

## THE 1982 AMENDMENTS TO THE VOTING RIGHTS ACT: A STATUTORY ANALYSIS OF THE REVISED BAILOUT PROVISIONS

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### I. THE VOTING RIGHTS ACT OF 1965, AS AMENDED: AN OVERVIEW

#### *A. Introduction and Summary of the Original Act*

On June 29, 1982, President Reagan signed the Voting Rights Act Amendments of 1982.<sup>1</sup> At the signing ceremony, the President declared that the legislation constituted the “longest extension of the act since its enactment [in 1965] and demonstrates America’s commitment to preserving [the right to vote].”<sup>2</sup> The President also stated that the amendments extended the “special provisions applicable to certain states and localities, while at the same time providing an opportunity for the jurisdictions to bail out from the special provisions when appropriate.”<sup>3</sup>

The Voting Rights Act of 1965<sup>4</sup> has been described variously as “one

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1. Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified in scattered sections of 42 U.S.C. §§ 1973 to 1973aa-6 (1982)).

2. Remarks on Signing H.R. 3112 into Law, 18 WEEKLY COMP. PRES. DOC. 847 (June 29, 1982).

3. *Id.*

4. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

of the most significant pieces of civil rights legislation ever enacted,"<sup>5</sup> as "designed by Congress to banish the blight of racial discrimination in voting,"<sup>6</sup> and as an act that "commits linguistic mayhems on the Constitution."<sup>7</sup> It was enacted under the legislative authority conferred by section 5 of the fourteenth amendment, section 2 of the fifteenth amendment, and article I, section 4 of the Constitution.<sup>8</sup> Some of the Act's provisions were permanent and applicable nationwide; other provisions were temporary and applicable only in designated areas.

The provisions of the original Act applicable nationwide included section 2, which prohibited the imposition or application of racially discriminatory voting qualifications or prerequisites to voting;<sup>9</sup> section 3, which authorized the courts to apply the remedies established by the Act's special provisions on a case-by-case basis in areas other than those covered by the legislative designation of states and political subdivisions subject to the Act's special provisions;<sup>10</sup> section 10, which contained a legislative declaration that poll taxes violate the fifteenth amendment and which instructed the Attorney General to bring suit to

5. U.S. COMMISSION ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT: TEN YEARS AFTER* (1975) [hereinafter cited as *TEN YEARS AFTER*]. For a discussion of earlier federal efforts to end racial discrimination in voting, see Derfner, *Racial Discrimination and the Right to Vote*, 26 *VAND. L. REV.* 523 (1973); Note, *Federal Protection of Negro Voting Rights*, 51 *VA. L. REV.* 1051 (1965). For a discussion of the constitutional issues presented by the original version of the Act, see Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 *STAN. L. REV.* 1 (1965); Cox, *Constitutionality of the Proposed Voting Rights Act of 1965*, 3 *HOUS. L. REV.* 1 (1965).

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

7. Ervin, *The Truth Respecting the Highly Praised and Constitutionally Devious Voting Rights Act*, 12 *CUM. L. REV.* 261, 279 (1982). Senator Ervin described the constitutional infirmities of the Act as follows: "[The] Act treats with contempt the constitutional prohibition of congressional bills of attainder, the due process clause of the fifth amendment, and the doctrine of the constitutional equality of the states." *Id.* at 273.

8. H.R. REP. NO. 439, 89th Cong., 1st Sess. 6 (1965) ("The bill, as amended, is designed primarily to enforce the 15th amendment to the Constitution of the United States and is also designed to enforce the 14th amendment and article I, section 4.") [hereinafter cited as 1965 HOUSE REPORT].

9. The original version of Section 2 provided:

No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen on account of race or color.

Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (amended 1975). The 1975 amendments to the Act substituted "race or color, or in contravention of the guarantees set forth in section [1973b(f)(2) of this title]" for "race or color." See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 206, 89 Stat. 402 (amended 1982).

10. Voting Rights Act of 1965, Pub. L. No. 89-110, § 3, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973a (1976 & Supp. V 1981)).

bar their use;<sup>11</sup> and two sections which provided civil and criminal remedies for violations of the Act.<sup>12</sup> In addition, section 4(e) of the Act provided that no person who successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English, could be denied the right to vote because of an inability to read or write English.<sup>13</sup>

The most significant provisions of the Voting Rights Act, however, were contained in the complex scheme of special remedies aimed at areas of the country where voting discrimination was most flagrant. Section 4<sup>14</sup> prescribed a formula (hereinafter referred to as the "coverage formula") by which certain states and political subdivisions were identified for special treatment (hereinafter referred to as "covered jurisdictions").<sup>15</sup> Jurisdictions became subject to the special provisions of the Act if they maintained a test or device (statutorily defined) as a prerequisite to registration or voting as of November 1, 1964, and had less than a fifty percent registration rate as of that date or less than a fifty percent turnout for the 1964 presidential election.<sup>16</sup> Among the special remedies provided by section 4 was the immediate suspension

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11. Voting Rights Act of 1965, Pub. L. No. 89-110, § 10, 79 Stat. 442 (codified as amended at 42 U.S.C. § 1973h (1982)). The Supreme Court in *Harper v. State Bd. of Elections*, 383 U.S. 663 (1966), held that imposition of a poll tax violates the equal protection guarantee of the fourteenth amendment. Additionally, the twenty-fourth amendment, ratified in 1964, prohibits the use of poll tax as a condition of voting in federal elections.

12. Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 11-12, 79 Stat. 443-44 (codified as amended at 42 U.S.C. §§ 1973i-1973j (1982)). Among the prohibited acts are refusing to permit eligible voters to vote, failing to tabulate the votes of eligible voters, intimidating or threatening a person for voting or attempting to vote, and providing false information when registering to vote. 42 U.S.C. § 1973i (1976). The penalties for violations of the Act include fines of up to \$5,000 or imprisonment for up to five years, or both. *Id.* § 1973j.

13. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 439 (codified at 42 U.S.C. § 1973b(e) (1982)). The constitutionality of this provision was upheld in *Katzenbach v. Morgan*, 384 U.S. 641 (1965).

14. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 438 (codified as amended at 42 U.S.C. § 1973b(b) (1982)).

15. *Id.* The use of a selective coverage formula was held constitutional in *South Carolina v. Katzenbach*, 383 U.S. 307, 329-33 (1966).

16. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 438 (codified as amended at 42 U.S.C. § 1973b(b) (1982)). The coverage determinations were made by the Attorney General based upon data supplied by the Director of the Census, and were not subject to judicial review. *Id.* By April, 1966, coverage determinations had been made with respect to the states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, forty counties in North Carolina, four counties in Arizona, Honolulu County in Hawaii, and Elmore County in Idaho. TEN YEARS AFTER, *supra* note 5, at 13. The coverage determination could be made either

of the right to use tests and devices as prerequisites to voting in the covered jurisdictions.<sup>17</sup> Section 5,<sup>18</sup> perhaps the most controversial provision of the Act, prohibited covered jurisdictions from implementing new voting qualifications and procedures different from those in effect on November 1, 1964, without a finding by the Attorney General or a three-judge panel of the District Court for the District of Columbia that the changes were not discriminatory in purpose or effect.<sup>19</sup> Section

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for the state as a whole or for local political subdivisions in the event the entire state was not subject to coverage. *See infra* notes 198-200 and accompanying text.

17. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 438 (codified as amended at 42 U.S.C. § 1973b(c), (f)(3) (1982)). Under the 1965 Act, the phrase "test or device" was defined as:

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

*Id.*

18. *Id.* § 5, 79 Stat. 439 (codified as amended at 42 U.S.C. § 1973c (1982)).

19. *Id.* A covered jurisdiction seeking to implement a new voting qualification or procedure has a choice whether to seek the prior approval of the Attorney General or approval through the declaratory judgment process in the District of Columbia District Court. If the jurisdiction elects to seek the approval of the Attorney General, the new provision may be implemented unless the Attorney General objects within sixty days of the submission. *Id.* While a covered jurisdiction may not appeal the Attorney General's objection to a submission, it may thereafter file a declaratory judgment action in the District Court for the District of Columbia seeking judicial approval of the same submission, and the court will undertake a de novo review of the matter. *Id. Cf. Perkins v. Matthews*, 400 U.S. 379, 391 (1971) (Attorney General's interpretation of § 5 is accorded "great deference").

