THE FUTURE OF THE VOTING RIGHTS ACT

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> *As I walked across that bridge forty-two years ago, it was so quiet, so peaceful, so orderly, no one was saying a word. . . . When we got to the highest point on the Edmund Pettus Bridge, looking down across the river, we could see a sea of blue: Alabama state troopers. . . . You saw these guys putting on gas masks, they came toward us, beating us with nightsticks, trampling us with horses and releasing tear gas.* [1]
>
> *U.S. Representative John Lewis*

I. THE VOTING RIGHTS ACT: PAST

On March 7, 1965, a few hundred civil rights activists set out to the road from Selma, Alabama, marching for voting rights.[2] Their planned journey of fifty miles to the state capital in Montgomery ended only a few blocks later, when they were turned back at the foot

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1. David Montgomery, *The Bridge from Selma, 42 Years Down the Road*, WASH. POST, Mar. 4, 2007, at D01.

2. *Today in History: March 7, First March from Selma*, LIBRARY OF CONG., http://memory.loc.gov/ammem/today/mar07.html (last visited Sept. 14, 2012) [hereinafter *First March from Selma*].

of the Edmund Pettus Bridge by Alabama state troopers.[3] The police fired off rounds of tear gas and beat the protesters with billy clubs,[4] killing one man,[5] cracking the skull of future Georgia Congressman John Lewis,[6] and sending seventeen others to the hospital.[7] That night, television news carried images of the brutality inflicted in Selma into living rooms across the country.[8]

The violence in Selma spurred long-delayed action in Washington. A week after the attack, President Johnson addressed a joint session of Congress, broadcast across the Nation, and urged swift passage of comprehensive voting rights legislation.[9] Within five months, on August 6, 1965, the Voting Rights Act was signed into law.[10] The Act gave force to the Fifteenth Amendment's command that no citizen be denied the right to vote on account of race or color.[11] Its permanent provisions ban minority vote dilution[12] and literacy tests,[13] while provisions subject to renewal grant language assistance where needed, provide for federal examiners and election monitors, and require approval of all changes to voting practices or procedures within certain jurisdictions. It is the last of these provisions—section 5's preclearance requirement and the formula for which jurisdictions it covers, found in section 4(b)—that is once again under attack.

The original 1965 Act took as its starting point a snapshot of election procedures and voter participation in the 1964 presidential election. Any state or jurisdiction that maintained a "test or device"

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3. *Id.*

4. *The Selma to Montgomery Voting Rights March: Shaking the Conscience of the Nation*, NAT'L PARK SERV., U.S. DEP'T OF INTERIOR, http://www.nps.gov/nr/twhp/wwwlps/lessons/133semo/133selma.htm (last visited Sept. 14, 2012) [hereinafter *Shaking the Conscience of the Nation*].

5. *First March from Selma*, *supra* note 2.

6. *We Shall Overcome*, NAT'L PARK SERV., U.S. DEP'T OF INTERIOR, http://www.nps.gov/nr/travel/civilrights/text.htm (last visited Sept. 14, 2012).

7. Montgomery, *supra* note 1.

8. Associated Press, *'Bloody Sunday' 1965 Revisited*, NBCNEWS.COM (Mar. 6, 2005, 8:10 PM), http://www.msnbc.msn.com/id/7109835/ns/us_news-life/t/bloody-sunday-revisited/; *Shaking the Conscience of the Nation*, *supra* note 4; *Selma-to-Montgomery March, National Historic Trail & All-American Road*, NAT'L PARK SERV., U.S. DEP'T OF INTERIOR, http://www.nps.gov/nr/travel/civilrights/al4.htm (last visited Sept. 14, 2012).

9. Special Message to the Congress: The American Promise, 1 PUB. PAPERS 281 (Mar. 15, 1965).

10. Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 2 PUB. PAPERS 840 (Aug. 6, 1965).

11. U.S. CONST. amend. XV.

12. Voting Right Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973 (2006)).

13. *See id*. § 4(d).

as a prerequisite to voting[14] as of November 1, 1964, and where either less than fifty percent of the voting age population were registered to vote or less than fifty percent of registered voters cast a ballot in the general election that fall, was required to suspend its tests and seek federal approval before any changes to voting standards, practices, or procedures could take effect.[15] That approval—called preclearance—could come either from an administrative review conducted by the Department of Justice or by a declaratory judgment issued by the District Court for the District of Columbia.[16] Regardless of who makes the decision, the criteria for preclearance would be the same: the jurisdiction requesting preclearance would bear the burden of proving that the voting change was not made for the purpose of discriminating on the basis of race and that it will not have a racially discriminatory effect.[17]

The snapshot in the 1965 Act remained unchanged for only five years when its expiring provisions were renewed for the first time in 1970. Congress updated the coverage formula to include jurisdictions that had a test or device as of November 1, 1968, and less than fifty percent voter registration or turnout.[18] Five years later, Congress again revisited the formula, updating it to capture the same problems with the 1972 elections as in 1968 and in 1964, and expanding it to address discrimination against language minority groups, this time granting a seven year reauthorization until the next renewal.[19] In 1982, the Act was again renewed, without

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14. *Id*. § 4(c) (defining "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").

15. *Id*. § 3(c).

16. Voting Rights Act § 2, 79 Stat. 437 at 445; *see also* Young v. Fordice, 520 U.S. 273, 276 (1997).

17. *Young*, 520 U.S. at 276.

18. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 4, 84 Stat. 314 (1970) (codified as amended at 42 U.S.C. § 1973b (2006)). The update resulted in the following "new" jurisdictions being covered: Monterey and Yuba Counties in California; Bronx, Kings, and New York Counties in New York; Apache, Cochise, Coconino, Mohave, Navajo, Pima, Pinal, and Santa Cruz Counties in Arizona; Elmore County in Idaho; Campbell County in Wyoming; three towns in Connecticut; eighteen towns in Maine; nine towns in Massachusetts; and ten towns in New Hampshire. *See* Determination of Director Regarding Voting Rights, 36 Fed. Reg. 5809 (Mar. 27, 1971); Determination of Director of the Bureau of the Census, 39 Fed. Reg. 16,912 (May 10, 1974). The covered jurisdictions in Wyoming, Connecticut, Idaho, Maine, and Massachusetts have since bailed out, and Arizona has since become covered statewide.

19. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 401-02 (1975) (codified as amended at 42 U.S.C. § 1973b (2006)). The jurisdictions covered

changes to the coverage formula but with amendments to the procedure for a jurisdiction to be removed from coverage, known as "bailout."[20] Unlike the previous iterations, which had much shorter life spans, the 1982 renewal was for twenty-five years.[21]

In 2006, Congress once again returned to the Voting Rights Act to reauthorize the expiring provisions. The House moved first. The bill was assigned to the Committee on the Judiciary, which developed "one of the most extensive legislative records in the Committee['s] history."[22] The Senate Judiciary Committee then held nine hearings on the bill, along with full consideration of the ample record developed in the House.[23] By overwhelming bipartisan margins in both chambers, the Voting Rights Act was reauthorized yet again, with the coverage formula renewed again without change, but with a requirement built in that the renewed provisions expire in 2032 absent further legislative action.[24]

As Congress recognized in its 2006 reconsideration, the Voting Rights Act is widely regarded as the most successful civil rights law in our Nation's history.[25] It brought dramatic change to the rates of minority voter registration, participation, and representation across

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to address discrimination against Spanish language speakers were as follows: Yuba, Kings, and Merced Counties in California; Curry, McKinley, and Otero Counties in New Mexico; Clyde Township and Buena Vista Township in Michigan; Collier, Hendry, Hardee, Hillsborough, and Monroe Counties in Florida; Bronx and King Counties in New York; El Paso County, Colorado, which later bailed out from coverage; and the entire states of Arizona and Texas. *See* Partial List of Determinations Made Pursuant to Section 4(b) of the Voting Rights Act of 1965, as Amended, 41 Fed. Reg. 34,329 (Aug. 13, 1976); Partial List of Determinations, 40 Fed. Reg. 43,746 (Sept. 23, 1975). The State of Alaska was covered to address discrimination against Native Alaskan language minorities. Partial List of Determinations, 40 Fed. Reg. 49,422 (Oct. 22, 1973). Also covered by the 1975 Amendments to address discrimination against American Indian language minorities were: Apache, Coconino, Navajo, and Pinal Counties in Arizona; Jackson County, North Carolina; Shannon and Todd Counties in South Dakota; McKinley County, New Mexico; and Choctaw and McCurtain Counties in Oklahoma, which later bailed out from coverage. *See* Partial List of Determinations Pursuant to Voting Rights Act of 1965, as Amended, 41 Fed. Reg. 783 (Jan. 5, 1976); Partial List of Determinations, 40 Fed. Reg. 49,422 (Oct. 22, 1975); *Section 4 of the Voting Rights Act: The Formula for Coverage under Section 4 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list (last visited Sept. 14, 2012) [hereinafter *The The Formula for Coverage*] (listing jurisdictions that have successfully bailed out from the coverage formula in section 4(b)).

20. Voting Rights Act Amendment of 1982, Pub. L. No. 205, § 24(a), 96 Stat. 131, 131-32 (1982) (codified as amended at 42 U.S.C. § 1973c (2006)).

21. *Id.* § 2.

22. H.R. REP. NO. 109-478, at 5 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618, 619.

23. S. REP. NO. 109-295, at 2-4 (2006).

24. Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 7 (1965) (codified as amended at 42 U.S.C. § 1973aa-1a(b)(1) (2006)).

25. 152 CONG. REC. 14,230 (2006).

the country, but its work is not yet done.[26] Despite its long-term success, recent renewal by Congress, and the continuing need for its strong protections of minority rights, section 5 of the Voting Rights Act is under a sustained constitutional attack. But those who would ask the Court to strike down section 5 underestimate the Act's resilience and flexibility.

II. CONSTITUTIONAL CERTAINTY OF SECTION 5

The constitutionality of the Voting Rights Act first came before the Supreme Court in 1966, in a direct, facial attack mounted by the State of South Carolina. The Court acted swiftly to uphold the Act's constitutionality on a rational basis standard. "The ground rules for resolving this question are clear," Chief Justice Warren wrote for an eight-member majority of the Court.[27]

> The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting.[28]

The test the Court therefore applied was Chief Justice Marshall's deferential formulation in *McCulloch v. Maryland*,[29] which had been applied to uphold other acts of congressional power to enforce the Reconstruction Amendments.

The root of the Court's application of a rational basis standard was strongly grounded in the text of the Constitution and in the justification for the Voting Rights Act offered by Congress. Section 2 of the Fifteenth Amendment made Congress "chiefly responsible for implementing the rights" guaranteed by section 1.[30] As to the extraordinary remedy provided by section 5, the Court found that after "nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims."[31] The Court took particular notice of evidence in the extensive congressional record showing that more limited measures clearly had not done the job of rooting out discriminatory voting practices.[32]

South Carolina v. Katzenbach was only the first appearance of the constitutionality of the Voting Rights Act before the Supreme

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26. *Id.* at 14,258, 14,252.
27. South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).
28. *Id.* (emphasis added).
29. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
30. *Katzenbach*, 383 U.S. at 326.
31. *Id.* at 328.
32. *Id.* at 313-15.

