standard articulated in *City of Boerne v. Flores*.²⁵⁷ In reaching these conclusions, the District Court considered the “massive legislative record” developed during the congressional hearings in 2005 and 2006, including racial disparities in registration and turnout; Section 5 objections, enforcement suits, and “more information request” letters;²⁵⁸ Section 2 litigation; the appointment of federal election observers; the number of minority elected officials; and the continued existence of racially polarized voting in covered jurisdictions.²⁵⁹ It also found Section 5 operated in a “less visible but undeniably powerful manner” by deterring local jurisdictions from implementing discriminatory changes.²⁶⁰ Ultimately, the District Court held the legislative record “include[d] extensive contemporary evidence of intentional discrimination” sufficient to withstand constitutional challenge under either test.²⁶¹

On appeal, the Supreme Court denied the government’s motion to affirm the District Court’s decision and noted probable jurisdiction for appeal.²⁶² In a surprise, the Supreme Court reversed the district court, but on narrow statutory construction grounds. The majority opinion, authored by Chief Justice John Roberts and joined by the entire Court except Justice Clarence Thomas, held the definition “political subdivision” in section 14(c)(2) did not apply to eligibility for bailout under Section 4.²⁶³ While conceding that “[s]tatutory

255. *Id.* at 232; see *supra* text accompanying notes 96–101 for further discussion of the Act’s statutory definition of a “political subdivision.”

256. *Nw. Austin Mun. Util. Dist. No. One*, 573 F. Supp. 2d at 231–35.

257. *Id.* at 235–82.

258. “More information request” letters are letters from the Justice Department to a covered jurisdiction explaining that the information submitted in connection with a proposed change is “insufficient to enable [the Department] to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote” due to “race, color, or membership in a language minority group.” *Id.* at 254.

259. *Id.* at 247–65.

260. *Id.* at 264–65.

261. *Id.* at 266.

262. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 129 S. Ct. 894 (2009). Unlike most cases, appeals from three-judge district court decisions can be appealed directly to the Supreme Court. 28 U.S.C. §§ 1253, 2284 (2006); 42 U.S.C. § 1973b(a)(5) (2006).

263. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2515 (2009).

definitions control the meaning of the statutory words . . . in the usual case,” the Court concluded this situation was exceptional.²⁶⁴ The majority reasoned that previous decisions—specifically, *United States v. Sheffield Board of Commissioners*²⁶⁵ and *Dougherty County Board of Education v. White*²⁶⁶—had established the term “political subdivision” had different meanings for coverage under Section 4 and preclearance obligations under Section 5. In other words, the Court contended sometimes a “political subdivision” (for purposes of bailout) was not a “political subdivision” (as defined in section 14(c)(2)).²⁶⁷ This contorted reasoning, however, was undermined by legislative history of the 1982 amendments which—as previously explained—amended Section 4 to permit only “political subdivisions in covered states, as defined in Section 14(c)(2), to bail out although the state itself remains covered.”²⁶⁸ Nonetheless, the Court concluded “[b]ailout and preclearance under § 5 are now governed by a principle of symmetry,” and since “all political units in a covered State are to be treated for § 5 purposes as though they were ‘political subdivisions’ . . . ‘it follows that they should also be treated as such for purposes of § 4(a)’s bailout provisions.”²⁶⁹ As a result, “piecemeal bailout” is now permitted under Section 5.²⁷⁰ The Court also criticized the Justice Department’s interpretation of bailout eligibility as unduly restrictive, arguing it helped “render the bailout provision all but a nullity.”²⁷¹ In sum, the Court ended up adopting a statutory construction that “was a manifestly implausible reading of the text”²⁷² which “virtually no lawyer” thought could succeed.²⁷³

If the Court’s opinion had simply addressed bailout eligibility, the decision would not have been particularly noteworthy. But Part II of Chief Justice

264. *Id.* at 2514 (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 204 (1949)).

265. 435 U.S. 110 (1978).

266. 439 U.S. 32 (1978).

267. *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2515 (“According to these definitions, then, the statutory definition of a ‘political subdivision’ in § 14(c)(2) does not apply to every use of the term ‘political subdivision’ in the Act.”).

268. S. REP. NO. 97-417, at 2 (1982) (emphasis added); see *supra* Part I.C.

269. *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2516 (quoting *City of Rome v. United States*, 446 U.S. 156, 192 (1980) (Stevens, J., concurring)).

270. *Id.*

271. *Id.*

272. *Leading Cases, Voting Rights Act*, 123 HARV. L. REV. 362, 367 (2009).

273. Richard Hasen, *Initial Thoughts on NAMUDNO: Chief Justice Roberts Blinked*, ELECTION LAW BLOG, June 22, 2009, <http://electionlawblog.org/archives/013903.html> (last visited Dec. 20, 2010), quoted in Ellen D. Katz, *From Bush v. Gore to NAMUDNO: A Response to Professor Amar*, 61 FLA. L. REV. 991, 993 (2009); see also Heather K. Gerken, *An Uncertain Fate for Voting Rights*, THE AM. PROSPECT, July 23, 2009, http://www.prospect.org/cs/articles?article=an_uncertain_fate_for_voting_rights (noting that before the Supreme Court’s decision, “few people thought [NAMUDNO’s] statutory argument was a strong one.”).

Roberts's decision sent a clear message the Court had "serious misgivings about the constitutionality" of the reauthorized Section 5.²⁷⁴ Specifically, it explained "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions under either [the *Katzenbach* or *City of Boerne*] test."²⁷⁵

Regarding the preclearance requirement itself, the opinion noted Section 5 "impose[d] substantial 'federalism costs'" by "authoriz[ing] federal intrusion into sensitive areas of state and local policymaking" regarding elections.²⁷⁶ This particular objection, however, is not new—in fact, it is nearly as old as Section 5 itself. In *Katzenbach*, Justice Hugo Black—the only dissenter regarding Section 5's constitutionality—made a similar point, asserting preclearance was a "radical degradation of state power" which "so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless."²⁷⁷ However, Black stood alone in contending Section 5 treated states as "little more than conquered provinces," as the remaining eight Justices found it constitutional.²⁷⁸ Furthermore, the basic preclearance requirement has been upheld by the Court on three additional occasions,²⁷⁹ most recently in 1999 in *Lopez v. Monterey County*, where six members of the *NAMUDNO* Court rejected the covered jurisdiction's claim preclearance "would tread on rights constitutionally reserved to the States."²⁸⁰ *Lopez* explained "the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however, and our holding today adds nothing of constitutional moment to the burdens that the Act imposes."²⁸¹ Thus, it is difficult to understand the Court's decision in *NAMUDNO* simply as a declaration the preclearance requirement itself is an impermissible intrusion on state sovereignty.

Rather, the Court's concern about Section 5's renewal appears to lie with another issue: the coverage formula is outdated and "fails to account for current political conditions."²⁸² The Court explained "[t]hings have changed in the South" since the 1960s and 1970s:

Some of the conditions that we relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved Voter

274. *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2511.

275. *Id.* at 2513.

276. *Id.* at 2511.

277. *South Carolina v. Katzenbach*, 383 U.S. 301, 358, 360 (1966) (Black, J., dissenting).

278. *Id.* at 360 (Black, J., dissenting).

279. *See Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973).

280. *Lopez*, 525 U.S. at 282.

281. *Id.* at 284–85.

282. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2512 (2009).

turnout and registration rates [between minorities and whites] now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.²⁸³

Indeed, the Court's opinion in *NAMUDNO* is replete with references to the coverage formula. Specifically, it criticizes the existing coverage formula for "differentiat[ing] between the States" "based on data that is now more than 35 years old" and declares "[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance."²⁸⁴ Rather, to pass constitutional muster, *NAMUDNO* explains Section 5's "geographic coverage" now must be "sufficiently related to the problem that it targets."²⁸⁵ In perhaps the most revealing portion of the opinion, the Court suggested a constitutional coverage formula would require evidence of recent discrimination within many, if not most, covered areas: "[T]he Act imposes current burdens and must be justified by current needs."²⁸⁶

Ultimately, *NAMUDNO* issued a clear invitation to Congress to address Section 5's coverage or risk it would be held unconstitutional the next time the issue came before the Court. The opinion explained the Court was "keenly mindful of [its] institutional role" and "[t]he Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it."²⁸⁷ But if Congress failed to address the perceived problem, the Court would do so—it stated it would "not shrink from its duty 'as the bulwar[k] of a limited constitution against legislative encroachments."²⁸⁸

The remaining member of the Court, Justice Thomas, dissented, arguing Section 5 should be held unconstitutional immediately. He explained *NAMUDNO* did not seek "bailout eligibility"—rather, it sought "bailout itself."²⁸⁹ But since "the Court is not in a position to award bailout," he argued "adjudication of the constitutionality of § 5, in my view, cannot be avoided."²⁹⁰ And Justice Thomas made it clear he believed Section 5 would fail this test. In

283. *Id.* at 2511; *see also id.* at 2516 ("More than 40 years ago, this Court concluded that 'exceptional conditions' . . . justified extraordinary legislation otherwise unfamiliar to our federal system. . . . [W]e are now a very different Nation.").

