

TRAVIS CRUM

The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance

ABSTRACT. Following *NAMUDNO*, the search is on for a way to save section 5 of the Voting Rights Act (VRA). This Note offers a solution through an examination of the VRA's most obscure provision: section 3. Commonly called the bail-in mechanism or the pocket trigger, section 3 authorizes federal courts to place states and political subdivisions that have violated the Fourteenth or Fifteenth Amendments under preclearance.

This Note makes a two-part argument. First, the pocket trigger should be used to alleviate the *NAMUDNO* Court's anxiety over the coverage formula's differential treatment of the states. The Justice Department and civil rights groups should build off of the handful of successful bail-ins and redefine the preclearance regime through litigation. Second, the pocket trigger provides a model for a revised VRA. The pocket trigger is more likely to survive the congruence and proportionality test because it replaces an outdated coverage formula with a perfectly tailored coverage mechanism—a constitutional trigger. It also sidesteps the political difficulties in designing a new coverage formula. The pocket trigger has the potential to create dynamic preclearance: a flexible coverage regime that utilizes targeted preclearance and sunset dates. This Note concludes by proposing possible amendments to the pocket trigger, such as adding an effects test or delineating certain violations that automatically trigger preclearance.

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Prior to law school, I worked for Judge Tatel, author of the three-judge district court opinion in *NAMUDNO*, while the case was pending in chambers. The views expressed are entirely my own.



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INTRODUCTION

Section 5 of the Voting Rights Act (VRA)¹ is living on borrowed time. Originally enacted to overcome “nearly a century of widespread resistance to the Fifteenth Amendment,”² section 5 requires certain “covered jurisdictions” to preclear all voting changes with federal authorities. Over the course of four decades, the VRA abolished Jim Crow and empowered minority voters. This resounding success has led some to question whether section 5 has created a world in which its protections are no longer constitutional. In 1997, the Supreme Court amplified these concerns by limiting Congress’s Fourteenth Amendment enforcement authority in *City of Boerne v. Flores*.³ When section 5 was reauthorized in 2006,⁴ commentators speculated whether the Court would invalidate one of the crown jewels of the civil rights movement.⁵

In *Northwest Austin Municipal Utility District No. One v. Holder* (NAMUDNO),⁶ the Court made clear that section 5 was constitutionally suspect. NAMUDNO, a Texas water district created to fund infrastructure for a housing development, sought a statutory exemption from the Act’s preclearance requirements. In the alternative, NAMUDNO brought a constitutional challenge, claiming that the VRA impermissibly infringed upon state sovereignty. At oral argument, the Justices lambasted the Justice Department and NAACP advocates.⁷ Justice Kennedy, in particular, focused on

1. 42 U.S.C.A. § 1973c (West Supp. 2009).

2. *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966).

3. 521 U.S. 507, 520 (1997) (establishing the congruence and proportionality test).

4. 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.

5. See, e.g., ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 213-15 (rev. ed. 2009); ABIGAIL THERNSTROM, *VOTING RIGHTS—AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS 196-98*, 213 (2009); Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-in Approach*, 106 COLUM. L. REV. 708, 743-45 (2006); 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, 206-07 (2005). For discussions of the VRA’s status as a landmark statute, see Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1783 (2007); and William N. Eskridge, Jr., *America’s Statutory “Constitution,”* 41 U.C. DAVIS L. REV. 1, 13-14 (2007).

6. 129 S. Ct. 2504 (2009).

7. See, e.g., Transcript of Oral Argument at 30, *Nw. Austin Mun. Util. Dist. No. One v. Holder* (NAMUDNO), 129 S. Ct. 2504 (2009) (No. 08-322) (question of Justice Alito) (“Well, if section 2 is ineffective, then why didn’t Congress extend section 5 to the entire country?”); *id.* at 51 (question of Justice Scalia) (“Do you ever expect—do you ever seriously expect Congress to vote against a reextension of the Voting Rights Act?”); *id.* at 31 (question of

the Act's coverage formula, questioning whether Congress justified section 5's "differentiation between the States."⁸ Even more telling, the Justices asked how the case could be resolved without reaching the constitutional question.⁹

When the decision was announced, however, there were no grand pronouncements on race, voting rights, or federalism. Invoking the constitutional avoidance doctrine, Chief Justice Roberts, writing for an eight Justice majority, held only that "all political subdivisions—not only [counties and parishes]—are eligible to file a bailout suit."¹⁰ Instead of invalidating section 5, the Court granted NAMUDNO an opportunity to "bail out" of the Act's coverage.¹¹

The narrow statutory ruling seemed contrived, surprising many in the academy and the civil rights community.¹² Some interpreted the Court's hesitation as a sign that section 5 was too important to strike down.¹³ Others

Chief Justice Roberts) ("But at what point does that history . . . stop justifying action with respect to some jurisdictions but not with respect to others that show greater disparities?").

8. *Id.* at 35 (question of Justice Kennedy). Justice Kennedy discussed and asked questions about the coverage formula during five exchanges. *See id.* at 22, 34-35, 44, 48, 55-56.
9. *See id.* at 13 (question of Justice Ginsburg) ("[I]f you have bailout, say we accept your reading of the statute, you are not contesting the constitutionality of the act if it matched your obligation to preclear with the right to bail out."); *id.* at 14 (question of Justice Souter) ("[D]o you acknowledge that if we find on your favor on the bailout point we need not reach the constitutional point?"). This was not the first time Justices raised doubts over the VRA's constitutionality. *See, e.g.,* *Riley v. Kennedy*, 128 S. Ct. 1970, 1987 (2008) (Stevens, J., dissenting) ("[I]t may well be true that today the [VRA] is maintaining strict federal controls that are not as necessary or appropriate as they once were.").
10. *NAMUDNO*, 129 S. Ct. at 2516.
11. Bailing out of the VRA means that a jurisdiction no longer has to preclear voting changes with federal authorities. Although there is no hard rule, "bailout" is the noun and adjective form, "bail out" is the verb form, and any variation of the term is normally spelled as two words, such as "bailed out" jurisdictions.

Similarly, there is no consistent usage of the term "bail-in" to describe section 3 coverage. This Note uses hyphenated versions—"bail-in," "bailed-in" and "bailing-in"—as nouns, verbs, and adjectives.

12. *See* Adam Liptak, *Justices Retain Oversight by U.S. on Voting Rights*, N.Y. TIMES, June 23, 2009, at A1, available at <http://www.nytimes.com/2009/06/23/us/23scotus.html> (interviewing Professors Richard Hasen, Samuel Issacharoff, and Ellen Katz).
13. *See* Bruce Ackerman, *Section Five and the On-Going Canonization of the Civil Rights Revolution*, Balkinization, June 22, 2009, <http://balkin.blogspot.com/2009/06/section-five-and-on-going-canonization.html> (predicting that "Section 5 of the VRA will be upheld by the Obama-Roberts Court in the fullness of time").

viewed it as “a warning to Congress that it needs to reconsider section 5, and shore it up, if it can, with a new formula for coverage.”¹⁴

Another constitutional challenge is inevitable, and supporters of a robust Voting Rights Act cannot presume the Court will blink again. The implausibility of the Court’s statutory argument indicates that there were not five votes to uphold the Act.¹⁵ Indeed, *NAMUDNO* “reads like a rough draft of [an] opinion . . . str[iking] down Section 5.”¹⁶ One can easily imagine Chief Justice Roberts remarking that “[i]t is a sordid business, this divvying us up by [state].”¹⁷ The absence of a reassuring concurrence further evidences section 5’s future vulnerability: no Justice thought it appropriate to speak out in support of the VRA. *NAMUDNO* is not an exercise in judicial minimalism for its own sake. Rather, the Court directed Congress to amend section 5 or risk further diminishment of its enforcement authority.

How, then, can *NAMUDNO II*¹⁸ be stopped? Because inaction is not a viable option, a flurry of proposals will be put forth to amend the Voting

14. Lyle Denniston, *Is Section 5’s Future Shaky?*, SCOTUSblog, June 22, 2009, <http://www.scotusblog.com/wp/analysis-is-section-5s-future-shaky>.

15. See Heather K. Gerken, *An Uncertain Fate for Voting Rights*, Am. Prospect, June 23, 2009, http://www.prospect.org/cs/articles?article=an_uncertain_fate_for_voting_rights.

16. *Id.*

17. *League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

18. On November 3, 2009, a federal court approved a consent decree allowing *NAMUDNO* to bail out of the Act’s preclearance requirements. See *Consent Judgment and Decree, Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, No. 1:06-cv-1384 (D.D.C. Nov. 3, 2009) (on file with author); see also Lyle Denniston, *NAMUDNO Case Is Over*, SCOTUSblog, Nov. 5, 2009, <http://www.scotusblog.com/wp/namudno-case-is-over>. Shortly thereafter, on February 4, 2010, *NAMUDNO* was dissolved. See *Northwest Austin MUD #1 Canyon Creek Austin, Texas*, <http://www.nwamud.texas.gov> (last visited Feb. 25, 2010). Thus, when this Note uses the shorthand “*NAMUDNO II*,” it is referring to any future case invalidating section 5, not the possibility that *NAMUDNO* will return to the Supreme Court.

The Act’s jurisdictional provisions facilitate cases reaching the Supreme Court quickly. For example, the Act requires that bailout suits be brought before a three-judge district court, with a direct appeal to the Supreme Court. See 28 U.S.C. § 1253 (2006); 42 U.S.C. § 1973b(a)(5). If Congress sought to delay *NAMUDNO II*, it could amend the Act to require that challenges proceed through the normal route for appeals. This would add about a year to litigation, as the case would be reviewed by a court of appeals. Additionally, the Supreme Court would no longer function as a court of review for VRA suits and would exercise certiorari jurisdiction. This may reduce the probability that the Court would hear a case on the merits. Cf. Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79 (1996).

Rights Act. Many of these proposals, however, were before Congress during the 2006 reauthorization and failed to attract support.¹⁹ These proposals share a singular flaw: they ignore what can be done using the existing Act.

This Note examines an obscure provision of the VRA: section 3(c).²⁰ Commonly called the bail-in mechanism or the pocket trigger, section 3 authorizes federal courts to place states and political subdivisions that have violated the Fourteenth or Fifteenth Amendments under preclearance. Using this remedial provision, the Department of Justice (DOJ) and civil rights groups can redefine the preclearance regime through litigation. Designed to trigger coverage in “pockets of discrimination”²¹ missed by section 5’s formula, section 3 was included in the original Voting Rights Act.²²

Despite this pedigree, the academic literature has ignored the pocket trigger, consigning it to footnotes and trivia. The pocket trigger has never received full-length treatment from any book, article, note, or comment.²³ This Note fills the academic void, detailing how the pocket trigger works and where it has been used in the past. It then argues that the pocket trigger can bolster the VRA’s constitutionality in the short- and long-term.

The Justice Department should use the pocket trigger to ameliorate the covered versus noncovered jurisdiction distinction—the “differentiation problem”—highlighted by Justice Kennedy at the *NAMUDNO* oral

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19. See Gerken, *supra* note 5, at 716–18 (discussing an opt-in strategy for preclearance); Michael P. McDonald, *Who’s Covered? Coverage Formula and Bailout*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 255, 267–69 (David L. Epstein et al. eds., 2006) (advocating a proactive bailout mechanism); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *YALE L.J.* 174, 212 (2007) (noting the failure of the proactive bailout amendment).
 20. 42 U.S.C. § 1973a(c). Although section 3 of the VRA includes provisions authorizing federal courts to appoint election observers and to suspend racially discriminatory tests or devices, this Note will use “section 3” to refer only to subsection c, the pocket trigger provision.
 21. H.R. Rep. No. 89-439, at 13 (1965), reprinted in 1965 U.S.C.A.N. 2437, 2444.
 22. Pub. L. No. 89-110, § 3(c), 79 Stat. 437, 437–38 (1965).
 23. Westlaw, LexisNexis, and Hein searches reveal only a handful of pieces with discussions of the pocket trigger. None devotes more than a few sentences. See, e.g., Pamela S. Karlan, *Section 5 Squared: Congressional Power To Extend and Amend the Voting Rights Act*, 44 *HOUS. L. REV.* 1, 27 & n.126 (2007) (devoting one paragraph and one footnote); Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 *VAND. L. REV.* 1249, 1250 n.4 (1989) (devoting one footnote sentence); Laughlin McDonald, *Racial Fairness—Why Shouldn’t It Apply to Section 5 of the Voting Rights Act?*, 21 *STETSON L. REV.* 847, 849–50 & nn.19–20 (1992) (devoting one paragraph and two footnotes); Persily, *supra* note 19, at 208 & n.144 (devoting one sentence and one footnote); Daniel P. Tokaji, *If It’s Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 *HOWARD L.J.* 785, 795 n.61 (2006) (devoting one footnote sentence).

argument.²⁴ If and when the Court invalidates section 5, the pocket trigger can perform triage, creating a deterrent effect and bailing-in jurisdictions that engage in racial discrimination in voting.

Because the pocket trigger lacks many of section 5's alleged constitutional infirmities, it can serve as a model for a modern Voting Rights Act. Given its constitutional trigger, targeted preclearance, and flexible bailout, section 3 is more congruent and proportional than section 5. Quite simply, it is far more likely to survive the Supreme Court.

Additionally, the pocket trigger replaces a static preclearance regime with a dynamic one. In its youth, the coverage formula was defined by revision and experimentation. The 1970 and 1975 reauthorizations modified the coverage formula's two proxies for discrimination by updating election dates and adding protections for language minorities. The original bailout process was used more frequently, given that it permitted a covered jurisdiction to bail out through a showing that it had not used an unlawful test or device. Frozen in time since 1975, the contemporary coverage formula fights yesterday's problems. Through iterative litigation, the pocket trigger can establish a dynamic preclearance regime, targeting today's constitutional violators. Indeed, the pocket trigger enhances the Act's impact, creating additional incentives to bring suit. And by transferring coverage determinations from Congress to the courts, the pocket trigger empowers minority communities to bargain with and target those jurisdictions they determine should be bailed-in.