The provision for administrative approval by the Attorney General was designed to give covered jurisdictions a rapid method of securing implementation of proposed changes in voting qualifications and procedures. *Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969). The provision limiting preclearance through the judicial process to the District of Columbia District Court was designed to ensure uniform judicial interpretation of the § 5 standard. *Voting Rights: Hearings on S. 1564 Before the Senate Judiciary Comm.*, 89th Cong., 1st Sess. 69-73 (1965) (testimony of Attorney General Katzenbach) [hereinafter cited as *1965 Senate Hearings*]. *See also infra* notes 167-80 and accompanying text.

During the period from 1965 through 1981, over 39,000 preclearance requests were submitted to the Attorney General. *Bills to Amend the Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 1742-43 (1982) (attachment C-1 to statement of Assistant Attorney General Reynolds) [hereinafter cited as *1982 Senate Hearings*]. During approximately the same period, only twenty-three declaratory judgment actions were filed. Keady & Cochran, *Section 5 of the Voting Rights Act: A Time for Revision*, 69 KY. L.J. 741, 750-53 (1981). The preclearance requirement applies to any unit of government within the geographic territory of a covered jurisdiction that proposes to implement a new voting qualification or procedure. *United States v. Board of Comm'rs*, 435 U.S. 110 (1978). *See infra* text accompanying notes 204-05.

5 has been broadly construed<sup>20</sup> to require covered jurisdictions to seek preclearance of a wide variety of laws and practices, including changes in qualifications or eligibility for voting, publicity about voting or registration, balloting and assistance to voters, and methods of determining the outcome of elections.<sup>21</sup> In addition, preclearance is required for any changes in the boundaries of voting precincts or in the location of polling places;<sup>22</sup> changes in the constituency of officials or the boundaries of political subdivisions, such as by redistricting, annexation, or reapportionment; and changes to at-large elections from district elections or changes to district elections from at-large elections.<sup>23</sup> Finally, covered jurisdictions are required to seek preclearance for any change in the method of determining the outcome of an election (e.g., by requiring a majority vote), any change affecting the eligibility of persons to become or remain candidates, any change in the term of elective office or in the offices that are elective, any change affecting the necessity of, or methods for, offering issues for approval by referendum, or any change affecting the right or ability of persons to participate in political campaigns.<sup>24</sup> The remaining special remedies that apply only to covered jurisdictions include the authority of the Attorney General

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20. In *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), the Court stated: “[W]e must reject the narrow construction . . . [of] § 5. The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.” *Id.* at 565. The Court continued, “It is significant that Congress chose not to include even . . . minor exceptions in § 5, thus indicating an intention that all changes, no matter how small, be subject to § 5 scrutiny.” *Id.* at 568. *See also Georgia v. United States*, 411 U.S. 526, 534-35 (1973) (preclearance required for any change that has the “potential” for vote dilution).

21. 28 C.F.R. § 51.12(a), (b), (f) (1983). *See Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (preclearance required for changes in the procedure for casting write-in votes).

22. 28 C.F.R. § 51.12(d) (1983). *See Perkins v. Matthews*, 400 U.S. 379 (1971) (preclearance required for changes in the location of polling places).

23. 28 C.F.R. § 51.12(e). *See Perkins v. Matthews*, 400 U.S. 379 (1971) (preclearance required for reapportionment plan and for proposed annexation); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (preclearance required when covered jurisdiction proposes to change from single-member districts to at-large elections).

24. 28 C.F.R. § 51.12(f)-(k). *See Board of Educ. v. White*, 439 U.S. 32 (1978) (preclearance required for new local school board policy mandating that employees take unpaid leave-of-absence when running for public office); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (preclearance required for changes in candidate eligibility rules and changes from elective to appointed offices).

For a treatment of the scope of the preclearance requirement, see generally H. BALL, D. KRANE & T. LAUTH, *COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT* (1982) [hereinafter cited as *COMPROMISED COMPLIANCE*]; MacCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965*, 29 *CATH. U.L. REV.* 197 (1979).

upon certification to assign federal examiners to list eligible persons for registration and to appoint observers to report on the conduct of elections.<sup>25</sup>

The special provisions in the original Act were designed to be effective for a maximum period of five years from the date when a jurisdiction was determined to be covered.<sup>26</sup> Though there was no fixed calendar date upon which the Act's special provisions would expire, a covered jurisdiction could exempt itself from coverage (hereinafter referred to as "bailout") if it could carry the burden of proving, in a declaratory judgment action before a three-judge panel of the District Court for the District of Columbia, that it had not used a test or device with a discriminatory purpose or effect for the five year period prior to the filing of the action.<sup>27</sup> Covered jurisdictions, therefore, could be reasonably certain that the special provisions would terminate no later than the expiration of five years from the date of coverage, since under section 4 their right to employ tests and devices was suspended when they became covered. Some jurisdictions sought to bail out prior to the expiration of the five-year period, and thus had to demonstrate that their tests and devices in effect before coverage had not been administered with a discriminatory purpose or effect for at least the preceding five-year period from the date bailout was sought.<sup>28</sup>

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25. Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 6-9, 79 Stat. 439-41 (codified as amended at 42 U.S.C. §§ 1973d-1973g (1982)); see *infra* notes 230-45 and accompanying text.

26. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 438 (amended 1970).

27. *Id.* Section 4(a) also provided that no declaratory judgment could be obtained if, during the five-year period, a final judgment had been entered in any court of the United States, determining that the jurisdiction had denied persons the right to vote on account of race or color through the use of tests or devices. *Id.* The original bailout standard also incorporated a de minimis limitation. A covered jurisdiction would not be held to have engaged in the use of tests or devices with a discriminatory purpose or effect if the incidents of such use were few in number and prompt, corrective action was taken, if the continuing effects of such use were eliminated, and if there was no reasonable probability of their recurrence in the future. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(d), 79 Stat. 438 (codified as amended at 42 U.S.C. § 1973b(d) (1982)).

28. During the first five years of the Act, the State of Alaska, Wake County in North Carolina, Elmore County in Idaho, and three counties in Arizona successfully obtained early termination of their obligations under the special provisions. TEN YEARS AFTER, *supra* note 5, at 14. Two other North Carolina counties, Nash and Gaston, were unsuccessful in their attempts to bail out during the same period. 1982 Senate Hearings, *supra* note 19, at 1787. See *infra* notes 118-34 and accompanying text.

### *B. Summary of the 1970 and 1975 Amendments*

In 1970, Congress, following lengthy hearings,<sup>29</sup> concluded that while substantial progress had been made under the Act, racial discrimination in voting continued and the section 5 preclearance mandate had been enforced only minimally.<sup>30</sup> In August, 1970, Congress passed the Voting Rights Act Amendments of 1970.<sup>31</sup> The 1970 amendments extended the effective period of the section 5 preclearance requirement and the other special provisions of the Act for an additional five-year period; that is, section 4(a) of the Act was amended to require covered jurisdictions seeking bailout to demonstrate that they had not used a test or device with a discriminatory purpose or effect for ten years prior to the time bailout was sought.<sup>32</sup> Congress also amended the coverage formula and brought under the Act's special provisions those jurisdictions that maintained a test or device as a prerequisite to registration or voting on November 1, 1968, and which had less than a fifty percent registration rate on November 1, 1968, or less than a fifty percent turnout for the 1968 presidential election.<sup>33</sup> Finally, Congress passed a nationwide five-year ban on the use of tests and devices as a prerequisite to registration and voting.<sup>34</sup>

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29. *Amendments to the Voting Rights Act of 1965: Hearings on S. 818, S. 2456, S. 2507, and Title IV of S. 2029 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 91st Cong., 1st & 2d Sess. (1970); *Voting Rights Act Extension: Hearings Before Subcomm. No. 5 of the House Judiciary Comm.*, 91st Cong., 1st Sess. (1969).

30. H.R. REP. NO. 397, 91st Cong., 1st Sess. 7 (1970) [hereinafter cited as 1970 *House Report*]. No written Senate Report was submitted with the 1970 amendments.

31. Pub. L. No. 91-285, 84 Stat. 315 (1970) (codified as amended in scattered sections of 42 U.S.C. §§ 1973 to 1973bb-1 (1982)).

32. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 315 (1970) (amended 1975).

33. *Id.* § 4, 84 Stat. 315 (1970) (amended 1975).

The 1970 coverage formula resulted in coverage of the boroughs of the Bronx, Brooklyn, and Manhattan in the city of New York, one county in Wyoming, two counties in California, eight counties in Arizona, four election districts in Alaska, Elmore County in Idaho, and various towns in Connecticut, New Hampshire, Maine, and Massachusetts. TEN YEARS AFTER, *supra* note 5, at 14-15. Eight of these jurisdictions (Elmore County, the Alaska election districts, and three of the eight Arizona counties) had exempted themselves after being covered by the original Act. *See supra* note 28.

34. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 201, 84 Stat. 315 (amended 1975).

The 1970 amendments also included provisions that prohibited denying to any citizen 18 years of age or older the right to vote on account of age, prohibited the application of state durational residency laws for voting in presidential elections, and established uniform standards for registration and absentee balloting in presidential elections. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 202, 302, 84 Stat. 316 (codified at 42 U.S.C. § 1973aa-1 (1982)). The consti-

During the period immediately preceding and following the passage of the 1970 amendments, activity under the section 5 preclearance requirement increased perceptibly. It was during this period that the Supreme Court broadly construed the section 5 mandate<sup>35</sup> and the Department of Justice first issued regulations to provide guidance to covered jurisdictions with respect to their preclearance obligations.<sup>36</sup> Prior to 1970, section 5 had been widely ignored.<sup>37</sup>

As 1975 approached, Congress again was faced with the question whether to allow the special provisions to expire for those jurisdictions originally covered. Hearings were held,<sup>38</sup> and while it was clear that the number of blacks registered to vote had increased dramatically during the preceding ten years,<sup>39</sup> Congress found that a significant disparity still existed between the percentages of black and white registered voters, that compliance with section 5 was still a problem, and that continuation of the preclearance mandate was necessary to guarantee that the 1980 reapportionment process would be free from racial gerrymandering.<sup>40</sup>

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tutionality of the nationwide prohibition on the use of tests and devices was sustained in *Oregon v. Mitchell*, 400 U.S. 112 (1970). That decision also upheld the constitutionality of the abolition of state durational residency limitations and the uniform registration and balloting provisions for presidential elections. The Court, however, declared the 18-year-old vote provisions unconstitutional as applied to state elections. For a treatment of the *Mitchell* case, see Greene, *Congressional Power Over the Elective Franchise: The Unconstitutional Phases of Oregon v. Mitchell*, 52 B.U.L. REV. 505 (1972).

35. See *Allen v. State Bd. of Elections*, 398 U.S. 544 (1969); see also *supra* notes 20-24 and accompanying text.

36. The current regulations are contained in Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. §§ 51.1-.17 (1983).

37. See WASHINGTON RESEARCH PROJECT, *THE SHAMEFUL BLIGHT: THE SURVIVAL OF RACIAL DISCRIMINATION IN VOTING IN THE SOUTH* 138 (1972); see also *Perkins v. Matthews*, 400 U.S. 379, 393 n.11 (1971). Only 578 preclearance submissions were made through the year 1970. COMPROMISED COMPLIANCE, *supra* note 24, at 244-45 (table).

38. *Extension of the Voting Rights Act of 1965: Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 94th Cong., 1st Sess. (1975); *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975).

39. Between 1964 and 1972, 1,148,621 new black voters had been added to the list of eligible voters in the covered jurisdictions. TEN YEARS AFTER, *supra* note 5, at 41.

40. See generally S. REP. NO. 295, 94th Cong., 1st Sess. (1975) [hereinafter cited as 1975 SENATE REPORT]; H.R. REP. NO. 196, 94th Cong., 1st Sess. (1975) [hereinafter cited as 1975 HOUSE REPORT]. Pre-Act estimates placed the percentage of white and black registered voters in the covered states at 73.4% and 29.3%, respectively. By 1972, the gap had narrowed to 67.8% for whites, compared to 56.6% for blacks. TEN YEARS AFTER, *supra* note 5, at 43. Nearly 6,000 preclearance submissions were filed between 1971 and 1975, inclusive. 1982 Senate Hearings, *supra* note 19, at 1742 (table).



In 1975, the Act again was amended<sup>41</sup> to continue the special provisions in covered jurisdictions for an additional seven years, bringing to seventeen years the period of time a jurisdiction covered by either the 1964 or 1968 coverage formulas would have to show the absence of the use of a test or device with a discriminatory purpose or effect in order to terminate coverage under the Act's special provisions.<sup>42</sup> The 1975 amendments also made permanent the five-year nationwide ban that had been imposed in 1970 on the use of tests or devices.<sup>43</sup> Finally, based upon testimony presented at the hearings, Congress extended the protection of the Act to members of language minority groups.<sup>44</sup> Congress amended the definition of "test or device" to include the use of English-only election material in states or political subdivisions in which a single-language minority comprises more than five percent of the voting age population.<sup>45</sup> It then extended the coverage of the Act's special provisions to those jurisdictions that maintained a test or device (as newly defined) as of November 1, 1972, and had a registration or voter turnout rate of less than fifty percent in the 1972 presidential election.<sup>46</sup>

Congress also developed a new program to aid minority-language voters. In any state or political subdivision in which more than five percent of the voting age population are members of a language minority group and in which the illiteracy rate of such groups is greater than the national illiteracy rate, all written election material, including bal-

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41. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 402 (codified as amended in scattered sections of 42 U.S.C. §§ 1973 to 1973bb-1 (1982)).

42. *Id.* §§ 101, 201, 206, 89 Stat. 400-02 (amended 1982).

43. *Id.* § 201, 89 Stat. 315 (codified at 42 U.S.C. § 1973aa (1982)).

44. The legislative history of the 1975 amendments discloses that while Congress heard evidence of physical intimidation and economic reprisals against Mexican-American voters, its primary concern was with the language difficulties encountered. See 1975 SENATE REPORT, *supra* note 40, at 23-35; 1975 HOUSE REPORT, *supra* note 40, at 16-27. The protections afforded by the 1975 amendments extend to language minority voters of American Indian, Asian-American, and Alaskan Native descent, in addition to those of Spanish heritage. See 42 U.S.C. § 1973aa-1a(e) (1976).

45. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 401-02 (codified at 42 U.S.C. § 1973b(f)(3) (1982)).

46. *Id.* § 202, 89 Stat. 401 (1975) (codified at 42 U.S.C. § 1973b(b) (1982)). Jurisdictions included under the 1975 coverage formula were the entire states of Alaska and Arizona, two counties in California, one county in Colorado, five counties in Florida, two townships in Michigan, one county in North Carolina, and three counties in South Dakota. 1982 Senate Hearings, *supra* note 19, at 1722-24. Jurisdictions falling within the 1975 coverage formula because of the language minority provisions are required to provide election material in the language of the applicable language minority group. 42 U.S.C. § 1973b(f)(4) (1982).

lots, must be provided in the language of the applicable minority group.<sup>47</sup>

Jurisdictions covered under the Act's special provisions by the 1975 coverage formula could seek to bail out upon showing that no test or device had been used with a discriminatory purpose or effect for the ten-year period preceding the filing of a declaratory judgment action.<sup>48</sup> No specific bailout mechanism was provided for those jurisdictions covered only by the minority language assistance provisions; instead, they were required to meet the requirements for a ten-year period.<sup>49</sup>

*C. Progress Under the Act and the Pressures to Revise and Extend the Act in 1982*

During the period from 1965 to 1981, most structural impediments to minority registration and voting were removed, minority registration and voting increased significantly, and, as a consequence, the number of elected minority officials grew dramatically in covered states.<sup>50</sup> By 1980, for example, in South Carolina, one of the states originally covered by the special provisions of the Act, nearly 56% of the black voting-age population was registered, compared to roughly 62% of the white voting age population,<sup>51</sup> pre-Act estimates placed the registra-

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47. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 301, 89 Stat. 402-03 (codified at 42 U.S.C. § 1973aa-1a(b) (1982)). The 1975 amendments also required that a covered jurisdiction which provides other materials or information relating to the election process must provide them in the language of the applicable minority group. See 42 U.S.C. § 1973aa-1a(c) (1976). If the applicable minority language is unwritten or historically unwritten, the covered jurisdiction must provide oral assistance to minority language voters. *Id.* For purposes of this section of the Act, illiteracy means the failure to complete the fifth primary grade. *Id.* § 1973aa-1a(b).

The Department of Justice has interpreted the minority language provisions as requiring that the covered jurisdiction provide materials and assistance "in a way designed to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities." 28 C.F.R. § 55.2(c) (1983). Jurisdictions covered only by language assistance provisions are listed in Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. pt. 55 appendix. Some jurisdictions are covered by both the traditional special provisions and the special language assistance provisions. *Id.*

For a treatment of the language minority provisions, see U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 76-88 (1981) [hereinafter cited as UNFULFILLED GOALS].

48. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 101, 89 Stat. 400 (amended 1982).