284. *Id.* at 2512.

285. *Id.*

286. *Id.*

287. *Id.*; *see also id.* ("The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." (citing *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981))).

288. *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2513 (quoting *THE FEDERALIST NO. 78*, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

289. *Id.* at 2517 (Thomas, J., dissenting).

290. *Id.* However, Justice Thomas did not explain why, if *NAMUDNO* was eligible for bailout, it could not be granted it on remand—as it ultimately was.

his opinion—which was several pages longer than the majority’s—he contended “the lack of current evidence of intentional discrimination with respect to voting renders § 5 unconstitutional.”²⁹¹ Indeed, Justice Thomas would set the standard of proof for a renewed Section 5 so high Congress could not possibly hope to satisfy it. In his opinion, Justice Thomas stated before the Act, there had been a recent history of widespread disenfranchisement, fraud, and violence against minority voters in the South, and “[i]t was against this backdrop of ‘historical experience’ that § 5 was first enacted and upheld against constitutional challenge.”²⁹² Absent these “exceptional circumstances,” however, Justice Thomas contended Section 5 “would not have been [an] appropriate . . . exercise of congressional power.”²⁹³ In other words, he claimed, “the constitutionality of § 5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible.”²⁹⁴ Not surprisingly, then, Justice Thomas concluded the “extensive pattern of discrimination that led the Court to previously uphold § 5 . . . no longer exists.”²⁹⁵

After Chief Justice Roberts’s opinion was released, voting rights scholars expressed surprise at the statutory construction basis for the decision.²⁹⁶ Some have asserted the *NAMUDNO* decision is a textbook example of “judicial minimalism” that was “careful to preserve the existing breadth and applicability of [S]ection 5,” even at the expense of “arguably ignoring the statutory language to sustain its interpretation.”²⁹⁷ But this is more likely *faux* restraint, as a truly minimalist decision could have started and ended with the Court’s construction of bailout eligibility and not continued on to discuss the Court’s concerns about Section 5’s constitutionality. In some ways, the majority’s opinion is a lurking “time bomb” in the event Congress does not narrow Section 5’s scope—if Congress fails to act, a subsequent decision

291. *Id.* at 2519.

292. *Id.* at 2521–23.

293. *Id.* at 2523.

294. *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2524.

295. *Id.* at 2525.

296. See, e.g., Adam Liptak, *Justices Retain Oversight by U.S. on Voting*, N.Y. TIMES, June 23, 2009, at A1 (quoting Richard Hasen, Samuel Issacharoff, and Ellen Katz); see also Katz, *supra* note 273, at 997 (“Ultimately, the Court voted to supplant Congress’s judgment, but not in the manner many expected. Rather than throw out the statute, the Justices simply rewrote it.”).

297. Leading Cases, *Voting Rights Act*, *supra* note 272, at 366; see also Stuart Taylor, *Judicial Statesmanship on Voting Rights*, NATIONAL JOURNAL, June 27, 2009, available at 2009 WLNR 12535713 (asserting that the decision was an act of “judicial modesty” and “judicial statesmanship”).

striking down Section 5 could rely heavily on the reasoning articulated in *NAMUDNO*.²⁹⁸

Indeed, the clock may already be ticking, as several post-*NAMUDNO* challenges to its constitutionality have already landed in court. The first, *Laroque v. Holder*, was filed in April 2010 by several private citizens of Kinston, North Carolina.²⁹⁹ Kinston, a political subdivision of Lenoir County, North Carolina,³⁰⁰ received an objection from the Justice Department in August 2009 for its switch in a 2008 referendum to nonpartisan elections for Kinston's mayor and city council.³⁰¹ In its objection, the Justice Department stated black voters—who comprise a majority of registered voters in Kinston, but have been a minority of the electorate in most general municipal elections—depended on “crossover” votes from a small group of white Democrats in order to elect a candidate of their choice.³⁰² “[E]limination of party affiliation on the ballot,” the Justice Department explained, would likely cause black candidates to “lose a significant amount of crossover votes due to the high degree of racial polarization present in city elections” and thus would “eliminate the single factor that allows black candidates to be elected to office.”³⁰³ This objection—unlike *NAMUDNO*—makes the City of Kinston ineligible to pursue bailout under the current standard.³⁰⁴ However, the plaintiffs in *Laroque*—individual voters, potential candidates, and an unincorporated association of supporters of the referendum for nonpartisan elections—face a significant standing challenge before the alleged merits of their claim can be heard. In June 2010, the Justice Department moved to

298. See, e.g., Tony Mauro, *Can the Voting Rights Act Survive Another Challenge?*, NAT'L L.J., June 29, 2009, at 1.

299. Complaint at ¶ 2, *Laroque v. Holder*, No. 1:10-CV-00561, 2010 WL 5153603 (D.D.C. Dec. 20, 2010).

300. Lenoir County, North Carolina has been covered by Section 5 since 1965. Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9,897 (Aug. 6, 1965); see also *Section 5 Covered Jurisdictions*, *supra* note 123.

301. Complaint, *supra* note 299, at ¶¶ 14–18; see also Letter from Loretta King, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to James P. Cauley III (Aug. 17, 2009), http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_081709.pdf.

302. *Id.*

303. *Id.* The objection letter further explained that:

[i]n Kinston elections, voters base their choice more on the race of a candidate rather than his or her political affiliation, and without either the appeal to party loyalty or the ability to vote a straight ticket, the limited remaining support from white voters for a black Democratic candidate will diminish even more. And given that the city's electorate is overwhelmingly Democratic, while the motivating factor for this change may be partisan, the effect will be strictly racial.

Id.

304. See 42 U.S.C. § 1973b(a)(1)(E) (2006) (requiring the absence of any Section 5 objections over the past ten years in order for bailout to be granted).

dismiss the *Laroque* suit, arguing the plaintiffs lacked Article III standing for their facial and as-applied challenges to Section 5's constitutionality.³⁰⁵ This motion was granted by the district court in December 2010³⁰⁶ and has been appealed to the D.C. Circuit, where the matter is pending as of early March 2011.³⁰⁷

A second challenge, *Shelby County v. Holder*, was filed by Shelby County, Alabama, in April 2010.³⁰⁸ Shelby County has requested a declaratory judgment that Section 5's preclearance obligation and Section 4(b)'s coverage formula are both unconstitutional exercises of Congress's powers under the Fourteenth and Fifteenth Amendments.³⁰⁹ Unlike the private plaintiffs in *Laroque*, however, *Shelby County* was filed by a "political subdivision" directly covered by Section 5 and thus there is no apparent standing challenge to its claims.³¹⁰ Shelby County further asserts it is ineligible for bailout for several reasons, including its failure to seek preclearance before implementing a voting change and a 2008 Section 5 objection to a municipality located within the county's borders.³¹¹ As a result, it asserts the question of whether the reenactment of "Section 5's preclearance obligation and Section 4(b)'s coverage formula were constitutional in light of the legislative record before Congress in 2006 must now be resolved."³¹² Both Shelby County and the Justice Department have filed motions for summary judgment on Section 4(b) and Section 5's constitutionality,³¹³ and as of early March 2011, the parties are awaiting a ruling from the District Court.

Third, in *Georgia v. Holder*, filed in June 2010, the State of Georgia requested a declaratory judgment that its verification process for voter registration application data—which triggered an objection from the Justice Department in May 2009³¹⁴—did not violate Section 5.³¹⁵ As an alternative, if

305. Defendant's Motion to Dismiss at 1, *Laroque v. Holder*, No. 1:10-CV-00561, 2010 WL 5153603 (D.D.C. Dec. 20, 2010).

306. Order, *Laroque*, No. 1:10-CV-00561, 2010 WL 5153603, available at <http://electionlawblog.org/archives/laroque%20order.pdf>.