If Congress decides to revise the pocket trigger, this Note proposes potential amendments. For example, Congress could decouple section 3 from its constitutional trigger, predicating bail-in on a finding of discriminatory effect. Similarly, Congress could specify that a finding of discriminatory effect in a redistricting plan triggered coverage. Although an enhancement of section 3 may ease litigation, Congress should be wary of overstretching and inviting the Court's scrutiny yet again.

This Note is organized as follows. Part I explains the debate over section 5's constitutionality and the Court's recent decision in *NAMUDNO*. Part II examines the pocket trigger, telling the story of several bailed-in jurisdictions. Part III demonstrates why the pocket trigger may be able to save section 5, or, alternatively, how it can reduce the collateral damage if the Court invalidates it. Part IV argues that the pocket trigger is a desirable replacement for section 5 in a post-*NAMUDNO II* world because it is likely to survive constitutional scrutiny and effectively targets contemporary racial discrimination. And in Part

24. See *supra* note 8 and accompanying text.

V, this Note concludes by discussing ways the pocket trigger could be amended.

I. THE CONSTITUTIONAL CONTROVERSY OVER SECTION 5

“[D]esigned by Congress to banish the blight of racial discrimination in voting,”²⁵ section 5 requires that certain “covered jurisdictions”²⁶ preclear all voting changes with the Attorney General or the United States District Court for the District of Columbia (D.D.C.).²⁷ Section 4 contains the Act’s coverage formula and bailout provision. Under section 4(b), a state or political subdivision is a covered jurisdiction if during the 1964, 1968, or 1972 presidential election it 1) maintained an illegal “test or device,”²⁸ such as a literacy test, and 2) had voter turnout below fifty percent.²⁹ Under section 4(a), these covered jurisdictions can “bail out” of the Act’s coverage by showing that, inter alia, they have complied with the VRA for the previous ten years.³⁰ Although the coverage formula and bailout process have changed since 1965, the structure of the original Act remains intact.

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25. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).
 26. The jurisdictions currently covered by section 5 are the states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, counties in California, Florida, New York, North Carolina, and South Dakota, and townships in Michigan and New Hampshire. See 28 C.F.R. pt. 51 app. at 100-01 (2009). Since the 1982 amendments, seventeen political subdivisions in Virginia have bailed out. See *NAMUDNO*, 129 S. Ct. 2504, 2519 n.1 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part). On November 3, 2009, the District Court for the District of Columbia approved *NAMUDNO*’s bailout request. See *supra* note 18. For a helpful color-coded map of section 5 covered jurisdictions, see Civil Rights Division, U.S. Department of Justice, Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.php (last visited Oct. 18, 2009).
 27. 42 U.S.C.A. § 1973c (West Supp. 2009). The Supreme Court has interpreted section 5 broadly, requiring preclearance of almost all changes related to voting procedures. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 569-70 (1969) (requiring preclearance of changes relating to at-large districts, appointed positions, independent candidacy requirements, and write-in ballots); see also *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 38 (1978) (reaffirming *Allen*’s “broad construction” of section 5). But see *Presley v. Etowah County Comm’n*, 502 U.S. 491, 503-08 (1992) (holding that rules altering the allocation of power within an elected body are not subject to section 5).
 28. For the Act’s definition of “test or device,” see 42 U.S.C. § 1973b(c), (f)(2)-(3) (2006).
 29. *Id.* § 1973b(b).
 30. *Id.* § 1973b(a).

Enacted as a temporary provision, section 5 has been reauthorized four times: in 1970, 1975, 1982, and 2006.³¹ The current version expires in 2031.³² Section 2, in contrast, is the Act's permanent and nationwide prohibition against racial discrimination in voting.³³ Section 2 functions as the Act's enforcement provision in both covered and noncovered jurisdictions.

As Congress's most "inventive"³⁴ enforcement of the Fifteenth Amendment, "[t]he historic accomplishments of the Voting Rights Act are undeniable."³⁵ For almost a century between Reconstruction and the civil rights movement, the South disenfranchised African-Americans on a vast scale.³⁶ By the dawn of twenty-first century, registration rates of African-American voters have increased dramatically to now equal that of white voters in many states,³⁷ and the number of African-American elected officials in the six originally covered states has increased by over one thousand percent since 1965.³⁸ Despite these achievements, section 5's constitutionality has been questioned from the beginning.

A. *Katzenbach vs. Boerne*

In *South Carolina v. Katzenbach*,³⁹ Chief Justice Warren, writing for an eight Justice majority, upheld section 5 as "a valid means for carrying out the commands of the Fifteenth Amendment."⁴⁰ Establishing a permissive standard, *Katzenbach* directed that "[a]s against the reserved powers of the

31. See 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; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314.

32. See 42 U.S.C.A. § 1973b(a)(8) (West Supp. 2009) (stating that section 5 expires twenty-five years after its reauthorization).

33. 42 U.S.C. § 1973 (2006).

34. *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966).

35. *NAMUDNO*, 129 S. Ct. 2504, 2511 (2009).

36. In Mississippi, for example, only six percent of African-Americans were registered to vote in 1964. See *NAMUDNO*, 573 F. Supp. 2d 221, 247 (D.D.C. 2008), *rev'd on statutory grounds sub nom.* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009).

37. See *NAMUDNO*, 129 S. Ct. at 2511 (noting that in the covered states "[v]oter turnout and registration rates now approach [racial] parity").

38. See *NAMUDNO*, 573 F. Supp. 2d at 249.

39. 383 U.S. 301 (1966).

40. *Id.* at 337.

States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”⁴¹ Sustaining the “rationality of the [coverage] formula,”⁴² the Court found that Congress “began work with reliable evidence of actual voting discrimination in a great majority of the [covered jurisdictions] . . . and . . . was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by . . . the Act.”⁴³ The Court deferred to Congress’s judgment that the coverage formula’s use of proxies – “tests and devices” and turnout rates – was an appropriate and constitutional means of enforcing the Fifteenth Amendment.⁴⁴

Dissenting, Justice Black decried the Act’s intrusion on state sovereignty, claiming that it “so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless.”⁴⁵ According to Justice Black, preclearance treated the states as “little more than conquered provinces.”⁴⁶ From the beginning, therefore, the constitutional controversy over section 5 centered on the amount of deference owed to Congress and the role of the states under the Fifteenth Amendment.

Prior to 2006, each reauthorization of the Act was upheld by the Court.⁴⁷ In recent years, however, concerns have mounted over section 5’s validity. Two developments in the 1990s, in particular, foreshadowed section 5’s constitutional difficulties. In *City of Boerne v. Flores*,⁴⁸ the Court limited Congress’s Fourteenth Amendment enforcement authority against the states. Concerned that Congress would “decree the substance of the Fourteenth Amendment’s restrictions on the States,”⁴⁹ the Court asserted its supremacy in constitutional interpretation, declaring that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means

41. *Id.* at 324.

42. *Id.* at 331.

43. *Id.* at 329.

44. *Id.* at 330-31.

45. *Id.* at 358 (Black, J., dissenting).

46. *Id.* at 360.

47. See *Lopez v. Monterey County*, 525 U.S. 266 (1999) (upholding the 1982 reauthorization); *City of Rome v. United States*, 446 U.S. 156 (1980) (upholding the 1975 reauthorization); *Georgia v. United States*, 411 U.S. 526 (1973) (upholding the 1972 reauthorization).

48. 521 U.S. 507 (1997).

49. *Id.* at 519.

adopted to that end.”⁵⁰ *Boerne*’s congruence and proportionality test was not a fit of spite, but rather the first in a series of cases limiting Congress’s enforcement authority vis-à-vis the states.⁵¹ Purporting to follow *Katzenbach*, the *Boerne* line of cases praises the 1965 enactment of the VRA as a model of congruent and proportional legislation.⁵² Notwithstanding these pronouncements, *Boerne* was a radical break from *Katzenbach*.⁵³

In a series of voting rights cases, the Court signaled that the VRA impermissibly injected race into the nation’s politics. In *Shaw v. Reno*,⁵⁴ for example, the Court granted plaintiffs standing to challenge a state’s redistricting plan as an excessive racial gerrymander.⁵⁵ These cases evidenced “a concern that the VRA not dissolve into a system of racial spoils, [and] a worry that voting rights protections will entrench rather than undermine racial divisions.”⁵⁶

50. *Id.* at 520.

51. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (invalidating Title I of the ADA as applied to the states); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that Congress’s Fourteenth Amendment enforcement authority “does not extend” to the Violence Against Women Act’s civil remedies provision); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (prohibiting monetary damages against the states for violating the ADEA); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999) (striking down the Patent and Plant Variety Protection Remedy Clarification Act’s application to the states). More recently, the Court has sustained statutes under *Boerne*’s congruence and proportionality test. See *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (applying Title II of the ADA to the states for “the class of cases implicating the fundamental right of access to the courts”); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 735 (2003) (upholding the application of the FMLA to the states as a congruent and proportional response to gender discrimination).

52. See *Garrett*, 531 U.S. at 373; *Florida Prepaid*, 527 U.S. at 638-39; *Boerne*, 521 U.S. at 530-33.

53. See *Lane*, 541 U.S. at 564-65 (Scalia, J., dissenting) (distinguishing the *Katzenbach* and *Boerne* standards); Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2365-66 (2003) (contrasting *Boerne* with earlier Voting Rights Act cases); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 445 (2000) (arguing that the *Boerne* line of cases “impose[s] new and substantial restrictions on Congress’s power to enact antidiscrimination laws”).

54. 509 U.S. 630 (1993).

55. *Id.* at 642. The Court has also limited the scope of the VRA. See *Georgia v. Ashcroft*, 539 U.S. 461, 482-83 (2003) (allowing influence and coalition districts to count as majority-minority districts for section 5 retrogression analysis); *Johnson v. De Grandy*, 512 U.S. 997, 1009 (1994) (emphasizing the totality of the circumstances test in section 2 litigation); *Holder v. Hall*, 512 U.S. 874, 885 (1994) (holding that section 2 vote dilution suits could not challenge the size of a governing body).

56. Gerken, *supra* note 5, at 745.

Three themes emerge from *Boerne* and the recent voting rights cases. First, the Court trusts itself, not Congress, to determine the scope of the Fourteenth Amendment. Second, the Court will invoke federalism concerns to rebuke federal statutes as applied to the states. Third, the Court has interpreted the VRA in an attempt to decouple race from politics. Indeed, the Court intends “to bring [the nation] closer to the world of [post-racial,] normal politics.”⁵⁷ All of these themes surface in *NAMUDNO*.

B. NAMUDNO

Days after the passage of the 2006 reauthorization, *NAMUDNO*, a Texas water district, filed suit in the D.D.C. seeking to bail out from the Act’s preclearance requirements and, alternatively, a declaratory judgment that section 5 was unconstitutional.⁵⁸ In a lengthy opinion, Judge David Tatel, writing for the three-judge district court, denied both claims. Regarding bailout, the district court found *NAMUDNO* ineligible because it failed to meet the Act’s definition of a “political subdivision.”⁵⁹

Regarding section 5’s constitutionality, Judge Tatel held that *Katzenbach*, not *Boerne*, was the appropriate standard for reviewing the VRA for two reasons. First, the district court was compelled to follow the precedent most on point. For section 5, that precedent was *City of Rome v. United States*,⁶⁰ where the Supreme Court upheld the 1975 reauthorization under *Katzenbach*’s reasonableness approach.⁶¹ The district court recognized that none of the *Boerne* line of cases “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 Second, section 5 was passed to enforce the Fifteenth Amendment, whereas the *Boerne* line of cases expressed concerns

57. *Id.*

58. *NAMUDNO*, 573 F. Supp. 2d 221, 230 (D.D.C. 2008), *rev’d on statutory grounds*, 129 S. Ct. 2504 (2009). For more information about *NAMUDNO*, see Northwest Austin MUD #1, <http://www.nwamud.texas.gov> (last visited Mar. 22, 2010).

59. See *NAMUDNO*, 573 F. Supp. 2d at 233-34. The Act defines a “political subdivision” as “any 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.” 42 U.S.C. § 1973l(c)(2) (2006).

60. 446 U.S. 156 (1980).

61. See *id.* at 174-75; *NAMUDNO*, 573 F. Supp. 2d at 241.

62. *NAMUDNO*, 573 F. Supp. 2d at 242.

over Congress's Fourteenth Amendment enforcement authority.⁶³ *Boerne* cabins Congress's discretion under the Fourteenth Amendment's expansive and malleable language. Given the narrow concerns of the Fifteenth Amendment, the more restrictive congruence and proportionality test is misplaced. Moreover, the Supreme Court had never applied the congruence and proportionality test outside the Fourteenth Amendment context.⁶⁴ After finding section 5 constitutional under the *Katzenbach* standard,⁶⁵ the district court upheld section 5 as congruent and proportional legislation.⁶⁶

The Supreme Court, however, dodged the constitutional question entirely. Relying on the constitutional avoidance doctrine, the Court turned to the statutory question and declared that all political subdivisions were entitled to apply for bailout.⁶⁷ Perhaps most worrisome for section 5's future constitutionality, the eight-Justice majority concluded that "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions under either [the *Katzenbach* or *Boerne*] test."⁶⁸ In reaching this conclusion, the Court noted three "federalism costs"⁶⁹ imposed by the Act.