Court. After each reauthorization, the constitutionality of the act was challenged in new ways, and each time it was upheld as constitutional. Only seven years later, the 1970 reauthorization came before the Court in *Georgia v. United States*.[33] The Court reaffirmed the Act's constitutionality as a permissible exercise of congressional power under the Fifteenth Amendment, offering no discussion, except to cite to the reasons stated at length in *Katzenbach*.[34]

Another seven years passed before the Court once again was faced with the Act's constitutionality, this time in the incarnation reauthorized in 1975. The City of Rome, Georgia, argued that the Fifteenth Amendment prohibits only racially discriminatory *intent*.[35] Since section 5 of the Act requires covered jurisdictions to prove *both* a lack of discriminatory intent and a lack of discriminatory effect, the City claimed Congress exceeded its Fifteenth Amendment enforcement power by prohibiting voting changes that are only discriminatory in effect but enacted with a benign purpose.[36] The Court in *City of Rome v. United States* reaffirmed that the proper test was *rational basis* and determined that "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact."[37]

Beyond the question of whether Congress's power was limited to the four corners of the Fifteenth Amendment, the City further argued that section 5 violated state sovereignty.[38] That argument, however, went unheeded by the Court, which held that "principles of federalism that might otherwise be an obstacle to congressional authority are *necessarily overridden* by the power to enforce the Civil War Amendments."[39] The City argued in the alternative that the preclearance requirement had outlived its usefulness, but the Court declined to overrule Congress's considered judgment that the 1975 reauthorization was needed.[40] The Court noted that Congress had given "careful consideration to the propriety of readopting § 5's preclearance requirement" in its recent renewal of the Act.[41]

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33. Georgia v. United States, 411 U.S. 526 (1973).

34. *Id.* at 535.

35. City of Rome v. United States, 446 U.S. 156, 173 (1980).

36. *Id.*

37. *Id.* at 177.

38. Brief for the Appellants at 73-74, City of Rome v. United States, 446 U.S. 156 (1980) (No. 78-1840), 1979 WL 199615, at *73-74.

39. *City of Rome*, 446 U.S. at 179 (emphasis added).

40. *Id.* at 180.

41. *Id.* at 181.

Moreover, the Court clearly understood that it would take more than fifteen years to remedy a history of racial discrimination and disenfranchisement stretching back through the Nation's existence.[42] The Court stressed that the Act was originally passed in 1965, a full ninety-five years after the Fifteenth Amendment formally extended the right to vote, and that ten years later, the fact that Congress found that it would take at least a seven year extension to "counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable."[43]

As noted above, Congress extended the Voting Rights Act's special provisions, including the section 5 preclearance requirements, in 1982 for twenty-five years. The case upholding the 1982 reauthorization of the Act, *Lopez v. Monterey County*,[44] is somewhat more complicated than its predecessors, but no less clear on the Act's constitutionality and on the proper test. Monterey County is a covered jurisdiction in California, but the state is not covered.[45] The State made a change to election procedures for judges, which the County was charged with administering. The question was whether the statewide law had to be precleared, even though only Monterey County was a covered jurisdiction and the county had no discretion in applying the law.[46] The Court found that as a matter of simple statutory construction, the Voting Rights Act did apply and the law needed preclearance.[47] Both the Department of Justice and the courts had previously considered preclearance submissions by states that were only partially covered, and the case seemed open and shut.[48]

California, however, raised an as-applied challenge to the constitutionality of the Act.[49] The State argued that requiring preclearance of its statewide laws was unconstitutional because *it* had not been declared a covered jurisdiction, only Monterey County.[50] The Court once again applied a rational basis test to uphold the Act.[51] Specifically, the Court explained that "'[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into

42. *Id.* at 182.
43. *Id.*
44. 525 U.S. 266 (1999).
45. *Id.* at 269.
46. *Id.*
47. *Id.* at 282.
48. *Id.* at 280-82.
49. *Id.* at 282.
50. *Id.*
51. *See id.* at 282-83.

legislative spheres of autonomy previously reserved to the States.'"[52] Because Congress has the authority to "guard against changes that give rise to a discriminatory effect in [covered] jurisdictions," it also has the authority to require preclearance of a state law that may have such an effect in a covered county, even if the state is not covered.[53] The Court reaffirmed its analysis in *City of Rome* and concluded that "the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however."[54]

III. INEXPLICABLE CONSTITUTIONAL UNCERTAINTY

In spite of its resilience before Congress and the Court, the constitutionality of section 5 of the Voting Rights Act is again being challenged by those who argue it is an intrusion on state sovereignty designed for a bygone era. That was the core of the challenge raised in *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*), the case that brought the 2006 reauthorization before the Court.[55] In *NAMUDNO*, the Court questioned the constitutionality of the Act based on the tension between federal preclearance requirements and the protection of state sovereignty.[56] The Court expressed skepticism about the coverage formula under section 5, which had gone unchanged in the 2006 reauthorization, indicating that preclearance "imposes current burdens and must be justified by current needs."[57] The Court ultimately rendered a narrow holding, employing the constitutional avoidance doctrine to consider the utility district a "governmental unit" under the Act and therefore eligible to seek bailout—one of the provisions designed to self-tailor the coverage formula over time by allowing jurisdictions to make their case before a federal court and end their preclearance obligations.[58]

In spite of the Court's sidestep of the ultimate question, section 5's constitutionality was clearly not far from the Justices' minds. The utility district had put the question before the Court, and so the parties briefed the constitutionality issue extensively. They were divided over the test to apply: the long-used rational basis standard from *Katzenbach* and its progeny, or the newer test developed by the

52. *Id.* (quoting City of Boerne v. Flores, 521 U.S. 507, 518 (1997)).

53. *Id.* at 283-84.

54. *Id.* at 284-85.

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

56. *Id.* at 2511-12.

57. *Id.* at 2512.

58. *Id.* at 2516.

Court in *City of Boerne v. Flores*.[59] The *Boerne* test was significantly less deferential to congressional rationale, requiring a "congruence and proportionality" between a civil rights violation and the remedy enacted into legislation.[60] However, as Judge Tatel wrote for the lower court in *NAMUDNO*, *Boerne* was clearly the wrong standard for two reasons.[61] First, the Court's animating concern in *Boerne* was that Congress would use its Fourteenth Amendment powers to enact legislation so broad in its sweep as to redefine the Amendment's substantive restrictions on state actions—a power the Court saw as squarely within its own domain.[62] The Voting Rights Act prohibited discrimination on the basis of *race*—by its very terms, within the scope of the substantive restrictions of the Fourteenth Amendment.[63] Second, Judge Tatel pointed out that the Voting Rights Act and its reauthorizations had been primarily justified as an enforcement of the *Fifteenth* Amendment, which the Supreme Court had never subjected to *Boerne's* congruence and proportionality requirements.[64] Moreover, *Boerne* held out the Voting Rights Act as an exemplary instance of congruent and proportional legislation, citing favorably to the Act's built-in reconsideration by Congress and the availability of bailout.[65]

Ultimately, the *NAMUDNO* Court acknowledged the disagreement over the proper test for section 5's constitutionality, but made no decision on which standard was correct.[66] Nonetheless, the Court commented that the "Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test."[67] The burning question then is what changed between *Lopez* and *NAMUDNO*?