307. *Laroque v. Holder*, No. 10-5433 (D.C. Cir. appeal docketed Dec. 28, 2010).

308. Complaint at ¶ 1, *Shelby County, Ala. v. Holder*, No. 1:10-CV-00651, 270 F.R.D. 16 (D.D.C. Sep. 16, 2010).

309. *Id.* at ¶¶ 36–43.

310. *Id.* at ¶¶ 2, 28–29.

311. *Id.* at ¶ 34.

312. Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment at 2, *Shelby County, Ala.*, No. 1:10-CV-00651, 270 F.R.D. 16.

313. See *id.*; Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Summary Judgment, *Shelby County, Ala.*, No. 1:10-CV-00651, 270 F.R.D. 16.

314. Letter from Loretta King, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to Thurbert E. Baker, Att'y Gen., State of Ga. (May 29, 2009), http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_052909.pdf.

Georgia's voter verification process was not eligible for preclearance, it sought a declaratory judgment that Section 5's continued application was "an unconstitutional imposition on the sovereignty of the State of Georgia" and it exceeded Congress's remedial powers under the Fourteenth and Fifteenth Amendments.³¹⁶ In particular, Georgia attacked the reauthorization of Section 5 as a "disproportionate, irrational, and incongruous remedy."³¹⁷ However, this action was dismissed by mutual agreement in November 2010 after the Justice Department granted administrative preclearance to a revised version of Georgia's voter verification process.³¹⁸

In addition, only a handful of covered jurisdictions have publicly expressed interest in obtaining preclearance after *NAMUDNO*, even though the decision greatly expanded the number of political subdivisions that are potentially eligible, contradicting the predictions of some observers immediately after the Supreme Court's opinion.³¹⁹ These include Merced County—one of four counties in California subject to Section 5³²⁰—and Sandy Springs, Georgia, a suburb of Atlanta.³²¹

Finally, a brief coda to the *NAMUDNO* case itself is warranted. After remand to the District Court, the Justice Department consented to *NAMUDNO*'s bailout, finding it satisfied the statutory requirements.³²² As part of the consent decree, *NAMUDNO* agreed to dismiss its challenge to the constitutionality of Section 5 with prejudice.³²³ And surprisingly, *NAMUDNO* itself recently ceased to exist—in February 2010, the utility district was

315. Complaint at ¶¶ 46–70, *Georgia v. Holder*, No. 1:10-CV-01062, 2010 WL 4340346 (D.D.C. Nov. 2, 2010).

316. *Id.* at ¶ 72.

317. *Id.* at ¶ 77.

318. *Georgia*, 2010 WL 4340346, at *1–2.

319. See Mauro, *supra* note 298; Armand Derfner, *What Does the Supreme Court Voting Rights Act Decision Mean We Should Do Now?*, CAMPAIGN LEGAL CTR. BLOG, (June 26, 2009), http://www.clcblog.org/blog_item-291.html ("Now that the Court has broadened eligibility, and with heightened attention on it, we can expect to see more bail out suits, and it will become clearer whether bail-out is an adequate safety valve or not.")

320. See Danielle E. Gaines, *Merced County Seeks Removal From Federal Voting Rights Act's Restrictions*, MERCED SUN-STAR, Apr. 27, 2010, available at 2010 WLNR 8658473.

321. See April Hunt, *Fulton, Sandy Springs at Odds Over Voting Rights Act*, ATLANTA JOURNAL-CONSTITUTION, June 2, 2010, <http://www.ajc.com/news/north-fulton/fulton-sandy-springs-at-540446.html>. This request was granted in October 2010. See *supra* note 124 and accompanying text.

322. Consent Judgment and Decree, *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) (No. 06-1384), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Northwest-ConsentJudgment-11-3-09.pdf>.

323. *Id.*

abolished and its functions were assumed by the City of Austin.³²⁴ Thus, while the historic *NAMUDNO* lawsuit itself ended with a whimper, the “bang” may be yet to come.³²⁵

V. ADOPTING A REVISED BAILOUT SYSTEM

This article recommends Congress accept the Court’s invitation to reexamine and revise Section 5’s scope. In particular, Congress should consider—or in some cases, reconsider—several changes to the Act’s bailout regime. These revisions are intended to more narrowly tailor the scope of Section 5 by removing from coverage “good” jurisdictions without a recent history of discrimination in voting, while permitting continued coverage of “bad” jurisdictions that have run afoul of the Act.³²⁶

In sum, this article proposes addressing the Court’s concern that the geographic scope of Section 5 is no longer “sufficiently related” to the problem of discrimination in voting by modifying bailout to encourage—and even require—jurisdictions without a recent history of discrimination be removed from coverage.³²⁷ Bailout under Section 4(a) and coverage under Section 4(b) are essentially “two sides of the same coin”: after achieving bailout, a jurisdiction is no longer covered under the Act.³²⁸ Thus, the expansion of bailout can help correct the problem of overbroad coverage identified in *NAMUDNO*.³²⁹

A. Automatic Bailout

First, Congress should withdraw from coverage all jurisdictions that have not violated any provision of the Act since its last renewal in 1982. This provision, which this article calls “automatic” bailout, would remove from

324. AUSTIN, TEX., ORDINANCE NO. 20100204-016 (2010), available at <http://www.ci.austin.tx.us/edims/document.cfm?id=134147>. Thanks to Rick Hasen’s Election Law Blog for the tip. <http://electionlawblog.org/archives/015207.html>.

325. Cf. T.S. ELIOT, *The Hollow Men*, in COLLECTED POEMS 1909-1935 101, 105 (1936).

326. Cf. Persily, *supra* note 239, at 730 (“If the coverage formula were to include more jurisdictions, it might be desirable to make it easier for ‘good jurisdictions’ to bail out.”).

327. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2512 (2009).

328. Sabrina Jacobs, Note, *The Voting Rights Act: What Is the Basis for the Section 5 Baseline?*, 42 LOY. L.A. L. REV. 575, 593 (2009).

329. See *Hearing on Expiring Provisions*, *supra* note 207, at 223–24 (testimony of Prof. Samuel Issacharoff) (“A liberalized bailout provision—one that allowed counties or municipalities that have not engaged in objectionable conduct for some fixed number of years to escape the administrative burden and the costs associated with Section 5 preclearance—would alleviate some of the constitutional pressure on the most suspect of the Act’s features: the extension of the original coverage formula.”); *id.* at 19 (testimony of Prof. Richard Hasen) (“One thing that I think would go a long way toward helping the constitutional case and also take off some of the burden in a lot of these jurisdictions is to ease the bailout requirements.”).

coverage those jurisdictions least likely to discriminate against minority voting rights in the future: ones that have consistently complied with Act. Specifically, under automatic bailout, a covered jurisdiction would be removed from coverage if, since January 1, 1982, it: (1) has not received any Section 5 objections from the Justice Department or been denied preclearance in the district court³³⁰ and (2) has not received any adverse final court judgment, consent decree, or other settlement of litigation of vote discrimination claims under Sections 2 or 203 of the Act.

There are several benefits to an automatic bailout provision. First, it would obviate many of the reasons why jurisdictions currently eligible for bailout have not pursued it on their own—for example, because they are unaware of it, because they believe the requirements are too burdensome, or because they believe it would cost too much.³³¹ Second, automatic bailout would be administratively straightforward to implement because it rests on “objective criteria”³³²—the absence of voting rights violations in both judicial (Section 2) and administrative (Section 5) forums.³³³ In fact, automatic bailout could be similar to the process for designating coverage under Section 4: the Voting Section of the Justice Department could determine which covered jurisdictions satisfy these requirements and publish a list of them in the Federal Register, thus removing them from coverage.³³⁴

Third, and most importantly, automatic bailout would help satisfy the Court’s requirement in *NAMUDNO* that Section 5 coverage “must be justified by current needs” and targeted at “[t]he evil that § 5 is meant to address,” because all remaining covered jurisdictions would have had at least one

330. This requirement could omit any objections made by the Justice Department on a legal basis that subsequently was found to be improper by the Supreme Court. For example, during much of the 1980s and 1990s, the Justice Department had adopted a regulation that Section 5 preclearance would be withheld to prevent a “clear violation” of Section 2. See McCrary, Seaman & Valelly, *supra* note 89, at 291. Subsequently, in *Bossier Parish School District v. Reno*, the Supreme Court held that Section 5 preclearance could not be denied simply because the proposed change would violate section 2. 520 U.S. 471, 474, 485 (1997). However, this change would not have a large impact on coverage, as this theory was relied upon in a relatively small number of objections: 2 objections in the 1980s (1% of objections) and 6 objections in the 1990s (2%) were based entirely on a “clear violation” of Section 2, while an additional 6 objections in the 1980s (2%) and 41 objections in the 1990s (12%) were based in part on a “clear violation” of Section 2 (the other legal ground usually was a prohibited discriminatory intent under Section 5). See McCrary, Seaman & Valelly, *supra* note 89, at 297–98 & tbl. 2.