First, the Court criticized the coverage formula for "differentiat[ing] between the States, despite our historic tradition that all the States enjoy equal sovereignty."⁷⁰ According to the Court, congressional differentiation between the states "requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."⁷¹ Noting that "[t]he statute's coverage formula is based on data that is now more than 35 years old,"⁷² the Court commented that "[t]he evil that § 5 is meant to address may no longer

63. See *id.* at 243-45.

64. See *id.* at 243 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003) ("[P]etitioners ask us to apply the 'congruence and proportionality' standard described in cases evaluating exercises of Congress' power under § 5 of the Fourteenth Amendment. But we have never applied that standard outside the § 5 context.")).

65. See *id.* at 268.

66. See *id.* at 278-79.

67. *NAMUDNO*, 129 S. Ct. 2504, 2516-17 (2009).

68. *Id.* at 2513.

69. *Id.* at 2511.

70. *Id.* at 2512 (citation omitted) (internal quotation marks omitted).

71. *Id.* (emphasis added). Despite praising coverage formulas, the Court has emphasized that coverage formulas need to be justified by factual findings. See, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999) (noting that Congress could have limited the reach of the Act by "providing for suits only against States with questionable remedies or a high incidence of [patent] infringement").

72. *NAMUDNO*, 129 S. Ct. at 2512.

be concentrated in the jurisdictions singled out for preclearance.”⁷³ At oral argument, the Justices worried that Congress failed to reexamine the coverage formula.⁷⁴

Second, the Court questioned the scope of the preclearance requirement. It first criticized its breadth, noting that “[s]ection 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C.”⁷⁵ The Court then went on to question the depth of section 5, which requires preclearance from “every political subdivision in a covered State, no matter how small.”⁷⁶ Furthermore, at oral argument, members of the Court voiced anxiety over the incredibly small rate of objections to preclearance requests and the financial burden imposed by the universal preclearance requirement.⁷⁷

Third, the Court wondered when the Act would expire. At oral argument, the Justices questioned how many times Congress could renew the Act.⁷⁸ Moreover, the Court noted that conditions in the South have changed since 1965 and that “[p]ast success alone . . . is not adequate justification to retain the preclearance requirements.”⁷⁹ Thus, in the Court’s mind, the adequacy of the legislative record and the Act’s termination date are intimately linked.

73. *Id.*

74. *See, e.g.*, Transcript of Oral Argument, *supra* note 7, at 22 (question of Justice Kennedy) (“[T]hat’s part of the showing, it seems to me, that the Congress has to make, that these States that are now covered and that were covered are markedly different from the noncovered jurisdictions.”); *id.* at 30 (question of Justice Alito) (“Could Congress have reauthorized section 5 without identifying significant differences between the few jurisdictions that are covered and the rest of the country?”).

75. *NAMUDNO*, 129 S. Ct. at 2511.

76. *Id.*

77. *See* Transcript of Oral Argument, *supra* note 7, at 27 (question of Chief Justice Roberts) (arguing that the low objection rate suggests that section 5 is “sweeping far more broadly than [it] need[s] to, to address the intentional discrimination under the Fifteenth Amendment”); *id.* at 33 (question of Justice Kennedy) (noting that preclearance “costs the States and the municipalities a billion dollars over 10 years to comply”). In the early 1970s, the annual objection rate exceeded four percent of total preclearance submissions, but in recent years the objection rate has plummeted to .05%. *See* Hasen, *supra* note 5, at 192 & fig.3.

78. *See* Transcript of Oral Argument, *supra* note 7, at 51 (question of Justice Scalia) (“Do you ever expect—do you ever seriously expect Congress to vote against a reextension of the Voting Rights Act?”); *id.* at 31 (question of Chief Justice Roberts) (“But at what point does that history . . . stop justifying action with respect to some jurisdictions but not with respect to others that show greater disparities?”).

79. *NAMUDNO*, 129 S. Ct. at 2511.

Disagreeing with the Court's constitutional avoidance holding, Justice Thomas dissented, arguing that section 5 was unconstitutional.⁸⁰ Indeed, Justice Thomas discussed the three federalism costs articulated above. Regarding the differentiation problem, Justice Thomas canvassed the legislative record, concluding that the coverage formula was "premised on outdated assumptions about racial attitudes in the covered jurisdictions."⁸¹ Justice Thomas also criticized section 5's breadth, noting that it "pushes the outer boundaries of Congress' Fifteenth Amendment enforcement authority."⁸² Finally, Justice Thomas flipped the sunset argument, commenting that "[a]dmitting that a prophylactic law as broad as § 5 is no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory."⁸³ Despite *NAMUDNO*'s limited holding, there is at least one vote on the Court to strike down section 5.

Any of these concerns—the differentiation problem, the scope of preclearance, or the sunset provision—may be enough for the Court to invalidate section 5.⁸⁴ The Court explicitly cited the Act's preclearance requirement and coverage formula when it questioned the Act's constitutionality under either *Katzenbach* or *Boerne*. All of these problems, therefore, need to be addressed to salvage section 5. The pocket trigger provides solutions to these problems.

II. THE POCKET TRIGGER

A hybrid of sections 2 and 5, the pocket trigger combines an enforcement action with a prophylactic remedy. Put simply, section 3 authorizes courts to impose preclearance in response to violations of the Fourteenth and Fifteenth Amendments.⁸⁵ To do so, the court must first find intentional discrimination.⁸⁶

80. See *id.* at 2517-19 (Thomas, J., concurring in the judgment in part and dissenting in part).

81. *Id.* at 2525.

82. *Id.* at 2524.

83. *Id.* at 2525.

84. For more on section 5's constitutionality, see THERNSTROM, *supra* note 5; Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004); Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725 (1998); and Katz, *supra* note 53.

85. Section 3 provides in full:

If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth and fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred

Then, at the remedial stage, the district court has discretion to retain jurisdiction and impose preclearance.⁸⁷ One district court has held that section 3 requires multiple constitutional violations, but other courts have imposed preclearance through consent decree without addressing the issue.⁸⁸ Additionally, district courts have construed section 3 to permit targeted preclearance, requiring the submission of only certain types of voting

within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in [the language minority provision] of this title: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

42 U.S.C. § 1973a(c) (2006).

86. *See id.*

87. *See Jeffers v. Clinton*, 740 F. Supp. 585, 600 (E.D. Ark. 1990) (noting that the word “shall” in section 3 did not require a court to retain jurisdiction after the finding of a constitutional violation). *Jeffers* is the only reported decision addressing the standards for imposing preclearance. *See id.* Although the court declined to establish a test for bailing-in a jurisdiction, *Jeffers* mentions several important factors, such as the frequency and proximity of the constitutional violations, whether the violations are likely to recur, and whether judicial preclearance will deter discrimination. *Id.* at 601.

88. *Compare id.* at 600 (holding that multiple violations are required to bail-in a jurisdiction), with *Sanchez v. Anaya*, No. 82-0067M (D.N.M. Dec. 17, 1984) (consent decree) (on file with author) (imposing preclearance through consent decree for an illegal redistricting plan). Judge Richard Arnold's opinion in *Jeffers* hinged on the Act's use of the plural form of “violations.” This hyper-technical interpretation, however, runs counter to statutorily mandated rules of construction. *See* 1 U.S.C. § 1 (prescribing as a rule of statutory interpretation that “words importing the plural include the singular”). Moreover, any statute that violates the Fifteenth Amendment necessarily violates countless citizens' Fifteenth Amendment rights. It would be an incredibly odd statute that only violated a single person's constitutional rights. In any event, some constitutional claims, such as a Fourteenth Amendment vote dilution suit, are premised on the idea of a collective constitutional violation. *See, e.g., White v. Regester*, 412 U.S. 755, 765-67 (1973) (finding unconstitutional vote dilution).

changes.⁸⁹ Once preclearance has been imposed, the district court has discretion to determine how long the jurisdiction will remain bailed-in.⁹⁰

The preclearance language of section 3 mirrors section 5.⁹¹ Both sections prohibit the implementation of any voting change unless it has been precleared with the Attorney General or a court. Intending to avoid obstructionist Southern judges, Congress limited bailout and section 5 preclearance suits to the D.D.C. in the original VRA.⁹² Indeed, the D.D.C. was hand-picked for its

89. See, e.g., *Jeffers*, 740 F. Supp. at 601 (requiring pocket trigger preclearance for voting changes “imposing or relating to a majority-vote requirement in general elections”).

90. See, e.g., *Sanchez*, No. 82-0067M, slip op. ¶ 8 (mandating preclearance of legislative redistricting plans for a decade).

91. Compare 42 U.S.C. § 1973a(c), with 42 U.S.C.A. § 1973c(a) (West Supp. 2009). The Justice Department’s regulations state that section 3 bailed-in jurisdictions must follow the same procedures as section 5 covered jurisdictions. See 28 C.F.R. § 51.8 (2009).

The pocket trigger’s preclearance language matches the 1965 version of section 5, which prohibited the implementation of a voting change unless the Attorney General or the D.D.C. found that the change “[d]id not have the purpose and w[ould] not have the effect of denying or abridging the right to vote on account of race” Pub. L. No. 89-110, §§ 3(c), 5 (1965). In *Reno v. Bossier Parish School Board (Bossier Parish II)*, 528 U.S. 320 (2000), the Court interpreted section 5’s intent prong to require retrogressive purpose. *Id.* at 335. Thus, a finding of discriminatory intent was insufficient to object to a preclearance request; the Justice Department had to show the change had a retrogressive intent or effect. In the 2006 reauthorization, Congress amended section 5 to define “purpose” as “any discriminatory purpose.” Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5(3), 120 Stat. 577, 580-81 (codified at 42 U.S.C.A. § 1973c(c)). Congress, however, neglected to amend the pocket trigger’s preclearance language. Given Congress’s clear intent to overturn *Bossier Parish II*, this omission is most likely an oversight. Cf. Persily, *supra* note 19, at 207 (describing the 2006 VRA amendments as “[o]verturning *Bossier Parish II*”). Regardless, the “incompetent retrogressor” remains a problem for the pocket trigger. *Bossier Parish II*, 528 U.S. at 331.

In *McMillan v. Escambia County*, 559 F. Supp. 720 (N.D. Fla. 1983), the district court held that *Beer*’s retrogression test was inapplicable to the pocket trigger because section 3 was “designed to prevent a political subdivision . . . from performing an end run around and circumventing the court’s holding by enacting a new voting plan that was no worse than the one in effect at the time the suit was instituted.” *Id.* at 729; see also *Beer v. United States*, 425 U.S. 130, 141 (1976) (noting that “the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities”). The *McMillan* district court’s standard would object to a change motivated by a discriminatory purpose. This holding runs counter to *Beer* and *Bossier Parish II*, which interpreted identical statutory language. *McMillan*, therefore, is most likely no longer good law on this point.

92. Pub. L. No. 89-110, § 14(b), 79 Stat. 437, 445 (1965). For a discussion of Congress’s motivations for placing all section 4 and 5 suits in the D.D.C., see BRIAN K. LANDSBERG, FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT 180-82

“cosmopolitan and progressive judges.”⁹³ Although the federal judiciary has changed dramatically since the 1960s, the D.D.C. provision remains.⁹⁴ In pocket trigger litigation, however, the local district court retains jurisdiction and can receive preclearance requests. Thus, a court familiar with the underlying constitutional violation adjudicates whether future voting changes have a discriminatory purpose and effect.

Despite the preclearance provisions' similarities, there are two salient differences. First, whereas section 5 was designed as a temporary provision, the pocket trigger is permanent. The pocket trigger, therefore, does not face constitutional attack after each enactment.

Second, the two provisions have strikingly different triggers. Defined by section 4's coverage formula, section 5 requires preclearance in jurisdictions with histories of racial discrimination in voting dating back to the 1960s and 1970s. Initiated as a section 2 suit, section 3 requires a court to find—or a jurisdiction to admit—a constitutional violation. Under the Court's plurality opinion in *City of Mobile v. Bolden*,⁹⁵ discriminatory intent is necessary to establish a violation of the Fourteenth or Fifteenth Amendment.⁹⁶ Additionally, *Mobile* limits the Fifteenth Amendment's protections to state action that prevents citizens from registering to vote or casting a ballot.⁹⁷ Section 2's effects test,⁹⁸ therefore, is insufficient for pocket trigger litigation. Rather, district courts must find that the jurisdiction intentionally denied or abridged a citizen's right to vote on account of race, under either a Fifteenth Amendment ballot access standard or a Fourteenth Amendment vote dilution standard. While a showing of intentional discrimination raises the bar for the Justice Department and civil rights groups, section 3's constitutional trigger is not insurmountable. Indeed, the pocket trigger has been used successfully in the past.

(2007); and Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990*, at 378, 379-80 (Chandler Davidson & Bernard Grofman eds., 1994).

93. Davidson & Grofman, *supra* note 92, at 379.

94. 42 U.S.C. § 1973l(b) (2006).

95. 446 U.S. 55 (1980) (plurality opinion).

96. *Id.* at 65-67.

97. *Id.* at 65.