49. *Id.* § 301, 89 Stat. 402 (amended 1982).

50. UNFULFILLED GOALS, *supra* note 47, at 11.

51. *Id.* at 20. In North Carolina (where less than the entire state is covered) and Louisiana,

tion figures at about 37% and 76%, respectively.<sup>52</sup> Although there are no reliable figures on the number of elected black officials in the covered states prior to passage of the Act, one estimate has placed the number well under one hundred.<sup>53</sup> By 1980, the number of elected black officials in the eight covered southern states exceeded two thousand.<sup>54</sup>

Despite impressive gains in voting and in the election of minority candidates in the jurisdiction covered by the Act's special provisions, evidence of continued discriminatory practices and tendencies remained, at least in the view of civil rights groups. In anticipation of congressional consideration of the need for another extension of the Act in 1982 (the year in which the special provisions would expire for those jurisdictions covered), the United States Commission on Civil Rights<sup>55</sup> conducted an investigation and issued a report<sup>56</sup> concerning the status of voting rights in the covered jurisdictions. The report noted that while minority registration rates had increased significantly beginning in 1965, they continued to lag behind the registration rates for white voters.<sup>57</sup> The Commission attributed the disparity to discourteous and intimidating attitudes of registration officials, inaccessible registration sites, and the practice of purging registration lists without notice of the need to reregister.<sup>58</sup> The Commission also noted contin-

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the gap between white and black registration rates was slightly higher. In Louisiana, the 1980 registration rates were 76.4% for whites and 61.1% for blacks. In North Carolina, the rates for white and black voters were 71.9% and 55.2% respectively. *Id.*

52. TEN YEARS AFTER, *supra* note 5, at 43. The largest gap in registration rates for whites and blacks prior to adoption of the 1965 Act was in Mississippi, where the pre-Act estimate was a 69.9% registration rate for whites and a 6.7% registration rate for blacks. *Id.*

53. *Id.* at 49. By 1968, there were 156 elected black officials in the seven Southern states originally covered in their entirety. *Id.*

54. UNFULFILLED GOALS, *supra* note 47, at 12; see also *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 2180 (1981) (table) [hereinafter cited as *1981 House Hearings*]. As impressive as the gains have been, the proportion of elected black officials relative to the black population in covered jurisdictions remains relatively low. *Id.* at 2188-89 (table 2.3).

55. The United States Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. See Pub. L. No. 85-315, 71 Stat. 634 (codified as amended at 42 U.S.C. § 1975 (1982)). Among the duties of the Commission are studying and collecting information concerning discrimination, appraising the laws and policies of the federal government, and issuing interim reports to the President and to Congress. *Id.* § 1975(c).

56. UNFULFILLED GOALS, *supra* note 47.

57. *Id.* at 22.

58. *Id.* at 22-28. The report noted that many of the problems of access to the voter registration process may be attributed to the fact that registration traditionally is an urban, business-hour

ued discriminatory practices related to voting.<sup>59</sup> The Commission found evidence that minority voters were inhibited in exercising their right to vote because of the presence of inconvenient, inaccessible, or intimidating polling places; because of inadequate assistance for illiterate voters; because of harassment and intimidation of minority voters at the polls and the absence of minority election workers and officials; and because of the discriminatory use of absentee ballots.<sup>60</sup>

Finally, the Commission concluded that while compliance with the Act's preclearance mandate had increased significantly during the period from 1975 through 1981, the number of objections by the Attorney General to proposed changes in voting procedures and practices was high,<sup>61</sup> and an analysis of the nature of the objections disclosed that most of the proposed changes to which objections were raised would have had a significant adverse impact on minority voters.<sup>62</sup> On the basis of its overall findings, the Commission recommended extension of the special provisions of the Act for an additional ten years.<sup>63</sup>

During the 1970's, one additional voting concern developed that was to have a significant impact on congressional deliberations over the need to extend the special provisions of the Act. The Voting Rights Act had had the effect of eliminating the direct barriers to increased minority voting. Tests and devices as prerequisites to registration and voting

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process. The report asserts that, as of 1977, 44% of the black population in the South lived in non-metropolitan areas, and 39% existed below the poverty level. The registration process is made difficult because many cannot afford transportation to the registration location or because the registration office is closed before they can get there to register. *Id.* at 25.

59. *Id.* at 29.

60. *Id.* at 29-37.

61. *Id.* at 66. The most recent Department of Justice statistics reveal that a total of 39,837 preclearance requests had been processed as of September 30, 1981. *1982 Senate Hearings, supra* note 19, at 1745. The number of objections interposed in response to the submissions was 695 during the same period. *Id.* at 1784.

The Civil Rights Commission report argued that while the number of submissions had increased in recent years, many covered jurisdictions continued to implement changes without first obtaining approval. UNFULFILLED GOALS, *supra* note 47, at 70-73.

62. UNFULFILLED GOALS, *supra* note 47, at 65, 70. In 1980, the last full year for which records are available, 10 of the Attorney General's 39 objections were related to the method of electing local officials; 8 dealt with redistricting; and 7 concerned annexation. *1982 Senate Hearings, supra* note 19, at 1784.

63. UNFULFILLED GOALS, *supra* note 47, at 91. The Commission also recommended extending the minority language provisions for an additional seven years, amending § 2 of the Act to provide for an "effects" or "results" standard of proof, and adding a provision to the Act providing for damages against local officials who fail to comply with the preclearance requirement. *Id.* at 91-93.

had been eliminated in the covered jurisdictions (later, the prohibition on the use of tests and devices had been extended nationwide) and covered jurisdictions had been precluded from implementing new voting practices and procedures without first demonstrating that the proposed changes had no discriminatory purpose or effect. Neither the preclearance mechanism nor the provision suspending tests and devices, however, had had an impact on the use of various electoral systems in effect in covered jurisdictions at the time of the passage of the Act.<sup>64</sup> At the time the Act was adopted, numerous political bodies in the covered jurisdictions were elected through the use of multimember districts.<sup>65</sup> Minorities within covered jurisdictions that employed multimember or at-large methods of electing officials alleged that such systems diluted their collective voting power.<sup>66</sup> Constitutional challenges

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64. The prohibition on the use of tests or devices as prerequisites to registration or voting is limited by the statutory definition of tests or devices. *See supra* note 17; text accompanying note 45. The preclearance requirement applies only when a covered jurisdiction proposes to change an existing registration or voting procedure or to implement new procedures. *See supra* text accompanying notes 18-24.

65. The use of multimember districts in state legislative elections and in the election of local government officials is common in the covered jurisdictions. UNFULFILLED GOALS, *supra* note 47, at 42-58. Nationwide, most municipalities with populations of less than 100,000 use some form of multimember district system. Sanders, *The Government of American Cities: Continuity and Change in Structure*, 1982 MUN. Y.B. 178, 180 (table) (published by the International City Management Association).

66. The dilution phenomenon attendant at-large election has been described as follows: For example, in any town, city, or county, each member of the local governing body can be elected by all the voters (elected at large) or by only the voters of a particular district (elected by single-member district). In a town of 10,000 registered voters with a governing body composed of 10 members, this would mean that all 10,000 voters could cast ballots for all 10 members of the governing body, or that the voters, grouped into 10 districts of approximately 1,000 voters each, would be able to elect one member of the governing body to represent their particular district.

In certain circumstances, the consequences for minority representation of these different voting methods can be significant. If, for example, the town contains a majority of white voters, who consistently refuse to vote for minority candidates (that is, there is racial bloc voting), an at-large election system has the effect of denying minority voters the opportunity to elect a minority to office. In contrast, elections from single-member districts, some of which contain more than 50 percent minority voters, would make minority representation on the governing body much more likely.

UNFULFILLED GOALS, *supra* note 47, at 38. *See generally* Berry & Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA. ST. L. REV. 85, 86 n.10 (1979); Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353 (1976).