331. See *supra* Part II.

332. *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2518 (Thomas, J., dissenting).

333. See *Hearing on Expiring Provisions*, *supra* note 207, at 26 (testimony of Prof. Samuel Issacharoff) (“[O]ne could go to a bailout structure that was quite objective, absence-of-objection letters or absence of violations over a defined period of time, and make that much more of an administrative matter.”).

334. See 42 U.S.C. § 1973b(b) (2006).

violation of the Act since the 1982 renewal.³³⁵ As Richard Hasen testified during the Senate reauthorization hearings in 2006, an expansion of bailout would

help the constitutional case [for Section 5 by] showing that the law is going to then be focused on places that continue to have a history of discrimination. . . . [B]ailout [can] winnow out those places that have made significant progress on the basis of race, and so that those places that are doing well will not have to go through the kind of preclearance for these minor types of changes.³³⁶

However, there are also a few potential drawbacks to this automatic bailout proposal. First, it is possible that “bad” jurisdictions could qualify for bailout because they have been successfully restrained by the Act, but would resume discriminating if Section 5 coverage is dropped.³³⁷ This concern, however, could be addressed by reinstating coverage if a bailed-out jurisdiction subsequently violates Section 2 (or another provision of the Act) for a fixed period after automatic bailout. Indeed, the current bailout provision contains a similar requirement, allowing the Justice Department or “any aggrieved person” to request re-coverage anytime within a ten-year period *after* bailout if the previously-covered jurisdiction engages in conduct that, had it occurred before the date of bailout, would have made it ineligible to achieve bailout.³³⁸

Second, automatic bailout could release from coverage jurisdictions that violated minority voting rights, but have failed to come to the Justice Department’s attention because they routinely failed to submit election changes for preclearance. For example, two counties in South Dakota that contained large Indian reservations were first covered under the 1975 renewal, but at the advice of the state’s attorney general, they submitted for preclearance less than 10 out of over 600 changes from 1976 to 2002 that had an effect on elections or voting.³³⁹ However, after 45 years of coverage, there are likely few jurisdictions that still routinely attempt to evade their preclearance obligations.

Finally, identifying all jurisdictions eligible for automatic bailout from the thousands of local political subdivisions eligible after *NAMUDNO*³⁴⁰ could be

335. *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2512.

336. *Hearing on Expiring Provisions*, *supra* note 207, at 19–20 (testimony of Prof. Richard Hasen).

337. Persily, *supra* note 239, at 729.

338. 42 U.S.C. § 1973b(a)(5) (2006).

339. Laughlin McDonald, Janine Pease & Richard Guest, *Voting Rights in South Dakota: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 195, 195–97 (2007).

340. One issue that would need to be resolved for “automatic” bailout is the “nesting” issue—namely, whether a state or political subdivision can qualify for bailout if a local jurisdiction within its borders itself cannot bailout due to previous violations of the Act. Under *NAMUDNO*’s holding that bailout and preclearance are now based on the “principle of symmetry,” the answer would appear to be “yes.” *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2516.

a time-consuming endeavor for the Voting Section of the Justice Department.³⁴¹ However, this burden might be ameliorated by shifting part or all of the responsibility for identifying eligible jurisdictions to another division within the Justice Department or a separate agency.

This article's automatic bailout proposal would likely have a dramatic effect on the scope of Section 5's coverage in some states, but in others—particularly those with the most pervasive record of discrimination—significant portions would remain covered. As a case study, this article examines the impact of the proposed automatic bailout on Section 5 coverage in two states: Virginia and Mississippi.

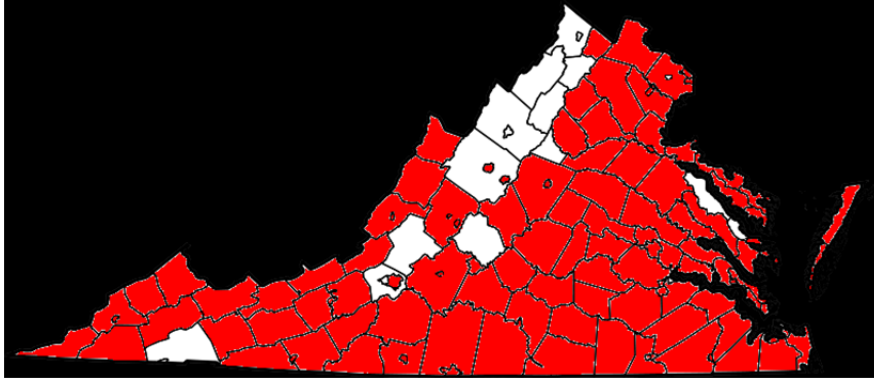
1. Case Study #1: Virginia

Currently, the Commonwealth of Virginia is covered under Section 5, as well as most of its major political subdivisions that register voters (counties and independent cities). The exceptions are thirteen counties and four independent cities—most of which are located in the Appalachian Mountains in the northwestern part of the state, and nearly all of which have low minority populations—that have bailed out from coverage since 1997.³⁴² Current Section 5 coverage at the county/independent city level in Virginia is illustrated in Figure 1a; covered jurisdictions are shaded, while bailed out jurisdictions are white.

341. See Rick Hasen, *House Moves to Renew Voting Rights Act*, ELECTION LAW BLOG, July 13, 2007, <http://electionlawblog.org/archives/006205.html> (restating argument by Leadership Conference on Civil Rights that requiring Justice Department to determine which covered jurisdictions were eligible for bailout would take “considerable resources” and compel it “to spend nearly all of its time conducting investigations to determine where discrimination no longer exists.”).

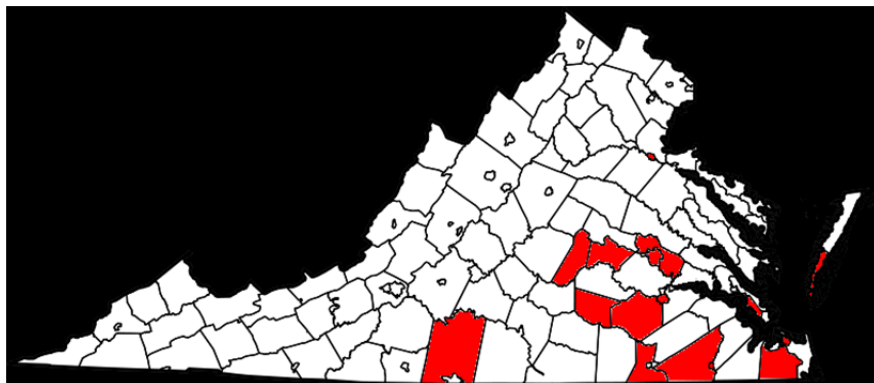
342. See Amici Brief of Bailed Out Jurisdictions, *supra* note 121, at Ex. B. The main exception is Essex County, which has an approximately 40% black population, according to the 2000 census. U.S. Census Bureau, Census 2000 Demographic Profile Highlights—Essex County, Va., http://factfinder.census.gov/home/saff/main.html?_lang=en (input Essex County, Virginia in the query box) (last visited Dec. 20, 2010).

FIGURE 1a:
CURRENT SECTION 5 COVERAGE IN VIRGINIA, AT COUNTY/CITY LEVEL



If automatic bailout is adopted, a large number of Virginia's counties and independent cities will be removed from Section 5 coverage. A list of the covered jurisdictions after automatic bailout is included in Appendix A. Notably, however, several major urban areas with sizeable minority populations—such as Chesapeake, Norfolk, Newport News, Richmond and neighboring Henrico County, and Petersburg—will still remain covered as a result of Section 5 objections and/or Section 2 litigation since January 1, 1982. Covered jurisdictions at the county/city level in Virginia after automatic bailout are depicted in Figure 1b as shaded areas, while bailed-out jurisdictions are depicted in white.