98. See *Thornburg v. Gingles*, 478 U.S. 30, 43-46 (1986).

A. Bailed-in Jurisdictions

The pocket trigger has been applied sparingly. During the VRA's first decade, no jurisdiction was bailed-in via the pocket trigger.⁹⁹ Since 1975, section 3 has bailed-in two states, six counties, and one city: the State of Arkansas;¹⁰⁰ the State of New Mexico;¹⁰¹ Los Angeles County, California;¹⁰² Escambia County, Florida;¹⁰³ Thurston County, Nebraska;¹⁰⁴ Bernalillo County, New Mexico;¹⁰⁵ Buffalo County, South Dakota;¹⁰⁶ Charles Mix County, South Dakota;¹⁰⁷ and the city of Chattanooga, Tennessee.¹⁰⁸ A brief

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99. See U.S. COMM'N ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT: TEN YEARS AFTER* 11 n.3 (1975). This is somewhat unsurprising, given that the coverage formula was reverse engineered to capture the worst violators and was amended in 1970 and 1975. See *infra* Subsection IV.B.1. Moreover, the fact that local district courts bail-in jurisdictions may have worked against its use in the early years of the VRA.
 100. *Jeffers v. Clinton*, 740 F. Supp. 585, 601-02 (E.D. Ark. 1990).
 101. *Sanchez v. Anaya*, No. 82-0067M, slip op. ¶ 8 (D.N.M. Dec. 17, 1984) (consent decree) (on file with author).
 102. *Garza v. County of L.A.*, Nos. CV88-5143 KN, CV88-5435 KN, slip op. at 2 (C.D. Cal. Apr. 26, 1991) (stipulation and order designating Los Angeles County for coverage under section 3(c) of the Voting Rights Act, 42 U.S.C. 1973a(c)) (on file with author) (requiring preclearance of changes relating to County's Board of Supervisors for a period of eleven years); see also M. David Gelfand, *Voting Rights Developments: Academic Reflections and Practical Projections for the 1990s*, 21 STETSON L. REV. 707, 715 n.42 (1992) (discussing the L.A. County bail-in). The L.A. County bail-in followed a Ninth Circuit ruling that the county supervisor districts intentionally discriminated against Hispanics. See *Garza v. County of L.A.*, 918 F.2d 763, 771 (9th Cir. 1990).
 103. *McMillan v. Escambia County*, No. 77-0432, slip op. at 3 (N.D. Fla. Dec. 3, 1979) (order) (on file with author) (bailing-in the county for a period of five years); see also *McMillan v. Escambia County*, 559 F. Supp. 720, 727 (N.D. Fla. 1983) (discussing the bail-in of Escambia County).
 104. *United States v. Thurston County*, No. 78-0-380, slip op. at 3 (D. Neb. May 9, 1979) (consent decree) (on file with author) (covering the county under section 3 for five years); see also Laughlin McDonald, *Expanding Coverage of Section 5 in Indian Country, in THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 19, at 163, 170 (noting the use of a consent decree to bail-in the county in response to discrimination against Native Americans).
 105. *United States v. Bernalillo County*, No. CV-98-156, slip op. ¶ 11 (D.N.M. Apr. 22, 1998) (consent decree) (on file with author) (covering the county under section 3 in response to discrimination against Native Americans).
 106. *Kirkie v. Buffalo County*, No. 03-CV-3011, 2004 U.S. Dist. LEXIS 30960, at *7 (D.S.D. Feb. 12, 2004) (consent decree); see also McDonald, *supra* note 104, at 190 (discussing the Buffalo County bail-in).
 107. *Blackmoon v. Charles Mix County*, No. Civ. 05-4017, slip op. ¶ 2 (D.S.D. Dec. 4, 2007) (consent decree) (on file with author); see also LAUGHLIN McDONALD, *AMERICAN INDIANS*

examination of four cases will illuminate common themes in pocket trigger litigation.¹⁰⁹

The State of New Mexico pocket trigger litigation began when a class of Native American and Hispanic plaintiffs challenged the state-level redistricting plan.¹¹⁰ In *Sanchez v. King*,¹¹¹ the district court found that the 1982 redistricting scheme violated the Fourteenth Amendment's one-person, one-vote standard.¹¹² The district court then directed the legislature to "make an honest and good-faith effort" to develop a constitutional redistricting plan.¹¹³

The legislature promptly passed a new plan, which was challenged as a "racially motivated gerrymander and [for] diluting minority voting strength."¹¹⁴ The district court held that the redistricting plan violated section 2

AND THE FIGHT FOR EQUAL VOTING RIGHTS 144-47 (2010) (describing the Charles Mix County litigation).

108. *Brown v. Bd. of Comm'rs*, No. C-1-87-388, slip op. ¶ 20 (E.D. Tenn. Jan. 11, 1990) (consent decree) (on file with author) (requiring preclearance of the 1990 redistricting plan). The city submitted a redistricting plan for preclearance and the court approved it. *Brown v. Bd. of Comm'rs*, No. CIV-1-87-388 (E.D. Tenn. Jan. 17, 1992) (order) (on file with author). For more information on the Chattanooga bail-in, see CHATTANOOGA CITY CHARTER app. 1, available at http://www.chattanooga.gov/City_Council/Charter/21%20-%20Appendix%201.pdf.

109. A National Commission on the Voting Rights Act report lists Cicero, Illinois, as a covered jurisdiction. NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005, at 34 (2006). However, this appears to be a mistake. Court documents reveal that Cicero, Illinois, was a section 3(a) case about federal election examiners, not a section 3(c) bail-in. See *United States v. Town of Cicero*, No. 00-C-1530, slip op. ¶ 7 (N.D. Ill. Oct. 26, 2000) (stipulation and order) (on file with author).

Additionally, a Colorado school district signed a consent decree agreeing to preclear future voting changes if a Native American (or any person endorsed by the Tribal Council) failed to win a seat on the board in two upcoming elections. See *Cuthair v. Montezuma-Cortez*, Colo. Sch. Dist. No. RE-1, No. 89-C-964, slip op. ¶¶ 5-6 (D. Colo. Apr. 9, 1990) (consent decree) (on file with author). When the consent decree was reexamined by a different district court judge, it was found unenforceable because the school district had not admitted liability. See *Cuthair v. Montezuma-Cortez*, Colo. Sch. Dist. No. RE-1, 7 F. Supp. 2d 1152, 1155 (D. Colo. 1998); see also McDONALD, *supra* note 107, at 161 (discussing the *Cuthair* consent decree).

110. See DANIEL MCCOOL, SUSAN M. OLSON & JENNIFER L. ROBINSON, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 82 (2007); McDonald, *supra* note 104, at 170-71.

111. 550 F. Supp. 13 (D.N.M. 1982).

112. *Id.* at 14.

113. *Id.* at 15.

114. McDonald, *supra* note 104, at 171.

by diluting Native American votes.¹¹⁵ Noting that a “racially-motivated gerrymander exists in the state redistricting plan,”¹¹⁶ the district court recognized that the 1982 VRA amendments established an effects test.¹¹⁷ The court, therefore, declined to “reach the issue of intent with respect to any particular district”¹¹⁸ and decided the case on statutory grounds. The Supreme Court summarily affirmed.¹¹⁹

After years of litigation, New Mexico signed a consent decree, agreeing to preclear any redistricting plan for the next decade.¹²⁰ New Mexico complied with the consent decree, submitting its 1991 redistricting plans to the Justice Department. Upon review, the Attorney General objected to the state senate plan, finding that New Mexico had failed to demonstrate that the plan was not motivated by a discriminatory purpose.¹²¹

In *Jeffers v. Clinton*,¹²² Arkansas became the second state to be bailed-in under section 3. Like *Sanchez*, *Jeffers* began as a redistricting suit. But as litigation progressed, a second issue arose: the use of majority-vote requirements.¹²³ Following *Mobile*, the district court recognized that violations of the Fourteenth and Fifteenth Amendments require a showing of discriminatory intent.¹²⁴ Accordingly, the court concluded that the disputed redistricting plan did not violate the Constitution.¹²⁵ On the second issue, the

115. *Sanchez v. King*, No. 82-0067-M, slip op. at 129 (D.N.M. Aug. 8, 1984) (findings of fact and conclusions of law) (on file with author).

116. *Id.* at 9.

117. *Id.* at 5-10.

118. *Id.* at 10. The district court’s opinion was rendered in the gap years between the VRA’s 1982 amendments and *Thornburg v. Gingles*, 478 U.S. 30 (1986). The district court, however, used the *Zimmer* factors to establish discriminatory effect. *Sanchez*, No. 82-0067-M, slip op. at 7-10.

119. *King v. Sanchez*, 459 U.S. 801 (1982).

120. *Sanchez v. Anaya*, No. 82-0067M, slip op. ¶ 8 (D.N.M. Dec. 17, 1984) (consent decree) (on file with author) (imposing preclearance for an illegal redistricting plan).

121. Letter from John R. Dunne, Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Manny M. Aragon, N.M. Senate President Pro Tempore, and Raymond G. Sanchez, N.M. House of Representatives Speaker (Dec. 10, 1991), printed in *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. of the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1620-21 (2005); see also *NAMUDNO*, 573 F. Supp. 2d 221, 275 (D.D.C. 2008) (discussing the New Mexico bail-in), *rev’d on statutory grounds*, 129 S. Ct. 2504 (2009).

122. 740 F. Supp. 585 (E.D. Ark. 1990).

123. *Id.* at 591-92.

124. *Id.* at 588-89.

125. *Id.* at 591.

court examined majority-vote requirements enacted by municipalities on four separate occasions in response to African-American political success. Declaring that the laws “represent[ed] a systematic and deliberate attempt to reduce black political opportunity,”¹²⁶ the court held that Arkansas had intentionally discriminated against African-American voters by enacting the majority-vote requirements.¹²⁷

Invoking section 3, the *Jeffers* court ordered Arkansas to preclear future laws establishing majority-vote requirements.¹²⁸ The court declined to set a termination date for coverage, leaving the preclearance requirement in place until “further order of this Court.”¹²⁹ Given that the court found no constitutional violation for the redistricting plan, this was the end of the section 3 inquiry. Nevertheless, the court, relying on its “inherent equitable power,”¹³⁰ ordered Arkansas to preclear its 1990 redistricting plan.¹³¹

Arkansas appealed both preclearance rulings to the Supreme Court.¹³² Asked by the Court to express the views of the United States,¹³³ the Solicitor General’s amicus brief sided with Arkansas on the “inherent equitable power” question, but agreed with the district court’s holding that the state should be bailed-in under section 3 for voting changes related to majority-vote requirements.¹³⁴ Shortly thereafter, Arkansas withdrew its appeal.¹³⁵ Arkansas has complied with the section 3 ruling, submitting a proposed majority-vote change to the Justice Department as recently as 2002.¹³⁶

In the past decade, consent decrees bailed-in South Dakota counties that discriminated against Native American voters. South Dakota has a long history of discrimination against Native Americans, as evidenced by numerous voting

126. *Id.* at 595.

127. *Id.* Between 1973 and 1989, the disputed majority-vote requirements were enacted in Little Rock, Pine Bluff, and West Memphis. *Id.* at 594.

128. *Id.* at 601.

129. *Id.* at 627.

130. *Id.* at 602.

131. *Id.*

132. Jurisdictional Statement at i, *Clinton v. Jeffers*, 498 U.S. 1129 (1991) (No. 90-394), 1990 WL 10022779.

133. 498 U.S. 965 (1990). The pocket trigger remains an issue of first impression for the Supreme Court.

134. Brief for the United States as Amicus Curiae at 8-9, *Jeffers*, 498 U.S. 1129 (No. 90-394).

135. *Jeffers*, 498 U.S. 1129.

136. See United States Department of Justice, Notice of Preclearance Activity Under the Voting Rights Act of 1965, As Amended, <http://www.usdoj.gov/crt/voting/notices/vnote011802.php> (last visited Feb. 10, 2010).

rights suits.¹³⁷ Indeed, South Dakota was a perennial violator of section 5, refusing to preclear approximately six hundred changes over a thirty year period.¹³⁸ The combination of recalcitrance, a large minority population, and spotty section 5 coverage made South Dakota fertile ground for pocket trigger litigation.

In *Kirkie v. Buffalo County*,¹³⁹ Native American plaintiffs alleged that the county commission districts violated the Fourteenth Amendment's one-person, one-vote standard, as well as the Fourteenth and Fifteenth Amendments' prohibition on intentional racial discrimination.¹⁴⁰ Rather than litigate, the county entered into a consent decree, which requires compliance with section 3 until January 1, 2013, approximately a decade. In contrast to the New Mexico and Arkansas cases, the *Kirkie* consent decree orders the county to submit all voting changes for preclearance.¹⁴¹

Another South Dakota county was covered in *Blackmoon v. Charles Mix County*.¹⁴² After finding the county commission districts malapportioned, the district court refused to impose preclearance. Relying on legislative history, the court held that the plaintiffs failed to meet section 3's "aggrieved person" definition, which requires a finding of discrimination.¹⁴³ Thus, even though the court declared that the county violated the Fourteenth Amendment, it concluded that section 3 was limited to remedies for racial discrimination in voting. The court noted that the discrimination requirement was necessary to prevent the preclearance provision—which only concerns racial discrimination—from becoming "nonsensical."¹⁴⁴

Following this ruling, the parties agreed to section 3 preclearance.¹⁴⁵ Under the consent decree, the court retained jurisdiction until December 1, 2024,

137. See, e.g., *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006) (holding that South Dakota's redistricting plan violated section 2); *Quick Bear Quiver v. Nelson*, 387 F. Supp. 2d 1027 (D.S.D. 2005) (granting motion for preliminary injunction barring the state from implementing new county commissioner redistricting law without preclearance). For a comprehensive list of voting rights suits in South Dakota, see MCCOOL ET AL., *supra* note 110, at 48 tbl.3.1.

138. See MCCOOL ET AL., *supra* note 110, at 86; McDonald, *supra* note 104, at 184-89.

139. No. 03-CV-3011, 2004 U.S. Dist. LEXIS 30960 (D.S.D. Feb. 12, 2004) (consent decree).

140. *Id.* at *1.

141. *Id.* at *6-7.

142. No. 05-4017 (D.S.D. Dec. 4, 2007) (consent decree) (on file with author).

143. *Blackmoon v. Charles Mix County*, 505 F. Supp. 2d 585, 592 (D.S.D. 2007).