The first answer can be found in where the Act was in its cycle of reauthorization. *Lopez* was decided in 1999, seventeen years after the 1982 reauthorization.[68] The Court was willing to accept that

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59. *Id.* at 2512-13.

60. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

61. Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 242-44 (D.D.C. 2008) ("[T]he City of Boerne standard does not apply to the issue before us. To begin with, although the City of Boerne cases repeatedly describe the Voting Rights Act as congruent and proportional, they never state that *Katzenbach's* and *City of Rome's* more deferential standard no longer governs constitutional challenges to statutes aimed at racial discrimination in voting. In fact, none of those cases even involved a statute dealing with race or voting rights.").

62. *Id.* at 242.

63. *Id.* at 241-42.

64. *See id.* at 243-44.

65. City of Boerne v. Flores, 521 U.S. 507, 532-33 (1997).

66. *NAMUDNO*, 129 S. Ct. 2504, 2512-13 (2009).

67. *Id.* at 2513.

68. Lopez v. Monterey Cnty., 525 U.S. 266, 266 (1999).

discrimination *had been* rampant seventeen years earlier when Congress last considered the matter, and with the need to reauthorize the law coming up around the corner, the Court could leave the ultimate review in Congress's hands again.[69] *NAMUDNO*, on the other hand, was decided just three years after Congress reauthorized the coverage formula.[70] An examination of the constitutionality of the Act on a standard even an iota higher than rational basis review would seemingly require the Court to consider whether the coverage formula reflected a contemporary list of bad actors in voting discrimination, and a decision to uphold the Act would freeze it in time for at least fifteen years.

Second, and much more fundamentally, the Court, or at least a possible majority of Justices, sees the country as farther along in a trajectory of ending racial discrimination than Congress does. The Chief Justice wrote that "[t]hings have changed in the South,"[71] citing to near parity among whites and minorities in voter registration and turnout, the unprecedented levels at which minority candidates have been elected to office, and a rarity of "[b]latantly discriminatory evasions of federal decrees."[72] The Court was therefore willing to discount the considerable evidence of continued racial discrimination amassed in the 2006 reauthorization, because it did not amount to what the Court would have seen as grounds for section 5's extraordinary remedy: "that public officials stand ready, if given the chance, to again engage in concerted acts of violence, terror, and subterfuge in order to keep minorities from voting."[73]

Finally, the composition of the Court matters and the changes to the Court during the administration of President George W. Bush especially matter for cases about race. Justice O'Connor, who wrote the majority opinion in *Lopez*, sided with the Court's liberals in numerous 5-4 decisions, most notably in cases dealing with civil rights and criminal procedure—two areas heavily laden with questions of racial discrimination.[74] Her departure from the Court prompted civil rights organizations to worry about the future of the Court's racial discrimination jurisprudence.[75] The worries, it seems,

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69. *Id.* at 283-84.

70. *NAMUDNO*, 129 S. Ct. at 2504.

71. *Id.* at 2511.

72. *Id.*

73. *Id.* at 2525.

74. *See Cases in Which Sandra Day O'Connor Cast the Decisive Vote*, ACLU (July 1, 2005), http://www.aclu.org/organization-news-and-highlights/cases-which-sandra-day-oconnor-cast-decisive-vote; Lori Ringhand, *Justice O'Connor and the Roberts Court*, RATIO JURIS BLOG POST (Nov. 16, 2006, 8:36 AM), http://ratiojuris.blogspot.com/2006/11/justice-oconnor-and-roberts-court.html.

75. *See, e.g., ACLU Concerned O'Connor Replacement Will Roll Back Vital Civil Liberties Protections*, ACLU (July 1, 2005), http://www.aclu.org/organization-news-

were not unfounded.[76] Justice O'Connor's replacement, Chief Justice Roberts, brought an ideological energy to the Court, forged in his days in the Reagan Justice Department where he pushed for an "aggressive stance" in opposition to congressional efforts to strengthen the Voting Rights Act.[77]

IV. LIFE AFTER *NAMUDNO*: CONSTITUTIONAL STANDARD

Despite prognostications to the contrary, the Voting Rights Act's preclearance requirement and coverage formula survived the challenge in *NAMUDNO* to see another day—and, importantly, another decennial redistricting cycle.[78] Nonetheless, the Act's constitutionality is being challenged head-on and will almost certainly come before the Court again in the next term.[79] Less certain, however, is the Court's reaction, but if it pays heed to legal precedent and the facts of a constantly evolving section 5, even the conservative Roberts Court will uphold the Act as constitutionally permissible enforcement of the Fifteenth Amendment.

Over the past few years, the Voting Rights Act has been subject to concerted efforts to undermine the constitutionality of section 5.[80] Challenges to the preclearance requirement have been brought alongside redistricting plans by Alaska, Arizona, and Florida; and Texas has challenged the law as a part of its suit to preclear its new law requiring voters show photo identification at the polls.[81] However, the challenge farthest along in the appeals process is the case brought by Shelby County, Alabama, which seeks a declaratory judgment that section 5 and the coverage formula are facially

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and-highlights/aclu-concerned-oconnor-replacement-will-roll-back-vital-civil-liber; *Civil Rights Coalition Notes Significance of O'Connor Retirement*, LEADERSHIP CONFERENCE (July 1, 2005), http://www.civilrights.org/judiciary/nominees/roberts/civil-rights-coalition-notes-significance-of-oconnor-retirement.html.

76. *See* Linda Greenhouse, *The Fire Next Term*, N.Y. TIMES OPINIONATOR BLOG (May 30, 2012, 9:00 PM), http://opinionator.blogs.nytimes.com/2012/05/30/the-fire-next-term/.