The adverse impact of at-large electoral systems is heightened when employed in conjunction with so-called "anti-single-shot" laws, requirements that candidates run for designated slots or ballot places, residence requirements, staggered terms, and majority vote requirements. *See* UNFULFILLED GOALS, *supra* note 47, at 39-40; Comment, *The Standard of Proof in At-Large Dilution Discrimination Cases After City of Mobile v. Bolden*, 10 FORDHAM URB. L.J. 103, 118 (1981).

to the maintenance of multimember districts were widespread,<sup>67</sup> often including allegations that multimember districts violate section 2 of the Voting Rights Act.<sup>68</sup> Prior to 1980, the challengers had achieved modest success,<sup>69</sup> but the 1980 Supreme Court decision in *City of Mobile v. Bolden*<sup>70</sup> seemingly ended any further constitutional or section 2 challenges to the maintenance of multimember electoral systems. The plurality opinion<sup>71</sup> in *Bolden* held that "action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose;"<sup>72</sup> that the fifteenth amendment prohibits "only purposefully discriminatory denial or abridgement . . . of the

67. See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Perkins v. City of W. Helena*, 675 F.2d 201 (5th Cir. 1982); *Washington v. Finlay*, 664 F.2d 913 (4th Cir. 1981); *Leadership Roundtable v. City of Little Rock*, 661 F.2d 701 (8th Cir. 1981) (per curiam); *Aranda v. Van Sickle*, 600 F.2d 1267 (9th Cir. 1979), *cert. denied*, 446 U.S. 951 (1980).

68. See, e.g., *United States v. Uvalde Consol. Indep. School Dist.*, 625 F.2d 547 (5th Cir. 1980); *McIntosh County Branch of the NAACP v. City of Darien*, 605 F.2d 753 (5th Cir. 1980).

69. See, e.g., *Perkins v. City of W. Helena*, 675 F.2d 201 (8th Cir. 1981); *Calderon v. McGee*, 584 F.2d 66 (5th Cir. 1978); *Perry v. City of Opelousas*, 515 F.2d 639 (5th Cir. 1975); *Wallace v. House*, 515 F.2d 619 (5th Cir. 1975); *Ausberry v. City of Monroe*, 456 F. Supp. 460 (W.D. La. 1978).

70. 446 U.S. 55 (1980). For treatments of the *Bolden* decision, see Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standard*, 50 GEO. WASH. L. REV. 689 (1982); Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 729-46 (1982); Note, *City of Mobile v. Bolden: Voter Dilution and New Intent Requirements Under the Fifteenth and Fourteenth Amendments*, 18 HOUS. L. REV. 611 (1981); Comment, *City of Mobile v. Bolden: A Setback in the Fight Against Discrimination*, 47 BROOKLYN L. REV. 169 (1980).

The plaintiffs in *Bolden* alleged that the at-large method of electing city commissioners diluted the voting strength of blacks in violation of the fourteenth and fifteenth amendments and section 2 of the Voting Rights Act of 1965. The district court agreed that the system violated the fourteenth and fifteenth amendments and ordered the city to utilize a mayor-council system wherein council members would be elected from single-member districts. *Bolden v. City of Mobile*, 423 F. Supp. 384 (S.D. Ala. 1976), *aff'd*, 571 F.2d 238 (5th Cir. 1978), *rev'd*, 446 U.S. 55 (1980).

71. Justice Stewart's plurality opinion was joined by Chief Justice Burger and Justices Powell and Rehnquist. Justice Stevens concurred in the result, but rejected the analysis of the plurality opinion. 446 U.S. at 90 (Stevens, J., concurring). Justice Stevens argued that voter dilution claims should be resolved by resort to an analysis of the objective effects of particular methods of electing officials. *Id.* Justice Blackmun also concurred in the reversal of the court of appeals, but on the ground that the remedy imposed was inappropriate under the circumstances. See *id.* at 80-83 (Blackmun, J., concurring). Justice Blackmun, however, was of the view that the factual findings supported the conclusion that the city was guilty of illegal vote dilution. *Id.* at 81. Justices Brennan, White and Marshall dissented. See *id.* at 103 (Brennan, J., dissenting); *id.* (White, J., dissenting); *id.* at 94 (Marshall, J., dissenting).

72. *Id.* at 62.

freedom to vote;<sup>73</sup> that the legislative history of section 2 of the Voting Rights Act “makes [it] clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself;<sup>74</sup> and that the fourteenth amendment equal protection mandate requires that a challenger to a multimember district prove that the district “conceived or operated [a] purposeful devic[e] to further racial . . . discrimination.”<sup>75</sup>

Reaction to the *Bolden* decision was predictable. At a minimum, *Bolden* was described as creating confusion as to the standard of proof necessary to establish a violation of the Constitution and section 2 of the Act.<sup>76</sup> Others, however, condemned the decision as a break with precedent, and, insofar as section 2 was concerned, as incorrectly construing congressional intent.<sup>77</sup>

The constitutional aspects of the *Bolden* decision are, of course, not subject to legislation revision. Congress does not possess the power to legislate a reinterpretation of the elements of a substantive violation of the fourteenth or fifteenth amendments.<sup>78</sup> On the other hand, Congress does have the power, conferred by section 5 of the fourteenth amendment and section 2 of the fifteenth amendment, to enforce the substantive rights of each amendment by “appropriate legislation.”<sup>79</sup> It is well established that his grant of legislative power is not limited to the power merely to legislate against that which is already prohibited by the substantive provisions of each amendment.<sup>80</sup> Moreover, Congress clearly has the power to declare its intent.<sup>81</sup> The aspect of the *Bolden*

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73. *Id.* at 65 (“Having found that Negroes in Mobile ‘register and vote without hindrance,’ the District Court and the Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case.”). Five justices, however, disagreed with the conclusion. *Id.* at 84 n.3 (Stevens, J., concurring); *id.* at 80 (Blackmun, J., concurring); *id.* at 103 (White, J., dissenting); *id.* at 128-29 (Marshall and Brennan, JJ., dissenting).

74. *Id.* at 61. Justices Stevens, Blackmun, and White did not discuss the § 2 issue.

75. *Id.* at 70 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971)).

76. H.R. REP. NO. 227, 97th Cong., 1st Sess. 29 (1981) [hereinafter cited as 1981 HOUSE REPORT].

77. S. REP. NO. 417, 97th Cong., 2d Sess. 17-19 (1982) [hereinafter cited as 1982 SENATE REPORT].

78. See *Katzenbach v. Morgan*, 384 U.S. 643, 651 n.10 (1966); 1982 SENATE REPORT, *supra* note 77, at 41.

79. *Katzenbach v. Morgan*, 384 U.S. 641, 646 n.5 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966).

80. *City of Rome v. United States*, 446 U.S. 156, 177 (1980); *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966).

81. The 1982 amendment to § 2 was for the express purpose of declaring the congressional intent that a violation of the statute could be established by showing the discriminatory effect of

decision that construed congressional intent with respect to section 2 of the original Act to constitute nothing more than a legislative restatement of the fifteenth amendment was, therefore, subject to legislative revision.<sup>82</sup> Congress could declare its intent with respect to section 2 in clear and unambiguous terms, thus negating the *Bolden* decision, subject only to the requirement that the remedial relief provided constitutes "appropriate legislation" to enforce the fifteenth amendment.

*D. Congressional Deliberations on the 1982 Extension: Development of the New Bailout Standard*

Congressional deliberations concerning the need for another extension of the Act in 1982, therefore, were complicated by pressures to respond to (and revise) the *Bolden* decision with respect to section 2 of the Act. A number of bills<sup>83</sup> were introduced in the House of Representatives, including H.R. 3112 by Representative Rodino, that proposed a ten-year extension of the special provisions of the Act (seven years for the minority language assistance provisions) and a modification of section 2 to provide for a "results" standard of proof. Representative Hyde also introduced bills<sup>84</sup> that sought to impose a "results" test under Section 2 and that would have replaced the alternative Justice Department-District of Columbia District Court preclearance requirement with an exclusively judicial preclearance system. Under the Hyde bills, preclearance would have been required, but the only approval mechanism would have been in the District of Columbia courts. Rep-

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the challenged practice. See 1981 HOUSE REPORT, *supra* note 76, at 29; 1982 SENATE REPORT, *supra* note 77, at 2.

82. *McMillan v. Escambia County*, 688 F.2d 960, 961 n.2 (5th Cir. 1982); *Taylor v. Haywood County*, 544 F. Supp. 1122, 1134 (W.D. Tenn. 1982).

83. At the outset of the hearings, the House Judiciary Committee had before it six bills to amend the Act. These bills appear in the *1981 House Hearings*, *supra* note 54, at 70-84, 163-67. Representative Rodino's bill, H.R. 3112 (which ultimately was approved by the House, as amended), proposed an amendment to section 2 which would have caused the section to read as follows:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [of Voting Rights Act of 1965].

See *id.* at 71.