144. *Id.*

145. *Blackmoon v. Charles Mix County*, No. 05-4017, slip op. ¶ 2 (D.S.D. Dec. 4, 2007) (consent decree) (on file with author).

approximately twenty years from the date the complaint was filed. However, voting changes enacted by South Dakota only need preclearance until December 1, 2014. Like the *Kirkie* litigation, Charles Mix County must preclear all voting changes.¹⁴⁶

Charles Mix County complied with the consent decree, submitting its 2007 redistricting plan to the Attorney General. The redistricting plan, which increased the number of districts from three to five, received an objection. According to the Justice Department, the county failed to prove the change was not motivated by a discriminatory purpose.¹⁴⁷

B. Lessons Learned from Pocket Trigger Litigation

Protecting the voting rights of African-Americans, Native Americans, and Hispanics, the “pocket trigger” has lived up to its name. Through litigation and consent decrees, it has targeted pockets of discrimination missed by the coverage formula. The absence of pocket trigger litigation evidences the appropriateness of section 5’s coverage formula. If there were a litany of section 3 cases, there would be even more doubts about the coverage formula. Here, silence speaks louder than words. With this in mind, what can be gleaned from the pocket trigger cases?

First and foremost, consent decrees have played an integral role in pocket trigger litigation. Consent decrees bailed-in New Mexico, Los Angeles County, Thurston County, Bernalillo County, Buffalo County, Charles Mix County, and Chattanooga. Only Arkansas and Escambia County have been covered involuntarily. If a jurisdiction signs a consent decree admitting it engaged in unconstitutional conduct, litigants can circumvent the laborious process of proving intentional discrimination.¹⁴⁸ In practical terms, consent decrees lower the threshold of proof required to trigger section 3, avoiding the evidentiary problems associated with proving intentional discrimination. This saves plaintiffs time and money, allowing the Justice Department and civil rights groups to focus on other suits. Both parties, moreover, share these benefits. From a jurisdiction’s perspective, signing a consent decree and preclearing future voting changes saves resources compared to protracted litigation. The

^{146.} *Id.* at 2.

^{147.} Letter from Grace Chung Becker, Acting Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Sara Frankenstein, Att’y for Charles Mix County, Grunderson Palmer Goodsell & Nelson, LLP (Feb. 11, 2008), available at http://www.justice.gov/crt/voting/sec_5/sd_obj2.php.

^{148.} See Karlan, *supra* note 84, at 736 (noting the “staggering” time and cost involved in proving intentional discrimination).

average cost of preclearing a voting change is a few hundred dollars, whereas litigation can cost millions.¹⁴⁹ Given this calculus, the parties in the Charles Mix County litigation signed the consent decree “[t]o avoid the expense of further litigation and trial”¹⁵⁰ To be sure, the cost effectiveness of preclearance versus litigation depends on when a jurisdiction agrees to coverage. But this tradeoff encourages jurisdictions to settle early.

Consent decrees transform the dynamics of section 3 litigation. By signing a consent decree and agreeing that future changes will be reviewed by the district court or the Attorney General, the parties may be able to reach an agreement, since future disputes will be resolved through an administrative mechanism. Furthermore, because a jurisdiction waives the right to appeal, consent decrees end litigation and insulate section 3 suits from appellate review.¹⁵¹ While section 3 avoids many of the concerns animating *NAMUDNO*,¹⁵² keeping these cases off the Supreme Court’s docket for several years may be in civil rights groups’ strategic interest.

Second, pocket trigger preclearance tends to be more targeted than its section 5 counterpart. Under section 5, covered jurisdictions must submit all voting changes for preclearance and remain covered until they actively seek a declaratory judgment to bail out from the D.D.C. and fulfill the requirements of section 4(a). While section 5 is technically temporary, Congress has shown few signs of letting it expire or revamping the coverage formula.¹⁵³ The section 3 preclearance regimes imposed by district courts have targeted preclearance for only certain voting changes and set a sunset date for coverage. For example, the *Sanchez* court, responding to a racial gerrymander, ordered New Mexico to preclear *only* redistricting legislation *for the next ten years*. The Chattanooga and Los Angeles County bail-ins followed a similar model. Other pocket trigger cases have used either targeted preclearance (Arkansas) or a sunset date (Escambia, Thurston, Buffalo, and Charles Mix counties).

149. See SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 103-07 (2006) (comparing preclearance and litigation costs).

150. *Blackmoon*, No. 05-4017, slip op. at 1; see also *United States v. Thurston County*, No. 78-0-380, No. 05-4017, slip op. at 2 (D. Neb. May 9, 1979) (consent decree) (on file with author) (“In order to expeditiously settle this matter and to conserve judicial resources, the parties to this litigation have conferred and agree that the controversy should be settled without the necessity of a trial.”).

151. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992) (noting that consent decrees are “subject to the rules generally applicable to other judgments and decrees”).

152. See *infra* Section IV.A.

153. See *infra* Subsection IV.B.1.

Third, this targeted model has proven successful at eradicating discrimination. Bailed-in jurisdictions have complied with these court orders, and, as in the section 5 context, the obligation to preclear changes deters discrimination.¹⁵⁴ Moreover, the preclearance regime provides minority groups with a powerful “bargaining chip” in negotiating political compromises.¹⁵⁵ When section 3’s deterrence fails, the Attorney General has objected to discriminatory changes in New Mexico and Charles Mix County.

From these lessons, the general outline of a pocket trigger case appears. In response to a discriminatory voting change or practice, the Justice Department or a civil rights group would bring suit under section 2 of the VRA. In the complaint, the plaintiff would allege intentional discrimination. During litigation, negotiations would take place to bail-in the jurisdiction via consent decree. If these efforts failed, the case would be resolved at summary judgment or after trial. If the district court found a constitutional violation, the jurisdiction could be bailed-in under the statute. Finally, the district court could follow prior practice by setting a sunset date (usually five to ten years) and targeting the types of voting changes that require preclearance.

The pocket trigger, therefore, provides a targeted, flexible, and more responsive means of imposing preclearance. While the statute’s requirement of a constitutional violation poses strategic and tactical concerns for civil rights groups, the willingness of seven jurisdictions, including one state, to sign consent decrees alleviates the burdens associated with proving intentional discrimination. And if the Justice Department or civil rights groups embark on more pocket trigger cases, targeted preclearance and sunset dates should help convince jurisdictions to sign consent decrees or, alternatively, to convince judges to impose preclearance.

III. STOPPING *NAMUDNO* II

Will Congress respond to *NAMUDNO*’s warning? If history is any indication, it is unlikely. The writing has been on the wall since *Boerne*. In 2006, Congress gambled when it reauthorized section 5’s coverage formula. *NAMUDNO* showed that Congress’s bet was far too risky. Despite a hostile

154. See Bruce E. Cain & Karin MacDonald, *Voting Rights Act Enforcement: Navigating Between High and Low Expectations*, in *THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 19, at 125, 126 (arguing that “risk aversion drives much of the nearly universal compliance with the VRA”).

155. Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 *ELECTION L.J.* 21, 36 (2004) (arguing that section 5 provides minority voters an “invaluable bargaining chip”).

oral argument and the Court's assertion that the constitutionality of section 5 was in doubt under either the *Boerne* or *Katzenbach* standards, Congress has done nothing to strengthen the VRA. *NAMUDNO II* is in the Court's near future.

A. *Saving Section 5 from the Court*

The question, then, is whether the Justice Department or civil rights groups can save section 5 without Congress. To accomplish this, supporters of the VRA need to reexamine what can be done using the *existing* statute. The Justice Department or a civil rights group should file a section 3 suit at the next appropriate opportunity.¹⁵⁶

The hesitation to deploy the pocket trigger has reinforced the rigidity of a coverage formula unchanged since 1975. With selective use of the pocket trigger, the Justice Department can demonstrate the VRA's flexibility. The pocket trigger and post-*NAMUDNO* bailout can refocus the Court's attention away from the coverage *formula* toward conceptualizing the VRA as a coverage *regime*. This distinction reframes the debate. At oral argument, Justice Kennedy expressed concern that "Congress has made a finding that the sovereignty of Georgia is less than the sovereign dignity of Ohio."¹⁵⁷ Before *NAMUDNO*, there was little chance that coverage determinations would change.

Through strategic application of section 3, the narrative would read differently. The coverage formula exists because those jurisdictions have a history of discrimination and Congress amassed evidence demonstrating that racial discrimination in voting continues in those jurisdictions.¹⁵⁸ The pocket trigger fixes the formula's under-inclusiveness, targeting contemporary constitutional violators. The Justice Department could then point to a recent bail-in of a state or county. Moreover, *NAMUDNO* greatly expanded the number of jurisdictions eligible to bail out by construing section 4 to include sub-county political units. The Justice Department could also adopt a "proactive" bailout program, notifying and encouraging eligible jurisdictions to

156. Here, section 3's provision allowing "aggrieved persons" to bring suit allows civil rights groups to circumvent a reluctant Justice Department. Moreover, a suit by the ACLU, which brought the two South Dakota cases, may put political pressure on the Justice Department to seek bail-in at the remedial stage of section 2 suits.

157. Transcript of Oral Argument, *supra* note 7, at 34.

158. For a thorough summary of the evidence gathered by Congress during the 2006 reauthorization, see *NAMUDNO*, 573 F. Supp. 2d 221, 247-65, 289-301 (D.D.C. 2008), *rev'd on statutory grounds*, 129 S. Ct. 2504 (2009).

seek exemptions from coverage.¹⁵⁹ Through vigorous use of the pocket trigger and bailout, the Justice Department could present the Court with a fluid coverage regime.

In this narrative, coverage becomes rehabilitative and temporary, rather than punitive and permanent. A flexible coverage regime undermines the argument that section 5 is a scarlet letter stigmatizing the South.¹⁶⁰ Ideally, a flexible coverage regime would swing five votes to uphold section 5.

As demonstrated by the media firestorm that followed the *NAMUDNO* oral argument, many Americans view the VRA as the pinnacle accomplishment of the civil rights movement. A decision invalidating section 5, therefore, would be a turning point in our nation's long march toward racial equality. But section 5 is more than a symbol. As studies have shown, federal oversight prevents and deters discriminatory changes.¹⁶¹ While the decades-old coverage formula may no longer target the areas most prone to racial discrimination in voting, jurisdictions that no longer discriminate may choose to bail out, and jurisdictions that have recently engaged in discriminatory conduct can be brought under the preclearance regime through the pocket trigger. The solution is not a decision invalidating section 5. *NAMUDNO II* would strike at the heart of Congress's enforcement authority against the states, weakening federal and congressional power in the long-term.

B. Responding to NAMUDNO II

In the wake of *NAMUDNO II*, the pocket trigger could perform triage while Congress determines a new strategy for protecting voting rights. Because *NAMUDNO II*'s holding would be limited to section 5, the pocket trigger would remain on the books.¹⁶² The Justice Department or the NAACP could initiate a section 3 suit the day after the decision. Thus, compared to proposals

159. See McDonald, *supra* note 19, at 267-69.

160. See Brief for Appellant at 58, *NAMUDNO*, 129 S. Ct. 2504 (2009) (No. 08-322).

161. See, e.g., Peyton McCrary, Christopher Seaman & Richard Valelly, *The Law of Preclearance: Enforcing Section 5*, in *THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 19, at 20, 23-26 (surveying 996 section 5 objections).

162. If aggressive use of the pocket trigger fails to save section 5, bailed-in jurisdictions would remain covered under section 3. Thus, a post-section 5 coverage map would invert the historical norm: the South would be uncovered while newly covered jurisdictions would be covered. To avoid this ironic result, the Justice Department would have to add bail-in requests to section 2 suits filed against covered jurisdictions. Courts would likely view this as redundant, however, and refuse to impose section 3 preclearance on already covered jurisdictions.

to amend the VRA, the pocket trigger has the unique benefit of requiring no additional congressional hearings or votes. While politicians negotiate on Capitol Hill, civil rights groups could return to the front lines and continue protecting voting rights.

Although section 3 puts civil rights advocates on the offensive, the 2010 redistricting cycle is just over the horizon. Given the high stakes of redistricting, the Justice Department and civil rights groups are already planning a wave of section 2 litigation, providing ample opportunity to redefine the coverage regime. Indeed, the redistricting cycle always produced a spike in section 5 objections, accounting for fifty-two percent of all objections in the 1990s.¹⁶³ The 2010 cycle will be no different. Decennial section 5 violators, like Louisiana,¹⁶⁴ would make prime targets for pocket trigger litigation.

Challenging a redistricting plan maximizes section 3's impact. Instead of piecemeal litigation targeting county- or municipal-level changes, a redistricting suit would bail-in an *entire* state.¹⁶⁵ Because election systems in many states are decentralized to the county or municipal level,¹⁶⁶ redistricting is a prime opportunity to use section 3. Any racially discriminatory redistricting plan, whether state house, state senate, or U.S. House of Representatives, would trigger statewide coverage. This additional deterrence would create new incentives for states to avoid racial gerrymandering and institute redistricting reforms.

Counterintuitively, some formerly covered jurisdictions may *welcome* the return of preclearance. Explaining the dearth of bailout applicants,

163. McCrary et al., *supra* note 161, at 25 tbl.2.1; *see also* OVERTON, *supra* note 149, at 109 (discussing the importance of redistricting in section 5 objections).

164. *NAMUDNO*, 573 F. Supp. 2d 221, 251 (D.D.C. 2008), *rev'd on statutory grounds*, 129 S. Ct. 2504 (2009) (remarking that "not one redistricting plan for the Louisiana House of Representatives had ever been precleared as originally submitted").