77. *Id.*; Joan Biskupic & Toni Locy, *Roberts Joined Effort to Limit Voting Protections in '80s*, USA TODAY (Aug. 12, 2005, 12:16 PM), http://yahoo.usatoday.com news/ Washington/2005-08-11-roberts-papers_x.htm?csp=1.

78. *NAMUDNO*, 129 S. Ct. at 2513.

79. *See* Greenhouse, *supra* note 76.

80. *See* Corey Dade, *Is the Voting Rights Act Endangered? A Legal Primer*, NPR NEWS (Feb. 28, 2012), http://www.npr.org/2012/02/28/147568469/is-the-voting-rights-act-endangered-a-legal-primer (discussing recent legal threats to the Voting Rights Act from several states); Joan Biskupic, *Insight: From Alabama, an Epic Challenge to Voting Rights*, REUTERS (June 4, 2012, 1:36 AM), http://www.reuters.com/article/2012/06/04/us-usa-court-votingrights-idUSBRE85304M20120604 (discussing the challenge to the Voting Rights Act by Shelby County, Alabama).

81. Editorial, *Section 5 and the Right to Vote*, N.Y. TIMES, Jan. 16, 2012, at A22.

unconstitutional and an injunction prohibiting their enforcement.[82] Bailout from the requirements of section 5 was not an option available to Shelby County—as it is for hundreds of other jurisdictions around the country—because the Justice Department denied preclearance to a redistricting change for a city voting district within the county in 2004.[83] It is hard to see another escape valve for the Supreme Court—it will likely tackle section 5 head-on.

Following the plaintiffs in *NAMUDNO*, Shelby County argued that the correct test for examining the Voting Rights Act's constitutionality is *Boerne's* congruence and proportionality analysis. Both the District of Columbia District Court and Court of Appeals agreed with Shelby County on the applicable standard, but both held that even under *Boerne*, section 5 as reauthorized in 2006 *is constitutional*.[84] Interestingly, the Circuit Court opinion was written by Judge Tatel, the author of that court's opinion in *NAMUDNO*, holding that the proper standard was rational basis.[85] Why the change of course? Judge Tatel's own explanation is that the lower court reads the Supreme Court opinion in *NAMUDNO* as "sending a powerful signal that congruence and proportionality is the appropriate standard of review,"[86] in spite of the Supreme Court's artful avoidance of actually deciding that very question. It seems, however, there may be a strategic lesson for Voting Rights Act advocates in Judge Tatel's shift. Even though precedent clearly shows that the proper analysis for determining section 5's constitutionality is the rational basis test applied in *Katzenbach*, in *City of Rome*, and in the post-*Boerne* case of *Lopez*, the case must also be made for why section 5 meets the heightened standard of congruence and proportionality. Judge Tatel's application of the *Boerne* test may well turn out to be a key once again to upholding the Act's constitutionality.

V. BAILOUT

The core of the Court's concern in *NAMUDNO* boils down to its understanding that "the Act imposes current burdens and must be justified by current needs."[87] Anticipating the Act's reappearance before the Supreme Court, civil rights groups will—and by all means, must—redouble the herculean efforts made in advance of the 2006 reauthorization to marshal evidence of the current need for the Act.

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82. Shelby Cnty. v. Holder (*Shelby I*), 811 F. Supp. 2d 424, 427 (D.D.C. 2011), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012).

83. Shelby Cnty.v. Holder (*Shelby II*), 679 F.3d 848, 857 (D.C. Cir. 2012).

84. *Shelby I*, 811 F. Supp. 2d at 507-08; *Shelby II*, 679 F.3d at 873.

85. *Shelby II*, 679 F.3d at 859.

86. *Id*.

87. *NAMUDNO*, 129 S. Ct. 2504, 2511-12 (2009).

Just as important, however, is the development of a full record of the burdens imposed by section 5 and the availability *and use* of the option of bailing out of the coverage formula. The application of the congruence and proportionality standard will place added weight on the importance of bailouts, as evidence that the coverage formula is dynamic.

A. Tailoring Through Bailout

The history of the Voting Rights Act indicates that the bailout provision has always been the lynchpin of the Act's tailoring. First, in the original enactment, Congress understood the coverage formula might well be overbroad in that it would potentially capture areas that had not engaged in racial discriminatory voting procedures.[88] The ability of jurisdictions to bailout was meant to address that possibility by affording any jurisdiction "an opportunity to exempt itself"[89] from the coverage formula.[90] The exemption would be granted upon a decision by a three-judge panel of the D.C. District Court that the jurisdiction had not used a voting test or device for the purpose or with the effect of discriminating on the basis of race for the preceding five years.[91] Therein lies the second connection between bailout and the Act's tailoring: bailout was the means by which the preclearance requirement would expire. In the 1965 enactment, there was no automatic sunset for section 5; instead, it was assumed that jurisdictions would bail out as soon as possible. Because the Act also suspended the use of *any* voting test or device in the covered jurisdictions—regardless of racially discriminatory intent or effect—once five years passed after enactment, the jurisdictions would automatically meet the bailout requirements. The required five-year nondiscrimination showing was extended to ten years in the 1970 amendments[92] and then to seventeen years in the 1975 amendments,[93] each time preventing any jurisdiction that was originally covered in 1965 from bailout by simply showing that it had

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

89. *Id.*

90. The potential for underinclusivity of the coverage formula was tackled by the so-called "pocket trigger," which allows for additional jurisdictions to be subjected to the preclearance requirements upon a finding of Fifteenth Amendment violations by a federal court. Pub. L. No. 89-110, § 3(c), 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973a(c) (2006)); *see also* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2006-09 (2010).

91. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 438 (1965) (codified as amended at 42 U.S.C. § 1973b (2006)).

92. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314 (1970).

93. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 101, 79 Stat. 400 (1975).

recently changed its ways.