84. *1981 House Hearings*, *supra* note 54, at 72, 163. Representative Hyde originally proposed two bills, H.R. 3198 and H.R. 3473. Later in the course of House deliberations, he introduced a third bill, H.R. 3948. See *id.* at 1856; see also *infra* note 94.



representative Hyde's original proposals were based upon his fear of "summary administrative procedure[s]" and his "deeply held belief that the laws of [the] country should properly be adjudicated in its courts rather than in the offices of its prosecutors."<sup>85</sup>

The House Judiciary Committee commenced hearings on the various bills on May 6, 1981. After seven weeks of hearings at which more than one hundred witnesses testified,<sup>86</sup> the committee reported H.R. 3112, as amended. The vote to report the bill as amended was 23 to 1, with Representative Butler of Virginia casting the only negative vote.<sup>87</sup> Most of the testimony offered in the course of the House hearings concerned the need for an extension of the special provisions of the Act and the need to revise section 2 because of the *Bolden* decision. Little consideration was given to the bailout mechanism until Representatives Hyde and Lungren introduced a bill<sup>88</sup> on June 17 to alter the method by which covered jurisdictions could terminate coverage under the Act's special provisions. Under the then-existing scheme of the Act, as previously described,<sup>89</sup> proposals to extend the special provisions of the Act were, in reality, merely extensions of the time period for which covered jurisdictions were required to prove the absence of the use of a test or device in order to obtain bailout through declaratory judgment proceedings. For most covered jurisdictions, bailout was determined with reference to a fixed calendar date—the required waiting period.<sup>90</sup>

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85. 1981 HOUSE REPORT, *supra* note 76, at 54.

86. 1981 House Hearing, *supra* note 54, at iii-viii.

87. 1982 SENATE REPORT, *supra* note 77, at 3; *see* 1981 HOUSE REPORT, *supra* note 76, at 61-74 (dissenting views of Rep. Butler). The final version of H.R. 3112 approved by the House contained a modification to § 2 imposing an effects or results test and making the preclearance requirement permanent except for those jurisdictions that met the revised bailout standard. The text of H.R. 3112 as approved by the House is contained at 1981 HOUSE REPORT, *supra* note 76, at 48-53.

88. H.R. 3948, contained at 1981 House Hearings, *supra* note 54, at 1845-61, provided that a covered jurisdiction seeking to bailout would have to show

that (1) no such test or device has been used by such State or subdivision during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2); (2) such State or subdivision has during that ten-year period made all the submissions to the Attorney General required under section 5; (3) the Attorney General has not successfully interposed any substantial objection with respect to any such submissions; and (4) such State or subdivision has engaged in constructive efforts designed permanently to involve voters whose right to vote is protected by this section in the electoral process.

*Id.* at 1858-59.

89. *See supra* text accompanying notes 32 & 41-42.

90. *See supra* text accompanying notes 27-28.

The Hyde-Lungren Bill sought a means through which covered jurisdictions could bail out (achieve "rehabilitation") by showing adherence to criteria and guidelines significantly more strict than previously had been required. Under this proposal, the special provisions would have continued indefinitely, but bailout would have been permitted for those covered jurisdictions that had a record of compliance with the Act and those that had made constructive efforts to eradicate discriminatory voting practices which had been permitted to remain in effect under the "grandfather" clauses of the Act.<sup>91</sup> The Hyde-Lungren Bill sought to make bailout "difficult, but not unreasonable," and sought to provide a procedure which would "isolate" those jurisdictions which failed to qualify, thereby providing an additional "therapeutic" incentive through the "disapproving focus" that would be generated throughout the rest of the nation.<sup>92</sup>

The Hyde-Lungren bailout proposal did not meet with outright opposition. The minority staff of the House Subcommittee on Civil and Constitutional Rights, of which Representative Hyde was the ranking minority member, engaged in negotiations with virtually every civil rights group interested in the Act's extension.<sup>93</sup> The sponsors then agreed to modify their proposal in several respects.<sup>94</sup> At the last moment, however, before the full House Judiciary Committee was to meet for a "markup" session on July 31, additional changes were made (some of which later were disowned by the sponsors) and a new bailout mechanism was discussed by the full committee.<sup>95</sup> The same day, the

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91. 1981 HOUSE REPORT, *supra* note 76, at 54 (supplemental views of Reps. Hyde and Lungren).

92. *Id.* at 55. The Hyde-Lungren proposal was not, however, the first congressional attempt to alter the bailout system. In 1975, Senator Scott and Representative Butler introduced legislation to alter the bailout system. Although their efforts were defeated, the amendment offered by Representative Butler closely resembled the scheme proposed by Representatives Hyde and Lungren. For an analysis of Representative Butler's proposal, see O'Rourke, *Voting Rights Act Amendments of 1982: The New Bailout Provision and Virginia*, 69 VA. L. REV. 765, 779-81 (1982).

93. 1981 HOUSE REPORT, *supra* note 76, at 55. Representatives Hyde and Lungren did not identify any parties to the negotiation process other than the Congressional Black Caucus. *Id.*

94. *Id.* at 55-57. Among the changes agreed to by Representatives Hyde and Lungren were: (1) that all bailout suits would be before a three-judge panel of the District Court for the District of Columbia; (2) that the interposition of any objection to a preclearance submission during the preceding ten-year period would bar bailout as would any adverse final judgment that was entered during the ten-year period finding voting rights discrimination; (3) provision for a ten-year probationary period; (4) the addition of language further defining the constructive efforts required; and (5) extension of the present bailout standard until 1984. *Id.*

95. *Id.* at 56; *see also id.* at 62 (dissenting views of Rep. Butler).

full committee reported H.R. 3112, as amended to include a revision of section 2 and to incorporate a new bailout mechanism based in part on the Hyde-Lungren proposal. Representative Butler's version of the events leading to the amended bailout provision recited that the new language was introduced less than one hour prior to the committee vote and that the only members of the committee aware of the content of the amended bailout provision were those members privy to the closed door session in which the bailout amendment was "negotiated."<sup>96</sup> According to Representative Butler, neither the sponsors of the proposal nor the staff had analyzed the impact of the provision, and the full committee had had no opportunity to examine the bailout amendment or object to its content.<sup>97</sup>

Despite the allegedly flawed committee process leading to the bailout amendment, the committee voted to report the Bill, as amended, by a 23 to 1 margin, with Representative Hyde voting in favor of the legislation despite his reservations concerning the constitutionality of the bailout amendment and his opinion that the revised language made bailout impossible as a practical matter.<sup>98</sup> The full House approved the Bill by a vote of 389 to 24 on October 5, 1981.<sup>99</sup>

Action in the Senate began on January 27, 1982, when the Subcommittee on the Constitution of the Senate Judiciary Committee commenced hearings on five bills relating to the Voting Rights Act which had been introduced and referred to the subcommittee, including S. 1992 (introduced by Senators Mathias and Kennedy), identical to the legislation approved by the House in October, 1981.<sup>100</sup> The subcommittee held nine days of hearings, and on March 24 met to consider S. 1992. By a 3 to 2 vote, it approved amendments to S. 1992 which had the effect of transforming the Bill into a straight ten-year extension of the Act.<sup>101</sup> The subcommittee also rejected the new bailout mechanism

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96. *Id.* at 62.

97. *Id.*

98. *Id.* at 57 (supplemental views of Reps. Hyde and Lungren).

99. 1982 SENATE REPORT, *supra* note 77, at 3.

100. The various Senate Bills, S. 53 (introduced by Senator Hayakawa), S. 1761 (introduced by Senator Cochran), S. 1975 (introduced by Senator Grassley) and S. 1992 (introduced by Senator Mathias and Senator Kennedy) may be found at *1982 Senate Hearings, supra* note 19, at 28-49. S. 1992 was cosponsored by 63 Senators. 1982 SENATE REPORT, *supra* note 77, at 3.

101. *See* 1982 SENATE REPORT, *supra* note 77, at 107-87. The Senate Subcommittee on the Constitution was critical of the House Judiciary Committee hearings, alleging that the House gave no opportunity for individuals opposed to changes in the Act to testify. *Id.* at 125. The full Senate Judiciary Committee subsequently approved S. 1992, as amended, by a 5-0 vote. *Id.* at 3.

and nullified the House action which had added a "results" test under section 2.