165. Surprisingly, the question whether the coverage of a county requires a noncovered state to preclear voting changes has never been answered. The Court has only held that a covered county must preclear changes mandated by a noncovered state. *See Lopez v. Monterey County*, 525 U.S. 266, 277-82 (1999) (noting this distinction). The *Lopez* Court, however, observed that many of its decisions and the Justice Department's regulations assumed section 5 applied to redistricting plans in noncovering states with covered counties. *See id.* at 279-81 (listing cases and regulations). Additionally, the pocket trigger has been used to bail-in states, even though the predicate offenses were committed by municipalities. *See Jeffers v. Clinton*, 740 F. Supp. 585, 601 (E.D. Ark. 1990).

166. *See* HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* 20-23 (2009) (explaining the problems associated with localized election administration systems).

commentators have noted that covered jurisdictions desire the federal government's oversight role.¹⁶⁷ Politicians may want coverage because Justice Department approval of a voting change "could be a powerful political message to those who might otherwise object"¹⁶⁸ Tellingly, Travis County, home of NAMUDNO, intervened in the bailout suit against the utility district, arguing that section 5's benefits outweighed its "modest burdens."¹⁶⁹ Given the political support for section 5 in covered jurisdictions, convincing a county or state to consent to section 3 coverage may be easier than it sounds.

IV. A MODERN VOTING RIGHTS ACT

The pocket trigger strengthens the preclearance regime in numerous ways. First, the pocket trigger is more likely to withstand a skeptical Roberts Court. Second, the pocket trigger establishes a preclearance regime that is more dynamic and targeted than section 5. Third, the pocket trigger creates new opportunities to litigate the scope of the Reconstruction Amendments.

A. *Surviving Constitutional Scrutiny*

Any replacement for section 5 must cure its constitutional infirmities. Because *Boerne's* congruence and proportionality test is stricter than *Katzenbach's* reasonableness standard,¹⁷⁰ this Note examines section 3 using *Boerne's* three-part analysis. Under *Boerne*, the Court first "identif[ies] with some precision the scope of the constitutional right at issue."¹⁷¹ Then, the Court "examine[s] whether Congress identified a history and pattern of

167. See, e.g., Persily, *supra* note 19, at 213-14.

168. *Id.* at 213.

169. Brief for Appellee Travis County at 9, *NAMUDNO*, 129 S. Ct. 2504 (No. 08-322).

170. The appropriate standard for adjudicating Congress's enforcement authority under the Reconstruction Amendments is beyond the scope of this Note. Resolving that question may require answering several preliminary questions. Could Congress have passed the VRA pursuant to its Fifteenth Amendment enforcement authority? Do the Fourteenth and Fifteenth Amendments have co-extensive enforcement authorities? Does *Boerne* apply to the Fifteenth Amendment? Does *Boerne* apply in the Fourteenth Amendment context when Congress legislates to deter racial discrimination?

Justice Scalia has renounced the congruence and proportionality test. Instead, Justice Scalia would apply *Katzenbach's* reasonableness standard for statutes designed to remedy or prevent racial discrimination. See *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting). The future of the VRA may hinge on what standard the Court applies. See *Thernstrom*, *supra* note 5, at 213.

171. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001).

unconstitutional [conduct] by the States”¹⁷² Finally, the Court asks whether there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹⁷³

1. *Boerne Step One*

At the first stage of the *Boerne* analysis, the Court “identif[ies] the constitutional right or rights that Congress sought to enforce when it enacted [section 3 of the VRA].”¹⁷⁴ In the *Boerne* line of cases, the nature of the right has two implications for the Court’s analysis. First, the Court “appear[s] to give Congress even greater latitude to craft remedial legislation in areas of traditional equal protection strict scrutiny.”¹⁷⁵ Second, because “racial classifications are presumptively invalid,”¹⁷⁶ it will be “easier for Congress to show a pattern of state constitutional violations.”¹⁷⁷ Thus, *Boerne* has a built-in sliding scale. For rights receiving heightened judicial review, Congress will have an easier time building a sufficient legislative record (per step two), and the Court will defer to Congress’s policy choices (per step three).

Here, the pocket trigger enforces the Fourteenth and Fifteenth Amendments’ prohibitions against racial discrimination in voting, the “core objectives of the Civil War Amendments.”¹⁷⁸ These rights receive greater judicial scrutiny than any examined in the *Boerne* line of cases.¹⁷⁹ The Court’s deference to Congress, therefore, should be at its zenith.

Furthermore, the pocket trigger’s judicialization of coverage determinations reinforces its constitutionality. *Boerne* and its progeny have made clear that “[t]he ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial

172. *Id.* at 368.

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

174. *Lane*, 541 U.S. at 522.

175. Issacharoff, *supra* note 84, at 1715.

176. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

177. *Id.*; see also *Lane*, 541 U.S. at 529 (explaining that “because the FMLA was targeted at sex-based classifications, which are subject to a heightened standard of judicial scrutiny, it was easier for Congress to show a pattern of state constitutional violations than in *Garrett* or *Kimel*, both of which concerned legislation that targeted classifications subject to rational-basis review” (internal quotation marks omitted)).

178. *NAMUDNO*, 573 F. Supp. 2d 221, 245 (D.D.C. 2008), *rev’d on statutory grounds*, 129 S. Ct. 2504 (2009).

179. See *id.*

Branch.”¹⁸⁰ In pocket trigger litigation, the Court retains its role as the final arbiter of the Constitution, since only a constitutional violation can bail-in a jurisdiction. Indeed, courts, not Congress, determine the scope of pocket trigger coverage. Because courts are more likely to trust their own judgments to bail-in jurisdictions than any set of proxies developed by Congress, the pocket trigger is on firmer ground than is section 5.

2. Boerne Step Two

Given that “[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one,”¹⁸¹ *Boerne* and its progeny examine the legislative record of constitutional violations to determine the appropriateness of the remedial or prophylactic response. The Court has cautioned that Congress needs to document “a pattern of unconstitutional discrimination by the States.”¹⁸² Thus, Congress cannot rely on examples of constitutional state conduct¹⁸³ or “anecdotal evidence.”¹⁸⁴

Because the pocket trigger is a permanent provision, the relevant legislative record is that of the Voting Rights Act of 1965, not that of the reauthorizations.¹⁸⁵ This is a virtue for the pocket trigger, given the “undisputed record of racial discrimination confronting Congress in the voting rights cases.”¹⁸⁶ Indeed, the Court upheld the more expansive section 5 using

180. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (citation omitted). *But see* Post & Siegel, *supra* note 53, at 513 (arguing that the *Boerne* line of cases misallocates constitutional interpretation amongst the branches).

181. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (citation omitted).

182. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 372 (2001).

183. *See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 645-46 (1999).

184. *Boerne*, 521 U.S. at 531.

185. Because of the addition of the language minority provisions to the VRA, the pocket trigger was amended in 1975 to add Fourteenth Amendment violations to its ambit. Pub. L. No. 94-73, § 205, 89 Stat. 400 (1975). In the *Boerne* line of cases, the Supreme Court has never examined a statute that has been amended in such a fashion. Thus, whether to examine the legislative record of the 1965 or 1975 version may be up for debate at the Court. In any event, the pocket trigger could cover language minorities solely under the Fifteenth Amendment. *See NAMUDNO*, 573 F. Supp. 2d 221, 243-45 (D.D.C. 2008), *rev'd on statutory grounds*, 129 S. Ct. 2504 (2009). Only vote dilution suits, then, would not be covered by the original pocket trigger. *Cf. City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion) (holding that the Fifteenth Amendment only encompasses ballot access suits).

186. *Florida Prepaid*, 527 U.S. at 640 (citation omitted); *see also Garrett*, 531 U.S. at 373 (praising the VRA's legislative record); *Boerne*, 521 U.S. at 530-33 (same).

the 1965 legislative record.¹⁸⁷ The second step in the *Boerne* inquiry, therefore, should not pose a problem for the pocket trigger.¹⁸⁸

3. *Boerne Step Three*

Under *Boerne*, there must be a “proportionality or congruence between the means adopted and the legitimate end to be achieved.”¹⁸⁹ Using the VRA as a paradigmatic example, *Boerne* notes that “termination dates, geographic restrictions, [and] egregious predicates”¹⁹⁰ are indicia of congruent and proportional legislation. Compared to section 5, the pocket trigger is more congruent and proportional. It addresses the three issues raised by *NAMUDNO*: coverage determinations, the scope of preclearance, and termination dates.

a. *From Coverage Formula to Coverage Mechanism*

Section 5’s Achilles’s heel may well be its outdated coverage formula. As the Court recognized, “[t]he statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.”¹⁹¹ To be sure, the coverage formula looks to the past and “does not cover the counties in Ohio and Florida with the most notorious voting rights violations in recent elections.”¹⁹² Section 5’s coverage formula is both under- and over-inclusive of today’s voting rights violators.

The differentiation problem plagues any coverage formula based on proxies. Section 5’s coverage formula uses three proxies, all of which are constitutionally suspect in the post-*Boerne* era. First, the Act’s definition of “test or device” includes facially constitutional literacy tests.¹⁹³ Under the

187. See *South Carolina v. Katzenbach*, 383 U.S. 301, 329-30 (1966) (examining the 1965 legislative record). *But see id.* at 316 (noting that section 3 was not challenged in the suit).

188. The Court has upheld permanent provisions without addressing the question whether those statutes will one day become unconstitutional once Congress has successfully eradicated the unconstitutional state conduct. See *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

189. *Boerne*, 521 U.S. at 533.

190. *Id.*

191. *NAMUDNO*, 129 S. Ct. 2504, 2512 (2009).

192. Persily, *supra* note 19, at 208.

193. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(c), 79 Stat. 437, 438 (defining “test or device”); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53-54 (1959)

Katzenbach standard, Congress was given discretion in enacting prophylactic legislation to determine that literacy tests were motivated by an impermissible purpose. Under *Boerne*, the Court may be more skeptical of using a proxy that is facially constitutional.¹⁹⁴ Second, the Act uses turnout data from the 1964, 1968, and 1972 presidential elections.¹⁹⁵ While the Court found these proxies appropriate in the past, it is clear that the current Court is suspicious of outdated data. Finally, section 5's language minority provisions, which only protect "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage,"¹⁹⁶ are racial classifications subject to strict scrutiny.¹⁹⁷

The pocket trigger solves the differentiation problem by replacing section 5's reliance on proxies with judicial findings of contemporary constitutional violations. Because section 3 utilizes a coverage *mechanism*, it sidesteps the under- and over-inclusiveness inherent in any coverage *formula*. And by eliminating the use of proxies, the pocket trigger is perfectly targeted, covering only those jurisdictions that have violated the Constitution. In other words, the pocket trigger directly links a constitutional violation to Congress's enforcement power to establish remedial schemes. With its constitutional trigger, section 3's "disparate geographic coverage is sufficiently related to the problem that it targets."¹⁹⁸

b. Targeted Preclearance

The Court has expressed concern that section 5 requires covered jurisdictions to preclear *all* voting changes, no matter how insignificant.¹⁹⁹ Additionally, during oral argument, Justice Kennedy worried that preclearance placed a financial burden on the covered jurisdictions, claiming that

(holding that, absent evidence of discriminatory intent, literacy tests were facially constitutional); THERNSTROM, *supra* note 5, at 27-28 (noting the use of constitutional literacy tests as a proxy). *But see* Ackerman, *supra* note 5, at 1790 (arguing that the VRA abrogated *Lassiter*).

194. See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 645-46 (1999) (noting that Congress must develop a legislative record of unconstitutional conduct by the states).

195. Act of Aug. 6, 1975, Pub. L. No. 94-73, § 202, 89 Stat. 400, 401; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 4, 84 Stat. 314, 315; Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 437, 438.

196. 42 U.S.C. § 1973l(c)(3) (2006).

197. See, e.g., Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (holding that all racial classifications are subject to strict scrutiny).

198. *NAMUDNO*, 129 S. Ct. 2504, 2512 (2009).

199. See *id.* at 2511.

compliance cost the covered jurisdictions a billion dollars over ten years.²⁰⁰ A universal preclearance regime, therefore, raises serious constitutional concerns for the Roberts Court.

The pocket trigger allays this concern by tailoring preclearance. For example, in *Jeffers*, the district court required the state to submit changes regarding majority-vote requirements.²⁰¹ A similar approach could be adopted for other jurisdictions, targeting problematic changes like redistricting, ballot access rules, and annexations.²⁰² Additionally, because the district court sets the parameters of section 3 preclearance, local conditions on the ground can be taken into account when designing a targeted prophylactic. Rather than submitting hundreds of voting changes, jurisdictions would save time and money by submitting only the most problematic changes. Targeted preclearance, therefore, would lessen the burden on covered jurisdictions.

c. Section 3 Coverage is Both Permanent and Temporary

The Court has also voiced skepticism regarding section 5's termination date. Some members of the Court have hinted that section 5 should no longer be viewed as a temporary provision.²⁰³ To be sure, the existence of a sunset provision is not necessary for a statute to survive the congruence and proportionality test. The Family and Medical Leave Act (FMLA), upheld in *Hibbs*, and Title II of the ADA, upheld in *Lane*, lack sunset dates.²⁰⁴ Nevertheless, because the pocket trigger is permanent, it will presumably receive additional scrutiny compared to the technically temporary section 5.

200. Transcript of Oral Argument, *supra* note 7, at 33 (question of Justice Kennedy).

201. See *Jeffers v. Clinton*, 740 F. Supp. 585, 601 (E.D. Ark. 1990) (requiring pocket trigger preclearance for voting changes "imposing or relating to a majority-vote requirement in general elections").

202. See *Overton*, *supra* note 149, at 109 (noting that "only 2.25 percent of the election changes submitted . . . between 1982 and 2004 involved redistricting" but that "61 percent of Justice Department objections between 1997 and 2002 involved redistricting"); McCrary et al., *supra* note 161, at 25 tbl.2.1 (showing that preclearance submissions of redistricting plans, ballot access changes, and annexations accounted for 52%, 14%, and 6% of all objections in the 1990s).