From the 1965 enactment until the revision of the bailout provision in the 1982 amendments, the Voting Rights Act's coverage formula was substantially retailored through litigation. Three counties in Arizona,[94] one county in North Carolina[95] and one in Idaho,[96] and the State of Alaska[97] all bailed out within the first two years of the Act's existence. The changes to the coverage formula in 1970 brought the three counties in Arizona, the one in Idaho, and four election districts in Alaska back under the Act's preclearance requirements, and newly covered an additional five counties in Arizona, two counties in California, three counties in New York and one in Wyoming, and towns in Connecticut, Massachusetts, Maine, and New Hampshire.[98] Shortly thereafter, Alaska and New York bailed out the jurisdictions within their boundaries.[99] New York's success, however, was short-lived. After a federal court in New York found that the once-covered counties had discriminated against Puerto Rican voters,[100] the counties were recovered and have remained subject to the preclearance requirements ever since.

In 1975, the revised coverage formula protecting language minority groups added counties in California, Colorado, Florida, Arizona, New Mexico, North Carolina, Oklahoma, and South Dakota, townships in Michigan, and covered the entire states of Texas, Arizona, and Alaska.[101] For those jurisdictions, bailout required showing that for ten years prior, they had not conducted elections

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94. Apache Cnty. v. United States, 256 F. Supp. 903, 906 (D.D.C. 1966).

95. Gaston Cnty. v. United States, 288 F. Supp. 678, 694 (D.D.C. 1968) (referencing the bailout of Wake County, North Carolina).

96. *Id.* at 694-95 (referencing the bailout of Elmore County, Idaho).

97. *Id.* (referencing the bailout of Alaska).

98. Determination of Director Regarding Voting Rights, 36 Fed. Reg. 5809 (Mar. 27, 1971); Determination of Director of the Bureau of the Census, 39 Fed. Reg. 16.912 (May 10, 1974); *see also* Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 395-96 (1985).

99. New York v. United States, 65 F.R.D. 10 (D.D.C.1972) (discussing Bronx, Kings, and New York Counties), *aff'd on other grounds sub. nom.* NAACP v. New York, 413 U.S. 345 (1973).

100. Torres v. Sachs, 381 F. Supp. 309, 312-13 (S.D.N.Y. 1974).

101. *See* Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 201, 89 Stat. 400 (1975) (codified as amended at 42 U.S.C. § 1973b (2006)); Partial List of Determinations Made Pursuant to Section 4(b) of the Voting Rights Act of 1965, as Amended, 41 Fed. Reg. 34,329 (Aug. 13, 1976); Partial List of Determinations, 40 Fed. Reg. 43,746 (Sept. 23, 1975) (Arizona was covered state-wide because of the prevalence of Spanish language minorities and at the county level to protect American Indian language minorities); Partial List of Determinations, 40 Fed. Reg. 49,422 (Oct. 22, 1973); Partial List of Determinations Pursuant to Voting Rights Act of 1965, as Amended, 41 Fed. Reg. 783 (Jan. 5, 1976); Partial List of Determinations, 40 Fed. Reg. 49,422 (Oct. 22, 1975).

only in English for the purpose or with the effect of discriminating against voters based on race, color, or membership in a language minority group.[102] The newly covered counties in New Mexico and Oklahoma were able to show that their language minority populations were also fluent in English and so the jurisdictions bailed out quickly.[103] Successful bailouts in the late 1970s and early 1980s also retailored the amended coverage formula by exempting the covered jurisdictions in Maine, Wyoming, Massachusetts, and Connecticut from the preclearance requirements.[104] Each jurisdiction was able to show that for seventeen years before the bailout lawsuit, it had not employed a voting test or device for the purpose or with the effect of discriminating on the basis of race.

The 1982 amendments strengthened the relationship between the bailout provision and the coverage formula's tailoring. No longer was bailout tied to the duration of the preclearance provisions; nor was the bailout option made available only to those jurisdictions that had never engaged in racially discriminatory voting practices in the first place. Instead, the 1982 amendments established bailout as the means by which once-bad actors could show that times had changed for minority voters in their jurisdiction. The seventeen years of nondiscrimination required by the 1975 bailout provision was shortened to ten years, dramatically expanding the number of jurisdictions potentially eligible for bailout.[105] The revised standard provided additional incentives for jurisdictions to comply with the Voting Rights Act and to take "positive steps to increase the opportunity for full minority participation in the political process."[106]

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102. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 201, 89 Stat. 400 (1975) (codified as amended at 42 U.S.C. § 1973b (2006)).

103. City of Rome v. United States, 446 U.S. 156, 198 n.8 (1980) (referencing bailout actions brought by New Mexico and Oklahoma); *see also* Hancock & Tredway, *supra* note 98, at 403.

104. Hancock & Tredway, *supra* note 98, at 403; *The Formula for Coverage*, *supra* note 19.

105. 42 U.S.C. § 1973b(a)(1) (2006). Showing nondiscrimination in voting required that for ten years prior to filing a bailout lawsuit, the jurisdiction and all subunits of government contained within its boundaries had not used a test or device for the purpose or with the effect of denying or abridging the right to vote on account of race, color, or membership in a minority language group; had not been subject to a final judgment or entered into a settlement that resulted in the jurisdiction abandoning the use of a voting practice challenged on grounds of racial discrimination; and have not received an objection to or denial of preclearance for a submitted voting change. *Id.*

106. S. REP. NO. 97-417, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177. Specifically, jurisdictions seeking bailout must show that they have eliminated voting procedures and methods of election that "inhibit or dilute equal access to the electoral process"; have "engaged in constructive efforts to eliminate intimidation and harassment" of voters; and have engaged in other efforts such as expanding voter registration opportunities and appointing minority election officials. 42 U.S.C. § 1973b(a)(1)(F).