FIGURE 1b:
SECTION 5 COVERAGE IN VIRGINIA AFTER AUTOMATIC BAILOUT, AT
COUNTY/CITY LEVEL



In addition, the state itself would remain covered due to Section 5 objections in 1982 (house legislative reapportionment), 1984 (candidate assistance to

voters), and 1991 (house legislative reapportionment), requiring it to continue submitting statewide voting changes, such as legislative and Congressional redistricting plans, for preclearance.³⁴³

2. Case Study #2: Mississippi

Like Virginia, the state of Mississippi is presently covered under Section 5. No political subdivisions from Mississippi have yet achieved bailout. This is likely due in part to the state's lengthy record of noncompliance with the Act; from 1969 through 2008, 169 separate objections were interposed by the Justice Department against election changes enacted by Mississippi and jurisdictions within its borders, as compared to thirty-three objections in Virginia,³⁴⁴ even though Virginia's population is over two-and-a-half times larger than Mississippi's.³⁴⁵

Figure 2 demonstrates the impact of this article's automatic bailout proposal on Mississippi at the county level. After automatic bailout, a majority of Mississippi's counties (forty-seven) would remain covered under Section 5, while thirty-three would be bailed out. The remaining covered jurisdictions would include Hinds County, the largest county by population (almost nine percent of the state) and home to Jackson, the state's capitol. Also covered would be the counties containing Mississippi's next three largest cities, Gulfport (Harrison County), Hattiesburg (Forest County), and Biloxi (Harrison County). Furthermore, many covered jurisdictions are "repeat offenders" of the Act. For example, Bolivar and Sunflower Counties, located adjacent to each other in the northwestern part of the state, have received five and six separate objections, respectively, since 1982.³⁴⁶ A complete list of jurisdictions that would remain covered in Mississippi after automatic bailout is listed in Appendix B.

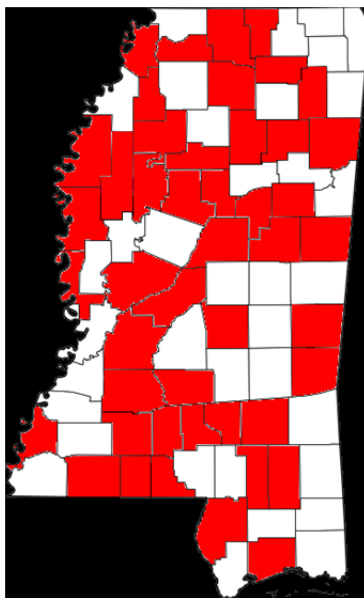
343. Letter from William Bradford Reynolds, Assistant Att'y Gen., U.S. Dep't of Justice, to Gerald Baliles, Va. Att'y Gen. (Mar. 12, 1982); Letter from James P. Turner, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to William J. Bridge, Va. Assistant Att'y Gen. (Aug. 3, 1984); Letter from John R. Dunne, Assistant Att'y Gen., U.S. Dep't of Justice, to K. Marshall Cook, Va. Deputy Att'y Gen. (July 16, 1991), *referenced at* http://www.justice.gov/crt/about/vot/sec_5/va_obj2.php.

344. *Compare* Voting Section, U.S. Dep't of Justice Civil Rights Div., *Section 5 Objection Determinations – Mississippi*, http://www.justice.gov/crt/about/vot/sec_5/ms_obj2.php (last visited Dec. 20, 2010) (listing 169 objection letters), *with* Voting Section, U.S. Dep't of Justice Civil Rights Div., *Section 5 Objection Determinations – Virginia*, http://www.justice.gov/crt/about/vot/sec_5/va_obj2.php (last visited Dec. 20, 2010) (listing 33 objection letters).

345. U.S. Census Bureau, *State Rankings—Statistical Abstract of the United States: Resident Population—July 2009*, <http://www.census.gov/compendia/statab/2010/ranks/rank01.html> (last updated Dec. 22, 2009).

346. This figure does not count separate objections to towns or other municipalities within these counties.

FIGURE 2:
SECTION 5 COVERAGE IN MISSISSIPPI AFTER AUTOMATIC BAILOUT, AT
COUNTY LEVEL



Like Virginia, the state of Mississippi itself would be covered due to multiple Section 5 objections since 1982. Specifically, Mississippi received Section 5 objections in 1982 (reapportionment of Congressional districts), 1983 (primary and general election dates), 1989 (modification of school district boundaries after city annexations), 1991 (redistricting of state house and senate legislative districts), 1992 (mail-in voter registration requirements), 1993 (use of single-member districts for school boards), 1995 (prohibition on elected officials holding multiple offices), 1997 (implementation of the National Voter Registration Act of 1993), and 2010 (majority vote requirement for election to certain county boards of education and boards of trustees for municipal school districts),³⁴⁷ as well as adverse Section 2 judgments in 1984 and 1991.³⁴⁸

347. See Voting Section, U.S. Dep't of Justice Civil Rights Div., *Section 5 Objection Determinations – Mississippi*, http://www.justice.gov/crt/about/vot/sec_5/ms_obj2.php (last visited Dec. 20, 2010).

348. *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss. 1984), *aff'd sub nom.* *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984); *Miss. St. Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991).

B. *Optional Bailout and Related Proposals*

In addition, Congress should also revise the existing statutory requirements for covered jurisdictions to voluntarily request bailout, which this article calls “optional” bailout. Any revision to the current standard for bailout in Section 4(a) should further its objective to “provide incentives to jurisdictions” with a history of discrimination in voting “to attain compliance with the law and increas[e] participation by minority citizens in the political process of their community.”³⁴⁹ Thus, the main objective of the revisions to optional bailout proposed by this article is to simplify the requirements for a covered jurisdiction to establish it has adequately cured its past discrimination and should be released from coverage.

To achieve optional bailout, a covered jurisdiction should be required to satisfy a two-part test. First, like the existing bailout standard, the jurisdiction should be required to satisfy an “objective” requirement that it has not violated the Act. For this requirement, a jurisdiction would have to establish, for the past twenty years: (1) it has not received any Section 5 objection from the Justice Department or denial of preclearance by the District Court, and (2) it has not received an adverse final court judgment or entered into a consent decree in litigation under Sections 2 or 203 of the Act.³⁵⁰ Unlike the pre-*NAMUDNO* standard, however, jurisdictions would *not* be required to demonstrate all governmental units located within the jurisdiction’s territory

349. S. REP. NO. 97-417, at 43 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 222.

350. This Article proposes a twenty (20) year, rather than the existing ten (10) year, compliance period for optional bailout because the relatively small number of Section 5 objections interposed during the 2000s would mean that the vast majority of covered jurisdictions—even after automatic bailout—would satisfy this requirement. For example, in Mississippi, the Justice Department’s website indicates that only a single objection—to the town of Kilmichael, population 830—was made in the entire state from 2000 through 2009. *See* Voting Section, U.S. Dep’t of Justice Civil Rights Div., *Section 5 Objection Determinations – Mississippi*, http://www.justice.gov/crt/about/vot/sec_5/ms_obj2.php (last visited Dec. 20, 2010). One additional objection, to the State of Mississippi, was also made in March 2010. *See* Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, to Margaret L. Meeks, Special Assistant Att’y Gen., State of Mississippi (Mar. 24, 2010), http://justice.gov/crt/about/vot/sec_5/pdfs/l_032410.pdf. In fact, the Justice Department made only 55 objections from January 2000 through July 2008 for *all* covered jurisdictions. Voting Section, U.S. Dep’t of Justice Civil Rights Div., *Section 5 Objection Determinations*, http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (last visited Dec. 20, 2010). As previously explained, the low number of objections during the 2000s may be due to two reasons: the Supreme Court’s decision in *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (“*Bossier II*”), which dramatically reduced the scope of the “purpose” prong of Section 5, and possible under-enforcement of Section 5 by political appointees in the Justice Department during the Bush Administration. *See supra* note 164. For these reasons, a rolling twenty-year period for compliance seems more appropriate.

had also satisfied these requirements.³⁵¹ As a result, a covered State that met these requirements could bail out, even if one or more of its counties had received a Section 5 objection or had an adverse court decision in Section 2 litigation.³⁵² In other words, this requirement would mirror automatic bailout, except it would cover a rolling twenty-year period, rather than being fixed at a certain date (1982).