203. See Transcript of Oral Argument, *supra* note 7, at 51 (question of Justice Scalia) ("Do you ever expect—do you ever seriously expect Congress to vote against a reextension of the Voting Rights Act?"); *id.* at 31 (question of Chief Justice Roberts) ("But at what point does that history . . . stop justifying action with respect to some jurisdictions but not with respect to others that show greater disparities?").

204. See *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

In any event, the pocket trigger puts a new spin on sunset provisions. While the statute does not expire, coverage determinations do. Thus, Congress will not be faced with the periodic task of amassing a legislative record of contemporary racial discrimination in voting. By using targeted, rolling reevaluation of a jurisdiction's coverage determination, section 3 takes the termination decision out of the political branches and gives it to the courts. This alleviates the separation of powers concerns animating *Boerne* and its progeny.²⁰⁵

There are two ways a jurisdiction could bail out of section 3 coverage. First, the district court could set a sunset date in its initial order, as it did in the New Mexico litigation.²⁰⁶ Indeed, the *Sanchez* district court targeted its sunset date to capture the 1990 redistricting cycle. Second, as in *Jeffers*, the district court could evaluate the jurisdiction's compliance on an ad hoc basis, bailing out the jurisdiction when it was satisfied that the jurisdiction would no longer engage in intentional discrimination.²⁰⁷ Compared to section 5's bailout standard, which requires ten years of compliance and several affirmative acts,²⁰⁸ section 3 bailout is relatively easy and predictable.

While there is no way to accurately predict how the Court will rule in a future case, the pocket trigger stands a good chance of surviving constitutional scrutiny. The pocket trigger alleviates all of the concerns articulated by the Court in *NAMUDNO*. If section 3 can survive judicial review, the question becomes whether it is a desirable alternative to section 5.

B. Dynamic Preclearance

In 1965, Congress “found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist

205. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (expressing concern that Congress could redefine the substance of the Fourteenth Amendment).

206. *Sanchez v. Anaya*, No. 82-0067M, slip op. ¶ 8 (D.N.M. Dec. 17, 1984) (consent decree) (on file with author) (imposing preclearance of redistricting plans for ten years).

207. See *Jeffers v. Clinton*, 740 F. Supp. 585, 627 (E.D. Ark. 1990) (leaving the preclearance requirement in place until “further order of this Court”).

208. 42 U.S.C. § 1973b(a)(1)-(4) (2006); see also *NAMUDNO*, 129 S. Ct. 2504, 2517 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (discussing the statutory requirements to bail out); Richard A. Williamson, *The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions*, 62 WASH. U. L.Q. 1, 20-21 (1984) (summarizing the 1982 bailout provisions).

tactics invariably encountered in these lawsuits.”²⁰⁹ Congress, therefore, “decide[d] to shift the advantage of time and inertia from the perpetrators of the evil to its victims.”²¹⁰ In short, preclearance was designed to overcome the weaknesses of litigation against jurisdictions with recalcitrant and racist officials.²¹¹

In the twenty-first century, rampant racial discrimination in voting is no longer the norm, and litigation is more effective at deterring and remedying racial discrimination. The VRA should adapt to the world it helped create. The pocket trigger provides a new model, one that combines the virtues of sections 2 and 5.

1. *Frozen Preclearance: A History of Coverage and Bailout*

Before turning to the pocket trigger, some historical context is needed. The 1965 coverage formula was reverse-engineered to include most of the Southern states with egregious histories of racial discrimination in voting.²¹² The Act accomplished this through its two proxies: a finding that a jurisdiction had a “test or device” and low voter turnout in the 1964 presidential election. The original section 5, however, missed some jurisdictions.²¹³ For example, Texas was covered only after Congress revised the coverage formula in 1975.²¹⁴ The VRA’s coverage formula, therefore, was never perfectly targeted.

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

210. *Id.*

211. See J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 55 (1999).

212. See *Katzenbach*, 383 U.S. at 329 (suggesting that Congress worked backward in developing the coverage formula); H.R. Rep. No. 89-439, at 7-8 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2457 (noting that preliminary coverage determinations were known to Congress); LANDSBERG, *supra* note 92, at 166 (arguing that the government’s previous litigation experience informed the development of the coverage formula); THERNSTROM, *supra* note 5, at 35 (“In 1965, the authors of the Voting Rights Act knew which states they wanted to cover, and they designed a statistical test to target them precisely.”).

213. See RUTH P. MORGAN, *GOVERNANCE BY DECREE: THE IMPACT OF THE VOTING RIGHTS ACT IN DALLAS 19* (2004) (suggesting that the coverage formula was manipulated to avoid covering Texas, the home state of President Lyndon Johnson).

214. Voting Rights Act Amendments of 1975, 40 Fed. Reg. 43,746 (Sept. 23, 1975); see 28 C.F.R. pt. 51 app. at 101 (2009). Texas’s history of racial discrimination in voting can be found in the *White Primary Cases*. See, e.g., *Smith v. Allwright*, 321 U.S. 649 (1944) (holding that the Democratic Party’s exclusion of African-Americans was state action prohibited by the Fifteenth Amendment).

Hence, Congress adjusted the coverage formula during the Act's first decade. Congress amended the coverage formula by updating the election dates and modifying the definition of "test or device."²¹⁵ Regarding the election dates, Congress simply added the presidential elections of 1968 and 1972.²¹⁶ Regarding the definition of "test or device," Congress dramatically expanded the Act in 1975 by adding the language minority provisions, which triggered coverage if a jurisdiction used English-only ballots where more than five percent of voting-age citizens were Hispanic, Asian American, Native American or Alaskan Native.²¹⁷ The 1970 and 1975 amendments covered, inter alia, the states of Alaska and Arizona, as well as counties in Florida, South Dakota, and Wyoming.²¹⁸ Since 1975, Congress has not updated the coverage formula.

The Act's coverage determinations "shall not be reviewable in any court."²¹⁹ Rather, the Act provides a path for jurisdictions to "bail out" of coverage. From 1965 to 1982, bailout was an error correction device, allowing a jurisdiction to bail out only if it could obtain a declaratory judgment from the D.D.C. that it had not used a test or device when it was covered.²²⁰ Between 1965 and 1982, several jurisdictions bailed out, including the state of Alaska and counties in Arizona, Idaho, New York, and North Carolina.²²¹ To be sure, jurisdictions seeking to bail out under the original provision were not always successful.²²²

215. See McDonald, *supra* note 19, at 262-67.

216. Act of Aug. 6, 1975, Pub. L. No. 94-73, § 202, 89 Stat. 400, 401; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, tit. I, 84 Stat. 314, 315.

217. Act of Aug. 6, 1975, Pub. L. No. 94-73, §§ 203, 207, 89 Stat. 400, 401-02. For an argument against the language minority provisions, see THERNSTROM, *supra* note 5, at 36-41.

218. OVERTON, *supra* note 149, at 97.

219. 42 U.S.C. § 1973b(b) (2006); see also *Briscoe v. Bell*, 432 U.S. 404, 415 (1977) (holding that Texas could not challenge the coverage determination).

220. See Williamson, *supra* note 208, at 20, 22. As enacted in 1965, the bailout provision prevented jurisdictions from bailing out if they had used a test or device in the previous five years. To stop a de facto expiration of section 5, Congress amended the bailout clock to ten years, then seventeen years. See *id.* Only in 1982 did Congress add an explicit expiration date for section 5 and amend the bailout process. Pub. L. No. 97-205, § 2, 96 Stat. 131, 131 (1982).

221. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 99, at 13-15. Alaska presents the most fluid story. The state was covered in 1965, but bailed out in 1966. Then, in 1970, four Alaskan election districts were covered, but bailed out in 1972. See *id.* The state of Alaska was covered by the language minority provisions in 1975. 40 Fed. Reg. 49,422 (Oct. 22, 1975). Additionally, three New York counties bailed out in 1972, only to be re-covered in 1974. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 99, at 15.

222. See, e.g., *Gaston County v. United States*, 395 U.S. 285, 296 (1969).

In 1982, Congress amended the bailout mechanism, shifting to a rehabilitative model.²²³ Currently, a jurisdiction can bail out if it can show, inter alia, that it has complied with the VRA and made affirmative efforts to improve civil rights.²²⁴ The 1982 amendments also expanded the types of jurisdictions eligible to bail out to include counties within covered states.²²⁵ Despite the more permissive bailout standard, since 1982, “only 17 jurisdictions—out of more than 12,000 covered political subdivisions—have successfully bailed out.”²²⁶ And yet, before 1982, at least forty-seven jurisdictions bailed out, more than double the number of post-1982 bailouts.²²⁷ The coverage regime, therefore, has remained virtually unchanged since 1975. The concerns animating *NAMUDNO* are largely due to Congress abdicating its responsibility to update the coverage regime to changing conditions.

2. *Toward a New Coverage Regime*

Designed to eradicate barriers to African-American political participation, the long-term “effect of preclearance was to provide a one-way ratchet for

223. See Williamson, *supra* note 208, at 18.

224. See *id.* at 20–21.

225. See *id.* at 22. *NAMUDNO* further expanded upon this definition by allowing *any* political subdivision, not just those that registered voters, to bail out. See *NAMUDNO*, 129 S. Ct. 2504, 2516 (2009).

226. *Id.*

227. As noted in *NAMUDNO*, only seventeen Virginia political subdivisions have bailed out under the 1982 amendments. See *id.* at 2519 n.1 (Thomas, J., concurring in the judgment in part and dissenting in part). Prior to the effective date of the 1982 amendments, several other jurisdictions bailed out. Compare U.S. COMM’N ON CIVIL RIGHTS, *supra* note 99, at 13–16 & nn.11–16 (listing Wake County, North Carolina; Honolulu County, Hawaii; Elmore County, Idaho; Campbell County, Wyoming; three towns in Connecticut; eighteen political subdivisions in Maine; and nine towns in Massachusetts), with 28 C.F.R. pt. 51 app. (2009) (listing none of these jurisdictions as currently covered). Additionally, some currently covered jurisdictions have previously bailed out. See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 99, at 14–15 & n.13 (noting the bailouts of the state of Alaska; four Alaska election districts; three Arizona counties; and three New York counties); 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, 392–93 (1985) (listing bailout cases); 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 257, 260–61 (Ana Henderson ed., 2007) (noting the pre-1982 bailouts of the state of Alaska, three Arizona counties, one Colorado county, one Hawaii county, one Idaho county, one North Carolina county, and counties in New Mexico and Oklahoma); Timothy G. O’Rourke, *Voting Rights Act Amendments of 1982: The New Bailout Provision and Virginia*, 69 VA. L. REV. 765, 774 n.48 (1983) (listing bailout cases).

minority political gains”²²⁸ in covered jurisdictions. In the early years of the VRA, this ratchet was necessary given widespread disenfranchisement and the ineffectiveness of litigation. But as the nation transitions to normal politics, minority groups are not exempt from the political mandate to “pull, haul, and trade.”²²⁹ Pocket trigger litigation ensures that minority politicians engage in political mobilization throughout the country, but guarantees a prophylactic safety net when those efforts fail due to racial discrimination.²³⁰

As an initial matter, dynamic preclearance circumvents the theoretically and politically difficult task of developing a new coverage formula. Although the 2006 reauthorization passed by considerable margins, support for the bill was not as deep as its near unanimous vote suggests. Some Republicans voted for the bill secretly hoping it would be invalidated by the Supreme Court.²³¹ Furthermore, any revamped coverage formula would likely encounter opposition from members of Congress from newly covered jurisdictions.²³² This underscores the hurdles for a revised section 5: it needs a *formula* that can pass Congress. At the moment, there is no agreed-upon replacement formula. Given Congress’s failure to seriously examine the coverage formula in 2006,²³³ there is little hope it will muster the political will to agree on a hitherto mythical replacement. In any event, the political genius of the pocket trigger is that no state or jurisdiction—or politician—will know for certain whether it

228. Issacharoff, *supra* note 84, at 1711.

229. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994); cf. ADAM SMITH, *THE WEALTH OF NATIONS* 12 (Knopf 1991) (1776) (noting humanity’s “propensity to truck, barter, and exchange one thing for another”).

230. Cf. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643, 648 (1998) (arguing that courts should intervene in politics to prevent lockup and encourage competition).

231. See KEYSSAR, *supra* note 5, at 214.

232. If, for example, the new coverage formula replaced the old election data with the 2004 presidential election turnout rates, the state of Hawaii and jurisdictions in sixteen other states would become covered. See McDonald, *supra* note 19, at 266 tbl.13.1. Members of Congress from those jurisdictions would likely fight a revised section 5 that targeted their state for preclearance but not others. Cf. MORGAN, *supra* note 213, at 19 (noting that an Alabama Senator criticized the coverage formula because it was designed to cover certain states and not others).

233. See Persily, *supra* note 19, at 208–09 (“The most one can say in defense of the [coverage] formula is that it is the best of the politically feasible alternatives or that changing the formula would sufficiently disrupt settled expectations that it is better to go with the devil we know than one we do not.”).

will be covered.²³⁴ Quite simply, section 3 is more politically palatable than a revised section 5.

By avoiding the differentiation problem, the pocket trigger reinterprets the coverage regime in a fashion that proposals to amend the VRA do not. For example, the proactive bailout proposal is simply an exit strategy. It cannot respond to new threats to minority voters' rights. It retains the outdated coverage formula but seeks to bolster section 5's constitutionality by convincing jurisdictions to bail out.²³⁵ Setting aside the question of whether numerous jurisdictions want to or could bail out quickly, proactive bailout becomes a nullity if the Court invalidates section 5. The pocket trigger, on the other hand, will be left standing after *NAMUDNO II*.