It also allowed counties or cities with voter registration responsibilities within a covered state to seek bailout on their own.[107]

The Court's decision in *NAMUDNO* further expanded the availability of bailout to smaller jurisdictions like the plaintiff utility district in that case. But for all the Court's focus on bailout in that case, it undercounted the jurisdictions that had actually taken advantage of the provision. As Professor Justin Levitt testified to the U.S. Commission on Civil Rights, the Court mistakenly stated that "only 17 jurisdictions—out of the more than 12,000 covered political subdivisions"[108] had successfully bailed out since 1982.[109] As an initial matter, the Court seems to have only tallied the bailouts since August 5, 1984, when the changes made to the bailout provision in the 1982 reauthorization took effect.[110] By the Court's own terms, it missed an additional seventeen jurisdictions that had bailed out since 1982.[111] There is also a disconnect between the "jurisdictions" bailed out and the number of "political subdivisions." Because most jurisdictions contain more than one subdivision, the actual number of political subdivisions that had bailed out between the effective date of the 1982 reauthorization and the date that *NAMUDNO* was before the Court was actually eighty-six (out of 11,774).[112] Furthermore, the Court completely ignored the twenty-four jurisdictions that had bailed out *prior* to 1982, including *all* covered jurisdictions in the states of Maine, Oklahoma, Massachusetts, and Wyoming.[113]

Since *NAMUDNO*, an additional thirty-one political subdivisions have successfully bailed out from the preclearance requirements of section 5 and there are many more underway.[114] A complaint pending before the federal district court in D.C. that seeks bailout for Merced County, California, will add another eighty-nine subdivisions to the roster,[115] bringing the grand total to 252 bailed out since the Act's incarnation.[116] The State of New Hampshire also filed its

107. *Id.*

108. *NAMUDNO*, 129 S. Ct. 2504, 2516 (2009).

109. *Redistricting and the 2010 Census: Enforcing Section 5 of the VRA: Hearing Before the U.S. Comm'n on Civil Rights*, 112th Cong. 5 n.29 (2012) [hereinafter *Hearings*] (statement of Justin Levitt, Assoc. Professor, Loyola Law Sch., L.A.), *available at* http://redistricting.lls.edu/files/USCCR%20testimony.pdf.

110. *Id.*

111. *Section 4 of the Voting Rights Act: Jurisdictions Currently Bailed Out*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list (last visited Sept. 14, 2012) [hereinafter *Jurisdictions Currently Bailed Out*].

112. *Hearings*, *supra* note 109, at 5 n.29.

113. *Jurisdictions Currently Bailed Out*, *supra* note 111.

114. *Id.*

115. *See* Complaint for Declaratory Relief Under Section 4 of the Voting Rights Act at 1-2, Merced Cnty v. Holder, No. 1:12-cv-00354 (D.D.C. Mar. 6, 2012) [hereinafter Complaint for Declaratory Relief].

116. We arrive at 252 thus: Twenty-four subdivisions bailed out prior to 1982 and

bailout lawsuit in the D.C. Court in August 2012 on behalf of its ten towns covered in 1970.[117] If that action succeeds, less than twenty percent of the jurisdictions covered by the 1970 amendments will remain subject to the preclearance requirement. Of the remaining covered jurisdictions, three bailed out but were recovered because of a subsequent finding of racial discrimination in a related case,[118] and all but four have received objections from the Attorney General to proposed voting changes submitted for preclearance.[119] Bailout litigation has thus not only benefitted the individual jurisdictions by exempting them from ongoing preclearance, but it has also provided the mechanism for tailoring the statute to impose current burdens only where there are current needs.[120]

B. The Ease of Modern Bailout

Even accounting for the Court's mistakenly low figures for the

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seventeen bailed out between 1982 and August 5, 1984. *Jurisdictions Currently Bailed Out, supra* note 111. Eighty-six subdivisions bailed out between August 5, 1984, and the Court's decision in *NAMUDNO*. *Hearings*, *supra* note 109, at 5 n.29. Since *NAMUDNO*, another thirty-six subdivisions have bailed out. *Jurisdictions Currently Bailed Out*, *supra* note 111. Together, these total 163 bailed out subdivisions. The addition of Merced County brings the total to 252. Complaint for Declaratory Relief, *supra* note 115.

117. Molly A.K. Connors, *U.S. Voting Rights Act Regulates N.H.*, CONCORD MONITOR, Mar. 27, 2012, http://www.concordmonitor.com/article/319836/us-voting-rights-act-regulates-nh?SESSefad2452e208c288985b42a449cd73d8=google&page=full.

118. Bronx and Kings Counties, New York, were recovered as a result of the district court finding of discrimination against Puerto Rican voters in *Torres v. Sachs*. 381 F. Supp. 309, 312-13 (S.D.N.Y. 1974).

119. *See Section 5 Objection Determinations*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (last visited Sept. 14, 2012) (objection determinations listed by state).

120. In its recently filed petition to the Court seeking review of the constitutionality of the Act, Shelby County, Alabama, argues that the bailouts that have occurred since *NAMUDNO* "cannot support the validity of Congress's judgment" in the 2006 reauthorization because they were not part of the legislative record. Petition for Writ of Certiorari at 35 n.5, Shelby Cnty. v. Holder, No. 12-96 (U.S. July 20, 2012). Shelby County misses two key points: first and foremost, as discussed throughout this Article, the bailout provision has always gone hand-in-hand with the coverage formula as the mechanism by which the formula is tailored on an ongoing basis. Shelby County would look only to the initial coverage as a snapshot in time, instead of the constant adaptation to *current needs* that Congress provided through the bailout option. Second, in avoiding the constitutional question in *NAMUDNO*, the Court reinterpreted the Act to allow smaller subunits to bailout. Although Congress did not consider the bailout of those particular types of jurisdictions as part of the tailoring mechanism, the next time the Act comes before the Court, it must look to the impact of its *NAMUDNO* decision. By making bailout available to smaller jurisdictions, the Court changed the *current burdens* imposed by the Act. Ultimately, the Court will have to evaluate whether its strategy of constitutional avoidance in *NAMUDNO* worked and should still be employed, and both the post-2006 and post-*NAMUDNO* bailouts are relevant for that purpose.

number of bailouts before *NAMUDNO*, successful bailouts have more than doubled in the three years since that decision. In part, the increase may be attributed to the ease and low cost of bailout. Despite claims to the contrary in academic literature, bailout is neither a costly nor cumbersome process.[121] Since 1997, all bailouts except the one granted in *NAMUDNO* have come through consent decrees entered into by the jurisdiction seeking bailout and the Attorney General.[122] Although accomplished through a lawsuit filed in federal court, bailout proceedings lack most of the time-consuming and expensive aspects of litigation.