Second, to achieve optional bailout, the existing “subjective” criteria³⁵³ that require a jurisdiction to demonstrate it has taken sufficient steps to expand minority participation in the electoral process³⁵⁴ would be replaced by a more quantitative measure: whether minority citizens in the covered jurisdiction have participated in the electoral process at rates substantially similar to non-Hispanic white voters in the last two federal elections. This would not require that minority citizens vote at identical (or greater) rates than non-Hispanic whites, but rather at comparable levels with some minor variation—perhaps 5%—for reasons unrelated to past or present discrimination, such as voter enthusiasm for particular candidate(s) or depressed turnout due to uncompetitive races or unopposed candidates.

In several states, this requirement already is satisfied (or is close to being satisfied) for black voters, but significant improvement would be needed in turnout among Hispanic voters in most covered jurisdictions. For example, based on Census Bureau data from the 2006 congressional midterm election, blacks in the states of Alabama, Mississippi, and South Carolina voted at rates within the proposed 5% test compared to non-Hispanic whites (and in the latter two states, black voters actually voted at a higher rate), with Georgia and Louisiana not far behind at 6.2% and 5.6% respectively.³⁵⁵ However, all of the covered states with a substantial Hispanic population—Arizona, Georgia, Texas, and Virginia—would need to make significant progress in Hispanic

351. See 42 U.S.C. § 1973b(a)(1)(D) (2006) (providing that to obtain preclearance, a State or political subdivision must demonstrate that “all governmental units within its territory have complied with section [5]”). If a covered jurisdiction achieves bailout, however, any smaller governmental units within the jurisdiction’s territory that were also subject to Section 5 would remain covered, unless such unit(s) were separately eligible for and requested optional bailout as well. *Id.* at § 1973b(a)(1).

352. In addition, unlike the current standard, the covered jurisdiction would not have to demonstrate that it had not been assigned any federal examiners. See *id.* § 1973b(a)(1)(C).

353. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2904, 2518 (2009) (Thomas, J., dissenting).

354. 42 U.S.C. § 1973b(a)(1)(F)(i)–(iii) (2006); see also *supra* text accompanying notes 103–104.

355. U.S. Census Bureau, Voting and Registration in the Election of November 2006, tbl. 4b (2008), <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2006/tables.html>.

voter participation to be eligible for bailout, as the gap in turnout compared to non-Hispanic whites ranged between 14.7% (Arizona) and 25.9% (Georgia).³⁵⁶

TABLE 1: TURNOUT DATA IN 2006 ELECTION, AS % OF ELIGIBLE POPULATION³⁵⁷

Covered State	Non-Hispanic Whites	Blacks	Hispanics
Alabama	50.9%	47.8%	Not available
Alaska	58.1%	Not available	Not available
Arizona	51.1%	24.4%	36.4%
Georgia	46.9%	40.7%	21.0%
Louisiana	41.9%	36.3%	Not available
Mississippi	39.9%	50.5%	Not available
South Carolina	43.7%	50.6%	Not available
Texas	45.2%	36.7%	25.4%
Virginia	51.9%	35.9%	31.9%

A similar pattern exists for the 2008 presidential election, where both black and Hispanic voters participated at record levels. Black turnout exceeded that of non-Hispanic whites in four states, Georgia, Mississippi, South Carolina and Texas, and was the same in Alabama.³⁵⁸ In Virginia, black turnout was only marginally lower than non-Hispanic whites (1.1%), while there was a larger difference in both Louisiana (6.2%) and Arizona (14.6%).³⁵⁹ Again, however, the proportion of Hispanic citizens voting in 2008 substantially lagged behind non-Hispanic whites, although progress was made in both Georgia (9.6% difference in 2008 vs. 25.9% in 2006) and Virginia (12.9% difference in 2008 vs. 20% in 2006).³⁶⁰

356. This difference is apparently not unique to covered jurisdictions; nationally, 32.3% of Hispanic citizens voted in 2006, compared to 51.6% of white non-Hispanics—a difference of 19.3%. *Id.* at tbl. 3. The lower participation rates for Hispanics appears partially due to differences in registration rates; 71.2% of non-Hispanic white citizens were registered in 2006, compared to only 53.7% of Hispanic citizens. *Id.*

357. *Id.* at tbl. 4b. “Not available” indicates the base was less than 75,000 persons and therefore too small for the Census Bureau to include the derived measure in its report.

358. U.S. Census Bureau, Voting and Registration in the Election of November 2008, tbl. 4b (2009), <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html>.

359. *Id.*

360. *Id.*

TABLE 2: TURNOUT DATA IN 2008 ELECTION, AS % OF ELIGIBLE POPULATION³⁶¹

Covered State	Non-Hispanic Whites	Blacks	Hispanics
Alabama	62.5%	62.5%	Not available
Alaska	71.2%	Not available	Not available
Arizona	67.0%	52.4%	36.6%
Georgia	64.1%	67.9%	54.5%
Louisiana	72.4%	66.2%	Not available
Mississippi	68.4%	72.9%	Not available
South Carolina	63.5%	72.6%	Not available
Texas	64.7%	64.9%	37.8%
Virginia	69.4%	68.3%	56.5%

In addition, Congress should consider two other measures related to optional bailout. First, it should implement Professor Hasen's "proactive bailout" proposal. During Senate hearings, Hasen proposed the Justice Department be required to proactively identify jurisdictions that satisfy the bailout criteria and inform them the Attorney General would consent to bailout if they requested it.³⁶² Placing the burden on the Justice Department to identify eligible jurisdictions and facilitate their bailout "would help the constitutional case [by] showing that the law is going to . . . be focused on places that have a history of discrimination" and thus "winnow out those places that have made significant progress."³⁶³ The Justice Department could be required to conduct this review on a biannual basis, after each federal election, to determine if any additional jurisdictions are eligible to seek removal from coverage.

Finally, Congress should permit covered jurisdictions that succeed in a bailout suit over the Justice Department's opposition to recover reasonable attorney's fees and costs.³⁶⁴ As previously explained, there is likely a

361. *Id.* "Not available" indicates the base was less than 75,000 persons and therefore too small for the Census Bureau to include the derived measure.

362. *Hearing on Expiring Provisions, supra* note 207, at 19–20; *see also* McDonald, *supra* note 43, at 269 (arguing if the existing bailout provision is ineffective, "a solution would be for the Department of Justice to proactively notify jurisdictions that they are potentially eligible for bailout, explain bailout procedures, and assist jurisdictions with initiating bailout litigation.").

363. *Hearing on Expiring Provisions, supra* note 207, at 20; *see also id.* at 37 ("My proposal for easing the bailout would put the onus on the Justice Department to review each covered jurisdiction's history, and to take proactive steps to inform jurisdictions that have met the requirements that they may bailout.").

364. This Article, however, does not advocate permitting jurisdictions to recover attorney's fees in *all* successful bailout litigation. Rather, it would restrict it to only litigation where the Justice Department opposes bailout. If recovery of attorney's fees was extended to all bailout suits, it could impose a considerable expense on the federal government, particularly if it resulted

perception among covered jurisdictions that bailout is too expensive to pursue, especially in light of the relatively low financial burden imposed by preclearance.³⁶⁵ Federal courts traditionally refrain from awarding attorney's fees to prevailing litigants absent a specific statutory authorization.³⁶⁶ However, Congress has frequently adopted "specific and explicit provisions for the allowance of attorney's fees under selected statutes granting or protecting various federal rights."³⁶⁷ For example, attorney's fees may be awarded to a prevailing party in litigation under Section 2 of the Act, except for the federal government.³⁶⁸

Permitting jurisdictions that successfully prevail in a bailout suit over the Justice Department's opposition to recover reasonable attorney's fees would serve two purposes. First, it would create a financial incentive for covered jurisdictions to pursue bailout if they reasonably believe they are entitled to termination of coverage, but the Justice Department has declined to consent to relief. Ordinarily, given the high costs of litigation, the Justice Department's opposition would sound the death knell for a bailout request, even in a close case. But if a jurisdiction has the opportunity to obtain bailout almost cost-free through a recovery of attorney's fees, this might incentivize it to pursue the bailout claim. In addition, an award of attorney's fees would encourage the Justice Department to promptly determine whether the bailout request was meritorious and oppose the requested relief only in cases where the covered jurisdiction was clearly not entitled to it.³⁶⁹

CONCLUSION

During the 2006 reauthorization, Congress was unable to revise Section 5's coverage formula or amend its bailout requirements to more narrowly tailor it

in dozens or hundreds of newly-eligible jurisdictions after *NAMUDNO* seeking bailout. In addition, the Justice Department might end up paying attorney's fees in cases where it would have consented to bailout anyway, resulting in a "windfall" for covered jurisdictions. A more targeted attorney's fees provision limited to cases where the Justice Department improperly *opposed* bailout thus would likely be more effective.