On May 4, 1982, the full Senate Judiciary Committee agreed to an amendment in the nature of a substitute for the subcommittee Bill offered by Senator Dole for himself and the sponsors of the original S. 1992.<sup>102</sup> The substitute amendment offered by Senator Dole reinstated most of the original text of S. 1992, including the new bailout provisions adopted by the House, and offered clarifying language concerning the "results" test of section 2.<sup>103</sup> The Judiciary Committee rejected a number of amendments to the Dole Bill offered by Senator East and ordered the bill favorably reported by a vote of 17 to 1.<sup>104</sup> The full Senate approved the House version of the bill after amending its language to contain the text of the Senate Bill, as amended.<sup>105</sup> The full House approved the Senate changes on June 23, 1982, and on June 29, 1982, President Reagan signed the legislation.<sup>106</sup>

### *E. Summary of the New Bailout Provisions*

Although the amendments to section 2 to produce a "results" test constituted the most controversial aspect of the 1982 amendments to the Act, as judged by the congressional deliberative process, the adoption of a new bailout system for the special provisions of the Act may, in the long run, generate even more controversy. Under the new provisions,<sup>107</sup> a covered jurisdiction, including a political subdivision within a state covered in its entirety, may terminate coverage if it can carry the burden of proving in a declaratory judgment action brought before a three-judge panel of the District of Columbia District Court that it and each governmental unit within its geographic territory, for the ten-year period prior to filing the petition: (1) no test or device has been used with a discriminatory purpose or effect; (2) no federal court has issued a final judgment declaring that the jurisdiction denied or abridged voting

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102. 1982 SENATE REPORT, *supra* note 77, at 3-4. The Dole proposal was also cosponsored by Senators DeConcini, Grassley, Metzenbaum, Biden, and Simpson.

103. The Dole proposal inserted subparagraph (b) of the final version of the Act, and introduced the twenty-five year time limit on the duration of the Act that is contained at 42 U.S.C. § 1973b(a)(1)(8) (1982).

104. 1982 SENATE REPORT, *supra* note 75, at 4.

105. 128 CONG. REC. S7139 (daily ed. June 18, 1982).

106. *Id.* at H3840-41 (daily ed. June 23, 1982); *see supra* text accompanying notes 1-3.

107. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131 (codified at 42 U.S.C. § 1973b(a)(1)-(9) (1982)).

rights; (3) the jurisdiction has not entered into any consent decrees, settlements or agreements which have resulted in abandonment of a challenged voting procedure; (4) no action is then pending at the time the bailout suit is filed alleging that denials or abridgments of the right to vote have occurred anywhere in the jurisdiction; (5) neither the Attorney General nor a court has assigned federal examiners or observers to the covered jurisdiction; (6) the covered jurisdiction has complied with all the preclearance provisions of section 5 and has not enforced non-submitted changes; (7) the Attorney General has made no objection to any submission for preclearance, other than those objections overturned by a court; (8) no court has denied a declaratory judgment action under section 5 with respect to a submission of a voting change; and (9) no submission to the Attorney General or declaratory judgment actions under section 5 are pending. Moreover, the jurisdiction seeking to terminate coverage must demonstrate that it and each governmental unit within its geographic territory have taken positive and constructive steps to end voting discrimination by (1) eliminating voting procedures and methods of election that inhibit or dilute equal access to the electoral process; (2) engaging in efforts to eliminate intimidation and harassment of persons exercising rights protected under the Act; and (3) engaging in other constructive efforts, such as expanded opportunity for convenient registration and voting and the appointment of minority persons as election officials.<sup>108</sup>

Under the bailout mechanism as it existed under the Act prior to 1982, a jurisdiction subject to the Act's special provisions knew of a certain date at which time its obligations would terminate.<sup>109</sup> While compliance with the Act's special provisions was required, there was no special incentive for a covered jurisdiction to compile an enviable record of compliance with the letter and spirit of the Act; conversely, a covered jurisdiction was subject to no special penalty that would prolong coverage in the event that compliance with the special provisions was less than complete.<sup>110</sup> Representative Hyde, who first proposed modification of the bailout mechanism, sought to end the arbitrary na-

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108. *Id.* § 1973b(a)(4)(f).

109. *See supra* text accompanying notes 27-28.

110. The sole criterion for bailout was compliance with the § 4 mandate suspending the right

ture of length of coverage by providing a method through which covered jurisdictions with good track records could disassociate themselves from those jurisdictions with a less than total commitment to nondiscriminatory voting practices and procedures.<sup>111</sup> Representative Hyde sought a bailout mechanism that was strict, but reasonably achievable; the final version, in his opinion, made bailout highly unlikely as a practical matter, thereby creating "severe constitutional repercussions."<sup>112</sup>

Since bailout is now possible for each political subdivision (as statutorily defined) within a covered jurisdiction regardless of the status of the covered parent state, it is likely that litigation concerning the new bailout criteria will be voluminous. The bailout criteria themselves are vague, and judicial interpretation will be necessary to clarify standards. The remainder of this Article will be devoted to a critical examination of the new bailout criteria, including an examination of the legislative history. Before proceeding to an analysis of the new bailout provisions, it would be instructive to consider briefly the bailout system as it existed prior to 1982, including the judicial interpretation given to section 4(a) of the Act that made bailout for most covered jurisdictions dependent almost entirely on the mere passage of time.

## II. PRE-1982 BAILOUT

The special provisions of the Voting Rights Act of 1965, as the earlier discussion noted,<sup>113</sup> were designed, in theory, to last indefinitely; no expiration date was provided. In practical effect, however, a covered jurisdiction could terminate coverage with reasonable certainty by means of a declaratory judgment action brought upon the expiration of five years (later amended to ten and then seventeen years) from the date it became subject to the special provisions. The test for bailout was whether the covered jurisdictions had refrained from using a test or device with discriminatory purpose or effect for the applicable statutory period.<sup>114</sup> Since the right to impose tests and devices as a prerequisite to registration or voting was suspended on the date of coverage,

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to employ tests or devices as prerequisites to registration or voting. *See* 26 U.S.C. § 1973b(a) (1976) (amended 1982).

111. 1981 HOUSE REPORT, *supra* note 76, at 54-55 (supplemental views of Reps. Hyde and Lungren).

112. *Id.* at 57.

113. *See supra* text accompanying notes 27-28.

114. *See supra* text accompanying note 27.

by definition,<sup>115</sup> the state (assuming that it complied with the suspension mandate) would prevail in the declaratory judgment action simply by waiting the required number of years before filing the bailout petition.

Bailout prior to the expiration of the applicable maximum waiting period as determined from the date of coverage was possible, and several jurisdictions successfully obtained early termination of their obligations under the Act.<sup>116</sup> These jurisdictions successfully demonstrated that their tests and devices in effect prior to the date of coverage had not been administered with a discriminatory purpose or effect for the required statutory period; in each case where bailout was permitted prior to the expiration of the applicable maximum statutory waiting period as determined from the date of coverage, no objection to bailout was made by the Department of Justice.<sup>117</sup>

For most jurisdictions, however, including the southern states and localities originally targeted for coverage, early bailout was made virtually impossible because of the interpretation given section 4(a) of the Act in *Gaston County v. United States*.<sup>118</sup> Gaston County was one of forty political subdivisions in North Carolina originally covered in March, 1966.<sup>119</sup> It sought to terminate coverage by a declaratory judgment action filed on August 18, 1966, in the District of Columbia District Court. Gaston County's suit was the first bailout action which went to trial, although four other jurisdictions earlier had obtained bailout when their motions for summary judgment were granted with the consent of the Attorney General.<sup>120</sup>

The legislative history of section 4(a) is sparse with respect to the standard which Congress intended the federal courts to apply. In *South Carolina v. Katzenbach*,<sup>121</sup> however, the case which had upheld the major features of the Act's special provisions, the Supreme Court had referred to the bailout mechanism. According to *Katzenbach*, the bailout mechanism did not involve the imposition of an impossible burden of

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115. See *supra* text accompanying note 17.

116. Between 1965 and 1980, there were nine successful bailout actions. See TEN YEARS AFTER, *supra* note 5, at 14-15; UNFULFILLED GOALS, *supra* note 47, at 6 n.27.

117. See O'Rourke, *supra* note 92, at 774-75.

118. 395 U.S. 285 (1969).

119. *Id.* at 287.

120. *Gaston County v. United States*, 288 F. Supp. 678, 679-80 (D.D.C. 1968) *aff'd*, 395 U.S. 285 (1969).