The first step for any jurisdiction seeking bailout is to assemble data relating to voter registration and the conduct of elections that will "assist the court in determining whether" bailout is appropriate.[123] The initial search gives the jurisdiction an opportunity to assess the likelihood of a successful bailout and to save time down the road when the Justice Department enters the picture. The information necessary for bailing out is generally maintained in the ordinary course of business and is increasingly accessible online. Jurisdictions should plan to gather copies of their section 5 preclearance submissions and responses, meeting minutes for agencies with the authority to make voting changes, precinct-level numbers of voter registration and turnout, and the number of minority persons who have worked as election officers, such as in the voter registration office, electoral board, or as poll officials.[124] Information demonstrating that persons within the relevant jurisdiction enjoy an equal opportunity to participate in the political process should also be gathered, including census data, descriptions of election methods for all elected bodies, and locations of voter registration opportunities and polling places.[125]

Further reducing the cost of bailout is the simple rule that when a county or a city bails out, all political subunits within the jurisdiction are bailed out at the same time. Thus, the one-time cost of a bailout for a county—estimated at less than $5,000[126]—and all

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121. *See generally* Brief of Amici Curiae Jurisdictions that Have Bailed Out Under the Voting Rights Act in Support of Appellees at 2-3, *NAMUDNO*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 815227, at *2-3 [hereinafter Brief of Amici Curiae].

122. *Jurisdictions Currently Bailed Out*, *supra* note 111.

123. 42 U.S.C. § 1973b(a)(4) (2006).

124. Brief of Amici Curiae, *supra* note 121, at 2-3.

125. *Id.*

126. *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. 106 (2005) (statement of J. Gerald Hebert, former Acting Chief, Civil Rights Division, U.S. Dep't of Justice), *available at* http://www.gpo.gov/fdsys/pkg/CHRG109hhrg24034/pdf/CHRG109hhrg24034.pdf.

its political subunits is affordable. The cost is even lower for smaller jurisdictions such as towns and municipal utility districts—often as low as $2,500.[127] Moreover, multiple counties have been permitted to bailout despite the existence of previously implemented, but unsubmitted changes, further giving administrative flexibility in the face of nondiscriminatory subunits that have been somewhat less than exact in their prior administrative upkeep.[128]

The experience of Prince William County, Virginia, shows that even relatively large counties can bail out successfully at low cost and without dedicating significant administrative resources to the process. To date, the County is the largest jurisdiction ever to bail out (over 400,000 persons),[129] yet it was not required to hire any additional staff to gather the necessary information.[130] The County's Voter Registrar reported that although the bailout "process took a little over a year" from start to finish, she "only worked intensely on the project for a two-week period."[131]

Once the jurisdiction officially decides to move forward with the bailout, it can inform the Department of Justice of its intentions and submit the gathered data for review and verification.[132] Attorneys in the Voting Section will then conduct an independent investigation of the jurisdiction's compliance with the bailout criteria.[133] The Justice Department may request additional information or the opportunity to review records in person and may conduct interviews of local leaders within the minority community.[134]

Jurisdictions seeking bailout must also inform the community of their intentions to seek bailout. The statute's formal notice requirement is minimal; jurisdictions must publicize their intentions to file a bailout lawsuit in the local media and post offices.[135] Some bailed out jurisdictions have also chosen to hold public hearings on

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127. Duncan Adams, *Localities Seek Voting Rights Act Bailout*, ROANOKE TIMES, Jan. 16, 2011, http://www.roanoke.com/news/roanoke/wb/273946 (noting combined $5,000 cost of bailout for two jurisdictions).

128. Brief of Amici Curiae, *supra* note 121, at 17-18; *see also* Consent Judgment and Decree at para. 36, Prince William Cnty. v. Holder, No. 1:12-cv-00014 (D.D.C. Apr. 10, 2012) (indicating bailout despite late submission of changes for preclearance).

129. Corey Dade, *Communities Find Relief From Voting Rights Act*, NPRNEWS (Aug. 11, 2012), http://m.npr.org/news/front/158381541?singlePage=true.

130. *Virginia County Successfully 'Bails Out' of Voting Rights Act Preclearance Requirements*, REDISTRICTINGONLINE.ORG (Apr. 12, 2012), http://redistricting online.org/VApwcbailout041212.html (noting the statement of the County Registrar of Voters that no additional staff was hired to complete the bailout and that it only required two weeks of intense focus from her time).

131. *Id.*

132. Brief of Amici Curiae, *supra* note 121, at 13-14.

133. *Id.*

134. *Id.*

135. 42 U.S.C. § 1973b(a)(4) (2006).

the process to give interested persons an opportunity to hear the reasons for seeking bailout and to ask questions and provide feedback.[136] While not required in order for bailout to occur, this more extensive dialogue in preparation for bailout—particularly when it means jurisdictions will take into account the views of minority community leaders—further allows for bailout to fulfill its statutory goal of providing incentives for jurisdictions to comply with the other provisions of the Voting Rights Act.

After the community has been notified of the jurisdiction's intent to seek a bailout, the lawsuit can be filed in the District Court for the District of Columbia. Although prior agreement by the Justice Department to a jurisdiction's eligibility is *not* required before filing, it is nearly always sought and obtained, and it significantly reduces the cost of the suit compared to more typically adversarial litigation.[137] The bailout process is thus "smooth, transparent, and straightforward."[138]

VI. CONCLUSION

At its incarnation, the Voting Rights Act was spurred to life by the images of brutality taken from the march across the Edmund Pettus Bridge and was broadcast to living rooms across America. After the Act's passage, the images of Bloody Sunday were overlaid with the map of those jurisdictions where racial discrimination was so pervasive that the extraordinary measure of section 5 was justified as a wholly rational exercise of congressional power. The mistake that is made today—including by some on the Roberts Court—is to conflate the indelibility of the images from Selma with an inextricability from the coverage formula. As the dramatic increase in bailouts shows, there is significant flexibility in the coverage formula, allowing a combination of jurisdictions and federal judges to continually tweak Congress's remedy to improve its congruence and proportionality.

136. Brief of Amici Curiae, *supra* note 121, at 14.

137. 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 268 (Ana Henderson, ed., 2007).

138. Brief of Amici Curiae, *supra* note 121, at 15.