365. See *supra* Part II.

366. See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 253–60 (1975); see also Mark D. Boveri, Note, *Surveying the Law of Fee Awards Under the Attorney's Fees Awards Act*, 59 NOTRE DAME L. REV. 1293 (1984).

367. *Alyeska Pipeline*, 421 U.S. at 260–61.

368. See 42 U.S.C. § 1973l(e) (2006) ("In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").

369. See, e.g., *Eddy v. Colonial Life Ins. Co. of Am.*, 59 F.3d 201, 208 (D.C. Cir. 1995) ("By awarding attorneys' fees, the courts make both delay and litigation less likely, thereby encouraging earlier resolution of claims."). Cf. Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217 (1994).

to apply to jurisdictions with a recent history of discrimination in voting. After *NAMUDNO*, it now has a second chance to do so. This article proposes several changes to accomplish this objective. First, Congress should automatically remove from coverage all jurisdictions that have not been found to violate the Act since 1982 by either a Section 5 objection or in litigation under Sections 2 and 203. Second, Congress should adopt a streamlined bailout test for the remaining covered jurisdictions by focusing on two things: the jurisdiction's compliance with the Act over the previous twenty years and whether minority voters in the jurisdiction participate in the election process at rates substantially similar to non-Hispanic whites. The Justice Department should help identify jurisdictions that are bailout-eligible and facilitate their removal from coverage by consenting to bailout. Finally, if the Justice Department opposes a bailout suit that is later successful, the covered jurisdiction should be entitled to recover attorney's fees. Failure to take these steps, or similar ones that effectively tailor the scope of the preclearance requirement, will likely result in an uncertain future for Section 5.

APPENDIX A

SECTION 5 COVERAGE IN VIRGINIA AFTER AUTOMATIC BAILOUT

Jurisdiction	Basis for Coverage	Preclearance Submission No./ Court Decision	Date
Petersburg City	Section 5 Objection	No. 81-2199	3/1/1982
State	Section 5 Objection	No. 82-2748	3/12/1982
Southampton County	Section 5 Objection	No. 81-2235	6/21/1982
Greensville County	Section 5 Objection	No. 82-2786	11/15/1982
State	Section 5 Objection	No. 84-3793	8/3/1984
Franklin City	Section 5 Objection	No. 84-4549	3/11/1986
Richmond County	Section 2 Judgment	<i>Henderson v. Bd. of Supervisors of Richmond Cnty.</i> , 988 WL 86680 (E.D. Va.)	6/6/1988
Nottoway County	Section 2 Judgment	<i>Neal v. Cleburn</i> , 689 F. Supp. 1426 (E.D. Va.)	6/27/1988
Henrico County	Section 2 Judgment	<i>McDaniels v. Mehford</i> , 702 F. Supp. 588 (E.D. Va.)	12/30/1988
Newport News	Section 5 Objection	No. 88-5098	7/24/1989
Norfolk City	Section 2 Judgment	<i>Collins v. City of Norfolk</i> , 883 F.2d 1232 (4th Cir.)	8/18/1989
State	Section 5 Objection	No. 91-1483	7/16/1991
Powhatan County	Section 5 Objection	No. 91-2115	11/12/1991
Newport News City School District	Section 5 Objection	No. 92-3887	2/16/1993
Chesapeake City School District	Section 5 Objection	No. 93-4561	6/20/1994

Dinwiddie County	Section 5 Objection	No. 99-2229	10/27/1999
Northampton County	Section 5 Objection	No. 2001-1495	9/28/2001
Pittsylvania County	Section 5 Objection	No. 2001-2026 No. 2001-2501	4/29/2002
Cumberland County	Section 5 Objection	No. 2001-2374	7/29/2002
Northampton County	Section 5 Objection	No. 2002-5693	5/19/2003
Northampton County	Section 5 Objection	No. 2003-3010	10/21/2003

Data Sources:

- Voting Section, U.S. Dep't of Justice Civil Rights Div., *Section 5 Objection Determinations – Virginia*, http://www.justice.gov/crt/about/vot/sec_5/va_obj2.php (last visited Dec. 20, 2010).
- Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J. L. REFORM 643, tbls. A, C, D (2006); *see also* <http://www.votingreport.org>.
- Westlaw database, U.S. District Courts – Virginia (DCTVA).

APPENDIX B

SECTION 5 COVERAGE IN MISSISSIPPI AFTER AUTOMATIC BAILOUT

Jurisdiction	Basis for Coverage	Preclearance Submission No./ Court Decision	Date
State	Section 5 Objection	No. 81-1697	3/30/1982
Lucedale (George County)	Section 5 Objection	No. 82-2252	7/27/1982
State	Section 5 Objection	No. 82-2250	2/22/1983
Copiah County	Section 5 Objection	No. 82-2240	4/11/1983
Adams County	Section 5 Objection	No. 83-2228	5/23/1983
Covington County	Section 5 Objection	No. 83-2383	5/23/1984
Quitman County	Section 5 Objection	No. 83-2515	5/27/1983
Scott County	Section 5 Objection	No. 83-2519	5/31/1986
Amite County	Section 5 Objection	No. 83-2335	6/6/1983
Warren County	Section 5 Objection	No. 83-2544	6/10/1983
Bolivar County	Section 5 Objection	No. 83-2346	6/13/1983
Oktibbeha County	Section 5 Objection	No. 83-2498	6/17/1983
Winston County	Section 5 Objection	No. 83-2556	6/29/1983
Jones County	Section 5 Objection	No. 83-2450	7/1/1983
Lincoln County	Section 5 Objection	No. 83-2472	7/5/1983
Lauderdale County	Section 5 Objection	No. 83-2457	7/5/1983
Tallahatchie County	Section 5 Objection	No. 82-2317	7/11/1983
Adams County	Section 5 Objection	No. 83-2328	7/11/1983
Copiah County	Section 5 Objection	No. 83-2376	7/18/1983
Sunflower County	Section 5 Objection	No. 83-2529	7/19/1984

Ridgeland Municipal School District (Madison County)	Section 5 Objection	No. 83-2481	7/25/1983
Bolivar County	Section 5 Objection	No. 83-2357	8/9/1983
Tate County	Section 5 Objection	No. 83-2536	8/1/51983
Leflore County	Section 5 Objection	No. 83-2468	8/22/1983
Pike County	Section 5 Objection	No. 83-2508 No. 83-2510	8/26/1983
Leflore County	Section 5 Objection	No. 83-2470	9/6/1983
Yazoo County	Section 5 Objection	No. 83-2560	12/16/1983
Lawrence County	Section 5 Objection	No. 83-2462	1/3/1984
Indianola (Sunflower County)	Section 5 Objection	No. 83-2533	1/20/1984
Issquena County	Section 5 Objection	No. 83-2440	2/10/1984
Natchez (Adams County)	Section 5 Objection	No. 83-2331	2/21/1984
Collins (Covington County)	Section 5 Objection	No. 83-2382	3/23/1984
Bolivar County	Section 5 Objection	No. 83-2351	4/16/1984
State	Section 2 Judgment	<i>Jordan v. Winter</i> , 604 F. Supp. 807 (N.D. Miss.)	4/16/1984
Pike County	Section 5 Objection	No. 83-2511	5/4/1984
Greenwood (Leflore County)	Section 5 Objection	No. 84-2469	5/14/1984
Greenwood (Leflore County)	Section 2 Judgment	<i>Jordan v. City of Greenwood</i> , 599 F. Supp. 397 (N.D. Miss.)	10/25/1984
Tate County	Section 5 Objection	No. 84-3011	11/26/1984