Moreover, by shifting coverage determinations from Congress to courts, minority groups actually have more control over coverage determinations. Rather than convincing Congress to cover a discriminatory state, the NAACP can simply file suit. This emphasizes grassroots knowledge over lobbying expertise. Additionally, Northern jurisdictions have never seriously contemplated the prospect of being covered by a preclearance regime. While section 3 does not automatically extend section 5 to every state, it spreads the "bargaining chip" of preclearance nationwide.²³⁶ The pocket trigger, therefore, empowers minority groups across the country in negotiating political compromises.

The threat of preclearance enhances section 2's deterrent effect. In the status quo, a jurisdiction that loses a section 2 suit must remedy the discriminatory plan. Under section 3, any intentionally discriminatory change or practice results in a long-term impact for that jurisdiction, compelling it to preclear voting changes in the future. This also increases the payoffs to civil rights groups and the Justice Department. Section 5 created an administrative scheme that examined every change in voting, many of which would never be

234. Because the pocket trigger is a permanent provision, any attempt to repeal it would need majority support. This further insulates the pocket trigger from political attack.

235. See McDonald, *supra* note 19, at 267-69 (arguing that "the Department of Justice [should] proactively notify jurisdictions that they are potentially eligible for bailout, explain bailout procedures, and assist jurisdictions with initiating bailout litigation"). The media coverage surrounding *NAMUDNO* may have accomplished the publicity envisioned by the proactive bailout proposal. It will be interesting to see how many jurisdictions apply for bailout after *NAMUDNO*.

236. Cf. Karlan, *supra* note 155, at 36 (arguing that section 5 provides minority voters an "invaluable bargaining chip").

challenged in court because of financial constraints.²³⁷ If a jurisdiction is bailed-in, the cost-benefit analysis of a section 2 suit changes dramatically. For example, if a major city moved a polling place for discriminatory reasons, a section 2 suit would likely be prohibitively expensive and time consuming. A section 3 suit not only restores the polling place but also requires the city to preclear voting changes.

Pocket trigger litigation redefines the coverage regime. Rather than confronting a frozen framework based on data from the 1960s and 1970s, the pocket trigger allows the Justice Department and civil rights groups to respond to contemporary discrimination. The pocket trigger also provides an invaluable tool for fighting discrimination in areas missed by section 5, as the five cases protecting the rights of Native American voters amply demonstrate. And given the changing demographics of America and the rapid increase in Hispanic voters, it is unsurprising that tomorrow's biggest voting rights fights may occur outside the South.²³⁸ The pocket trigger also creates a more flexible regime, allowing for targeted preclearance of problematic voting changes and tailored sunsets.²³⁹ In sum, the pocket trigger updates section 5, refining its scope in response to a changing Court and country.

C. *The Vanguard of Voting Rights*

A final concern is whether the pocket trigger's requirement of intentional discrimination demands too much. To be sure, section 2 litigation is expensive and requiring a finding of intentional discrimination only raises the cost.

237. Cf. OVERTON, *supra* note 149, at 106-07 (comparing preclearance and litigation costs); Brief for the Federal Appellee at 54, *NAMUDNO*, 129 S. Ct. 2504 (2009) (No. 08-322) (noting the heavy financial burdens associated with section 2 litigation).

238. Cf. Victor Andres Rodriguez, Comment, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 809 (2003) (arguing that "changing minority demographics indicate a need for Section 5's reauthorization, quite possibly its alteration, and perhaps even its expansion").

239. Here, the local district court, not the D.D.C., is the best arbiter. The localization of preclearance allows district courts to tailor preclearance schemes to the situation on the ground. Moreover, a court familiar with the history of discrimination in a section 3 jurisdiction can contextualize preclearance requests. This specialization creates a more efficient review system capable of identifying voting changes with discriminatory intent or effect. Cf. Gerken, *supra* note 5, at 725-27 (describing the U.S. Department of Justice's Voting Section's contact with local minority leaders during preclearance investigations). Finally, judges may be more willing to bail-in jurisdictions knowing they will have subsequent control over the proceedings. Cf. Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 122 (1982) (discussing the proliferation of structural reform litigation).

Although this is a valid concern, past practice indicates that a showing of discriminatory intent is unnecessary, given that most jurisdictions have consented to coverage.

While intentional discrimination may be hard to prove, it certainly still occurs. An examination of section 5 objections sheds light on the level of intentional discrimination in the covered jurisdictions. During the 1980s and 1990s, the Justice Department imposed 421 objections based solely or partly on findings that the jurisdiction acted with discriminatory intent.²⁴⁰ In the 1990s, discriminatory intent served as the sole basis of forty-three percent of objections, and an additional thirty-one percent were based on discriminatory intent and effect.²⁴¹ Assuming that the Justice Department could prove intentional discrimination in court or obtain a consent decree, these objections demonstrate that numerous cities and counties in nearly every covered state could have been brought under section 3 coverage since 1980.²⁴²

Section 2 suits finding intentional discrimination also provide guidance for section 3 coverage. A study by Professor Ellen Katz found intentional discrimination cases against numerous covered jurisdictions: the state of Alabama and individual jurisdictions in Alabama, Georgia, South Carolina, South Dakota, and Texas.²⁴³ The Katz study also discovered intentional discrimination in noncovered jurisdictions: the state of Illinois and jurisdictions in Arkansas, California, Colorado, Maryland, Massachusetts, Montana, Nebraska, New York, Pennsylvania, and Tennessee.²⁴⁴ While the Katz study found only a few of these suits, this is only part of the section 3 inquiry.

During the 1982 reauthorization, Congress responded to *Mobile* by strengthening section 2, establishing an effects test that has become the

240. *NAMUDNO*, 573 F. Supp. 2d 221, 252 (D.D.C. 2008), *rev'd on statutory grounds*, 129 S. Ct. 2504 (2009).

241. *Id.*

242. *See id.* at 289-301 (canvassing findings of discriminatory intent in section 5 objection letters in Alabama, California, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia).

243. *See* 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, 678-85 (2006).

244. *See id.* at 685-91. The Katz study correctly lists the *Jeffers* litigation as evidence of discriminatory intent in a noncovered jurisdiction, since the litigation resulted in Arkansas's coverage under section 3. *See id.* at 688-89. The Katz study also reveals that Thurston County, a jurisdiction bailed-in for five years in the 1970s, had continued to engage in purposeful discrimination in the 1990s. *See id.* at 690.

primary engine of voting rights litigation.²⁴⁵ Because discriminatory effect is easier to prove than intentional discrimination, many litigants take the path of least resistance.²⁴⁶ Although analytically distinct from an intent test, an effects test captures a wide swath of intentional discrimination, since only an incompetent bigot would enact a voting change that lacked discriminatory effect.

Given that a showing of discriminatory effect establishes a section 2 violation, courts often avoid deciding whether a jurisdiction engaged in intentional discrimination. In *LULAC*,²⁴⁷ for example, Justice Kennedy commented that the dismemberment of a majority Hispanic district “bears the mark of intentional discrimination that could give rise to an equal protection violation.”²⁴⁸ Justice Kennedy, however, declined to make an explicit finding of discriminatory intent.

Once a finding of intentional discrimination becomes the trigger for coverage, section 3 will act as an exogenous shock, requiring courts to reach the question of intentional discrimination. Pocket trigger litigation will create a contemporary record of unconstitutional state conduct to justify its continued existence. Section 5’s prophylaxis, on the other hand, destroyed the evidence needed to defend its reauthorization.²⁴⁹ Thus, the pocket trigger avoids “reduc[ing] Congress’s Fourteenth and Fifteenth Amendment enforcement authority to a Catch-22.”²⁵⁰

Using a constitutional trigger creates intriguing possibilities to relitigate the outer limits of the Fourteenth and Fifteenth Amendments. Several questions emerge. Could a *Shaw* finding trigger coverage? Is Congress’s enforcement authority under the Fourteenth and Fifteenth Amendments coextensive? Should the Court’s plurality holding in *City of Mobile v. Bolden* be revisited? Does the Fifteenth Amendment only prohibit racial discrimination affecting ballot access? Should a violation of the Fourteenth or Fifteenth Amendment require a showing of intentional discrimination? What is the

245. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 566-67 (3d ed. 2007) (discussing the motivations behind the 1982 amendments).

246. See Karlan, *supra* note 84, at 735 (noting the “pragmatic reasons for not requiring judicial findings of discriminatory purpose”).

247. 548 U.S. 399 (2006).

248. *Id.* at 440.

249. See Hasen, *supra* note 5, at 188 (noting that because of section 5 “states do not engage in much activity that demonstrates purposeful racial discrimination”).

250. *NAMUDNO*, 573 F. Supp. 2d 221, 274 (D.D.C. 2008), *rev’d on statutory grounds*, 129 S. Ct. 2504 (2009).

proper evidentiary threshold for a showing of intentional racial discrimination in voting?²⁵¹

Since the 1982 VRA amendments, litigators have shied away from these issues in front of the Court. All of these questions can now be litigated under the pocket trigger. Quite simply, section 3 provides a vehicle for an expansive and coordinated assault on the Burger Court's limited construction of the Fifteenth Amendment. While the current Court may recoil at this project, this aspect of the pocket trigger looks to the long-term.

Indeed, this strategy exploits *Boerne's* weakness. Although Congress may lack authority to reinterpret constitutional rights, the Court retains that prerogative. Therefore, if the Court expands the Fifteenth Amendment's scope, Congress's enforcement authority expands accordingly. Similarly, if the Court lessens the evidentiary burden to prove intentional discrimination, Congress can respond with new prophylactic measures to combat racial discrimination. The pocket trigger could force the Court to confront the outer limits of the Reconstruction Amendments.

V. AMENDING THE POCKET TRIGGER

Congress could revise section 3 in a plethora of ways.²⁵² For example, Congress could narrow the types of changes that need to be precleared or set temporal guidelines for coverage. Similarly, Congress could specify that a finding of discriminatory state action in certain problematic changes, such as redistricting plans, automatically triggered coverage.²⁵³ This revision would create more federal oversight of redistricting and streamline the bailing-in of entire states. But amending the pocket trigger would require Congress to reach an agreement on the parameters of section 3. Nevertheless, these changes would draw upon and codify the practices developed by district courts in pocket trigger litigation.

251. For more on proving intentional discrimination, see *Rogers v. Lodge*, 458 U.S. 613, 627 (1982), finding purposeful discrimination in the maintenance of an at-large election scheme; and Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1126-31 (1989), discussing the concept of intent in voting rights cases.

252. Edward Blum has advocated activating the pocket trigger whenever a voting rights suit is filed, requiring preclearance of all changes during litigation. See Edward Blum, *Voting Rights and the Beneficiaries of Selma*, *American*, Apr. 22, 2009, <http://www.american.com/archive/2009/june/voting-rights-and-the-beneficiaries-of-selma>. This proposal, however, creates perverse incentives for political parties seeking strategic advantages. One can only imagine the confusion and gridlock wrought by a slew of suits filed the day before an election.

253. See McCrary et al., *supra* note 161, at 25 tbl.2.1 (showing the predominance of redistricting plans in section 5 objections).

Congress could also decouple section 3 from its constitutional trigger, allowing a finding of discriminatory effect to trigger coverage.²⁵⁴ An effects test would significantly lessen the burden on the DOJ and civil rights groups in pocket trigger suits and would likely result in many more jurisdictions covered. But this change may also make section 3 more vulnerable to constitutional attack.²⁵⁵ Although an effects test lacks the differentiation problem inherent to coverage formulas, it relies on Congress's power to impose prophylactic laws on the states. Under *Mobile*, the Court may view a discriminatory effects test as a proxy for unconstitutional intentional discrimination. And in the post-*Boerne* era, the scope of Congress's authority to impose prophylactic and remedial schemes remains controversial at the Court.

Moreover, Congress's strategic considerations in amending the pocket trigger could vary depending on how the Court writes *NAMUDNO II*. One can imagine a broad opinion repudiating preclearance or a narrow decision striking down the coverage formula. If enacted, an effects test section 3 will face an inevitable court challenge. In preparing for this institutional battle, Congress should avoid antagonizing the Court. Here, history is instructive. In 1993, Congress attempted to overturn *Employment Division v. Smith*²⁵⁶ by passing the Religious Freedom Restoration Act of 1993 (RFRA).²⁵⁷ Jealously guarding its authority to interpret the Constitution, the Court invalidated RFRA.²⁵⁸ Writing for the majority, Justice Kennedy cabined Congress's Fourteenth Amendment enforcement authority, eviscerating *Katzenbach*'s reasonableness standard. In establishing the congruence and proportionality test, *Boerne* sowed the seeds of *NAMUDNO*. To be sure, Congress still has authority "to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent . . ." ²⁵⁹ But if Congress wants to rescue preclearance from the Roberts Court, it will need to rethink its voting rights strategy and spend time amassing sufficient evidence to amend the VRA.

254. An effects test would have a de facto sunset, given that racially polarized voting needs to be established under the *Gingles* factors. See Karlan, *supra* note 84, at 741.

255. For a discussion of why the constitutional trigger strengthens the pocket trigger's constitutionality, see *supra* Section IV.A.

256. 494 U.S. 872 (1990).

257. Pub. L. No. 103-141, 107 Stat. 1488.

258. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

259. *Tennessee v. Lane*, 541 U.S. 509, 520 (2004).

CONCLUSION

The pocket trigger is a solution already in the civil rights arsenal—it's just been in the bunker for the past forty years. Instead of waiting for congressional action, it provides the Justice Department and civil rights groups with an immediate response to *NAMUDNO*. Moreover, the pocket trigger provides a new model for preclearance if and when section 5 is invalidated. The pocket trigger utilizes a perfectly tailored coverage mechanism and institutes targeted preclearance for each jurisdiction. In sum, it updates section 5 for the twenty-first century.