Leflore County	Section 5 Objection	No. 84-2968 No. 84-2969	4/1/1985
Sunflower County	Section 5 Objection	No. 84-2007	6/7/1985
Madison County	Section 2 Judgment	<i>Goodloe v. Madison Cnty. Bd. of Elec. Comm'rs</i> , 610 F. Supp. 240 (S.D. Miss.)	6/25/1985
Madison County	Section 5 Objection	No. 85-2859	9/10/1985
Sunflower County	Section 5 Objection	No. 85-2904	6/7/1985
Yazoo County	Section 5 Objection	No. 84-3024	12/20/1985
State	Section 5 Objection	No. 86-3683	7/1/1986
Yazoo County	Section 5 Objection	No. 86-3786	7/7/1986
Sunflower County	Section 5 Objection	No. 86-3763	12/15/1986
Houston (Chickasaw County)	Section 2 Judgment	<i>Wright v. City of Houston</i> , 806 F.2d 634 (5th Cir.)	12/30/1986
Pike County School District	Section 5 Objection	No. 83-2512	2/9/1987
Mississippi Judicial Elections	Section 2 Judgment	<i>Martin v. Allain, Kirksey v. Allain</i> , 658 F. Supp. 1183 (S.D. Miss)	4/1/1987
Grenada County	Section 5 Objection	No. 87-3101	6/2/1987
Washington County	Section 5 Objection	No. 87-3308	6/19/1987
Quitman County	Section 5 Objection	No. 87-3225	9/28/1987
Belzoni (Humphreys County)	Section 5 Objection	No. 86-3627	10/1/1987
Monroe County	Section 5 Objection	No. 87-3200	1/12/1988

Grenada Municipal School District (Grenada County)	Section 5 Objection	No. 87-3098 No. 87-3099	5/9/1988
Chickasaw County	Section 2 Judgment	<i>Gunn v. Chickasaw Cnty.</i> , 705 F. Supp. 315 (N.D. Miss.)	1/24/1989
Greenville (Washington County)	Section 5 Objection	No. 88-4074	2/10/1989
State	Section 5 Objection	No. 87-3282	3/31/1989
Houston Municipal School District (Chickasaw County)	Section 5 Objection	No. 87-3067	4/18/1989
Chickasaw County	Section 5 Objection	No. 89-2646	2/27/1990
State	Section 5 Objection	No. 88-4035	5/25/1990
Monroe County	Section 2 Judgment	<i>Ewing v. Monroe Cnty.</i> , 740 F. Supp. 417 (N.D. Miss.)	6/29/1990
Cleveland Consolidated School District (Bolivar County)	Section 5 Objection	No. 90-3474	10/2/1990
Simpson County	Section 5 Objection	No. 90-3602 No. 90-3604	10/5/1990
Monroe County	Section 5 Objection	No. 90-3575	4/26/1991
State	Section 2 Judgment	<i>Miss. St. Chapter, Operation Push, Inc. v. Mabus</i> , 932 F.2d 400 (5th Cir.)	5/31/1991
Tate County	Section 5 Objection	No. 91-1137	7/2/1991
State	Section 5 Objection	No. 91-1402	7/2/1991
Bolivar County	Section 5 Objection	No. 91-1457	7/15/1991
Hinds County	Section 5 Objection	No. 91-1503	7/19/1991

Union County	Section 5 Objection	No. 91-0800	8/2/1991
Lee County	Section 5 Objection	No. 91-1096	8/23/1991
Bolivar County	Section 5 Objection	No. 91-2939	8/23/1991
Amite County	Section 5 Objection	No. 91-1504	8/23/1991
Tunica County	Section 5 Objection	No. 91-1438	9/3/1991
Benton County	Section 5 Objection	No. 91-1097	9/9/1991
Harrison County	Section 5 Objection	No. 91-1401	9/9/1991
Jefferson Davis County	Section 5 Objection	No. 91-1559	9/13/1991
Montgomery County	Section 5 Objection	No. 91-1139	9/16/1991
Clarke County	Section 5 Objection	No. 91-1392	9/24/1991
Oktibbeha County	Section 5 Objection	No. 91-1451	9/30/1991
Walthall County	Section 5 Objection	No. 91-1421	9/30/1991
Marshall County	Section 5 Objection	No. 91-1375	9/30/1991
Lauderdale County	Section 5 Objection	No. 91-2342	10/7/1991
Forrest County	Section 5 Objection	No. 91-1506	10/7/1991
Tate County	Section 5 Objection	No. 91-2967	10/11/1991
Leflore County	Section 5 Objection	No. 91-1463	10/21/1991
Sunflower County	Section 5 Objection	No. 91-1629	10/25/1991
Perry County	Section 5 Objection	No. 91-1598	11/19/1991
Pearl River County	Section 5 Objection	No. 91-1579	11/25/1991
Attala County	Section 5 Objection	No. 91-2449	1/13/1992
State	Section 5 Objection	No. 92-0993	3/30/1992
Tallahatchie County	Section 5 Objection	No. 91-3011	4/27/1992
State	Section 5 Objection	No. 91-3975	5/1/1992
Sunflower County	Section 5 Objection	No. 92-1415	5/21/1992

Marshall County	Section 5 Objection	No. 92-3602	10/31/1992
Amite County	Section 5 Objection	No. 92-2548	11/30/1992
Greenville (Washington County)	Section 5 Objection	No. 92-4012	2/22/1993
Lawrence County	Section 2 Judgment	<i>Bryant v. Lawrence Cnty.</i> , 814 F. Supp. 1346 (S.D. Miss.)	3/3/1993
Lee County	Section 5 Objection	No. 93-1026	3/22/1993
Chickasaw County	Section 5 Objection	No. 92-4440	3/26/1993
Gloster (Amite County)	Section 5 Objection	No. 92-4396	3/30/1993
Charleston (Tallahatchie County)	Section 5 Objection	No. 93-1053	6/4/1993
Monroe County	Section 5 Objection	No. 93-0356	9/17/1993
Okolona (Chickasaw County)	Section 5 Objection	No. 93-1558	10/29/1993
State	Section 5 Objection	No. 90-4933	11/24/1993
Canton (Madison County)	Section 5 Objection	No. 93-0115	12/21/1993
Clarke County	Section 5 Objection	No. 93-4338	1/10/1994
Carroll County	Section 5 Objection	No. 93-2449	4/18/1994
Quitman (Clarke County)	Section 5 Objection	No. 94-2431	12/19/1994
Adams County	Section 5 Objection	No. 94-4463	1/30/1995
State	Section 5 Objection	No. 94-4538	2/6/1995
Monroe County	Section 5 Objection	No. 95-0118	3/20/1995
Chickasaw County	Section 5 Objection	No. 94-4316	4/11/1995
Union County	Section 5 Objection	No. 95-1234	6/20/1995

Aberdeen (Monroe County)	Section 5 Objection	No. 95-1120	12/4/1995
Attala County	Section 2 Judgment	<i>Teague v. Attala Cnty.</i> , 92 F.3d 283 (5th Cir.)	8/8/1996
Calhoun County	Section 2 Judgment	<i>Clark v. Calhoun Cnty.</i> , 88 F.3d 1393 (5th Cir.)	7/9/1996
Grenada (Grenada County)	Section 5 Objection	No. 96-3225	3/3/1997
State	Section 5 Objection	No. 95-0418	9/22/1997
Chickasaw County	Section 2 Judgment	<i>Gunn v. Chickasaw Cnty.</i> , 1997 WL 33426761 (N.D. Miss)	10/28/1997
Quitman (Clarke County)	Section 2 Judgment	<i>Citizens for Good Gov't v. City of Quitman</i> , 148 F.3d 472 (5th Cir.)*	7/24/1998
Grenada (Grenada County)	Section 5 Objection	No. 96-2219 No. 98-1598	8/17/1998
Lafayette County	Section 2 Judgment	<i>Houston v. Lafayette County</i> , 20 F. Supp. 2d 996 (N.D. Miss.)	8/24/1998
McComb (Pike County)	Section 5 Objection	No. 97-3795	6/28/1999
Kilmichael (Montgomery County)	Section 5 Objection	No. 2001-2130	12/11/2001
Tupelo	Section 2 Judgment	<i>Jamison v. Tupelo</i> , 471 F. Supp. 2d 706 (N.D. Miss.)	1/23/2007

* Section 2 violation found by District Court; this finding was not contested on appeal. Fifth Circuit reversed and remanded on District Court's proposed remedy.

Noxubee County	Section 2 Judgment	<i>United States v. Brown</i> , 494 F. Supp. 2d 440 (S.D. Miss.)	6/29/2007
State	Section 5 Objection	No. 2009-2022	3/24/2010

Data Sources:

- Voting Section, U.S. Dep't of Justice Civil Rights Div., *Section 5 Objection Determinations – Mississippi*, http://www.justice.gov/crt/about/vot/sec_5/ms_obj2.php (last visited Dec. 20, 2010).
- Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J. L. REFORM 643, tbls. A, C, D (2006); *see also* <http://www.votingreport.org>.
- Westlaw database, U.S. District Courts – Mississippi (DCTMS).