121. 383 U.S. 301 (1966).

proof.<sup>122</sup> The Court referred to the testimony of the Attorney General during hearings on the Act, who had stated that a covered jurisdiction needed to do no more than (1) submit affidavits from voting officials asserting that it has not been guilty of racial discrimination through the use of tests or devices for the past five years; and (2) refute other evidence to the contrary that may be adduced by the government.<sup>123</sup>

Both the state code and constitution of North Carolina in effect at the time of the passage of the Act contained a requirement that "[e]very person presenting himself for registration shall be able to read and write any section of the Constitution [of North Carolina] in the English language."<sup>124</sup> The Attorney General concluded that the requirement was a test or device within the meaning of section 4(c) of the Act, and that since fewer than 50 percent of the persons of voting age residing in Gaston County had voted in the 1964 presidential election, the county was designated as a covered jurisdiction subject to the Act's special provisions.<sup>125</sup> Whether Gaston County would bail out successfully, therefore, was dependent on its ability to show that the literacy test had not been administered with a discriminatory purpose or effect for the five years preceding the filing of the action, or from August 16, 1961. Gaston County presented evidence to show its impartial implementation of the literacy test during this period, including evidence of the appointment of minority deputy registrars.<sup>126</sup> The Attorney General presented evidence to refute the claims of Gaston County, including evidence tending to show that the test had been administered "for the purpose" of abridging the right to vote on account of race or color.<sup>127</sup>

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122. *Id.* at 332.

123. *Id.*; see *Voting Rights: Hearings on S. 156 Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 26-27 (1965) [hereinafter cited as *1965 Senate Hearings*]; *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 92-93 (1965) [hereinafter cited as *1965 House Hearings*].

124. 395 U.S. at 287 n.3 (quoting N.C. CONST. art. VI, § 4); see also N.C. GEN. STAT. § 163-58 (1982).

125. *Id.* at 287.

126. 288 F. Supp. at 678, 682-83. The county presented evidence showing that in 1962, the number of voting precincts had been increased for the convenience of voters, that registration books had been kept open for substantial periods and registrars had been encouraged to be available at any reasonable hour, and that the registration process had received substantial publicity, including efforts directed specifically to the black community. Additionally, there was no evidence presented that any registrar had denied registration on racial grounds, nor was there any evidence of complaints from black citizens that they had been denied the right to vote. *Id.*

127. *Id.* at 683-84. For example, the government presented evidence that voting officials had waived the literacy test requirement for a number of white voters. Although the waiver policy was



The district court, however, found it unnecessary to determine whether purposeful discrimination existed in Gaston County during the period; instead, the district court concluded that the test was used in the county “with the effect” of abridging the right to vote on account of race.<sup>128</sup> The district court reached this position based on its subsidiary findings that during the entire period when persons then of voting age had been of school age, the schools in Gaston County had been segregated; that the separate educational facilities for blacks had been of appreciably inferior quality; and that equal educational opportunities therefore had been denied to blacks as a matter of both law and fact in Gaston County.<sup>129</sup> The district court concluded that the imposition of any literary test on blacks as a precondition to voting—let alone one which had a “relatively high” standard—must necessarily have had the “effect of abridging the right to vote on account of race” in Gaston County.<sup>130</sup>

The Supreme Court affirmed, holding that the district court properly had concluded that under section 4(a) “it is appropriate for a court to consider whether a literacy or educational requirement has the ‘effect of denying . . . the right to vote on account of race or color,’” because the covered jurisdiction had maintained separate and inferior schools for its black residents presently of voting age.<sup>131</sup> The Supreme Court interpreted the district court decision as based upon the specific finding that the covered jurisdictions not only maintained a system that was segregated, but also one that deprived blacks of equal educational opportunities (and thus an equal chance to pass the literacy test).<sup>132</sup> Under the *Gaston County* holding, covered jurisdictions with dual educational systems during the applicable period apparently still could obtain bailout by showing that the system had had no “appreciable discriminatory effect” on the ability of blacks to meet the literacy requirement.<sup>133</sup>

Both the district court and the Supreme Court in *Gaston County* justified this interpretation of section 4(a) on the basis of the Act’s legisla-

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not asserted as a discriminatory practice in itself, the government argued that since the waiver policy was not made public, black voters were led to believe that they would be required to pass the literacy test. *Id.*

128. *Id.* at 684.

129. *Id.* at 686-88.

130. *Id.* at 688-89.

131. 395 U.S. at 285, 293 (quoting § 4(a) of the Act).

132. *Id.* at 291.

133. *Id.*

tive history. While the relevant legislative history does not deal directly with the appropriate method of interpreting the bailout provision, it is clear that Congress was aware of the potential effect of unequal educational opportunities upon the right to vote, and that it sought to impose a system that would take into account the inequalities that would follow if states were permitted to continue to use literacy tests, even those fairly administered, in jurisdictions where disparate levels of educational achievement resulted from segregated school systems.<sup>134</sup>

Despite the Supreme Court's declaration in *Gaston County* that the mere existence of a segregated system of schools during the period when the voting age population was educated would not, per se, bar bailout, conditions in the other covered jurisdictions in the south were such that early bailout did not appear to be probable. This view was confirmed by the District of Columbia District Court's 1975 decision in *Virginia v. United States*,<sup>135</sup> the only other reported bailout suit.

In 1973, Virginia sought early bailout following the adoption of the 1970 amendments, which had extended from five to ten years the statutory period for which a covered jurisdiction had to show the absence of the use of a test or device with a discriminatory purpose or effect in order to terminate coverage. Prior to the adoption of the Act, the state had utilized a literacy test that was suspended when Virginia became covered in 1965.<sup>136</sup> Because the state was required to show the absence of a discriminatory test or device for a ten-year period prior to filing suit, it was required to prove that the literacy test used from 1963 to 1965 (when the test was suspended) had not been administered with a discriminatory purpose or effect. The State submitted survey data from voting registrars during the period indicating that the test had not been administered in a discriminatory fashion, thus presenting prima facie

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134. *1965 Senate Hearings*, *supra* note 123, at 22 (testimony of Attorney General Katzenbach). *See also* S. REP. NO. 162, 89th Cong., 1st Sess. pt. 3, 16 (1965) [hereinafter cited as 1965 SENATE REPORT].

135. 386 F. Supp. 1319 (D.D.C. 1974) (per curiam), *aff'd*, 420 U.S. 901 (1975).

136. Virginia was among the jurisdictions originally targeted for coverage by the 1965 coverage formula. *See supra* note 16. The required administrative determinations were made in August 7, 1965. 386 F. Supp. at 1320.

Until 1971, the Virginia Constitution contained a provision (the operation of which was suspended at the time Virginia was covered) requiring that a person wishing to register to vote "make application to register in his own handwriting, without aid, suggestion, or memorandum." *Id.* at 1320 (quoting VA. CONST. § 20 (1902, repealed 1971)).

evidence of lack of discrimination.<sup>137</sup> The district court rejected the state's contention on the basis of the same factors utilized in *Gaston County*. The state was shown to have engaged in de jure segregation of public schools until 1954, and its compliance with the Supreme Court's desegregation decisions was found to have been "grudging at best."<sup>138</sup> Evidence was presented by the Attorney General concerning the inferior status of and meager support given to black students and teachers in the segregated system, and the generally lower educational achievement rates for blacks in Virginia.<sup>139</sup> Finally, the state was unable to demonstrate that its dual educational system had had no appreciable discriminatory effect on the ability of blacks educated under such a system to meet the literacy test requirement.<sup>140</sup>

The effect of *Gaston County*, therefore, was to freeze the status quo for the vast majority of covered jurisdictions originally targeted for coverage by the Act's special provisions. While an early bailout mechanism was provided by the Act, in practice a covered jurisdiction was required to wait for a specified number of years (first five, then ten, and finally seventeen years) from the date of coverage before termination of coverage was possible. Under one view, the bailout mechanism as construed in *Gaston County* constituted a cruel hoax. Early bailout was possible in theory, but impossible in fact for most covered jurisdictions—those that had maintained segregated educational systems. Such a view of the bailout process, however, ignores the intent of Congress when it designed the statutory scheme that included the Act's special provisions.

The Supreme Court in *South Carolina v. Katzenbach*<sup>141</sup> stated that the Act's special provisions were designed to be operable in those jurisdictions where there was presented to the Congress reliable and overwhelming evidence of actual discrimination in voting.<sup>142</sup> Rather than deal directly with those jurisdictions, Congress instead adopted a formula that identified jurisdictions for coverage by resort to two characteristics thought to be shared in common by those jurisdictions with a history of voting discrimination—the use of tests and devices and low

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137. *Id.* at 1325.

138. *Id.* at 1323.

139. *Id.* at 1323-24.

140. *Id.* at 1325-26.

141. 383 U.S. 307 (1966).

142. *Id.* at 329.

voter turnout. It is true, of course, as the Supreme Court in *Katzenbach* recognized, that the use of a formula creates a risk of both underinclusion and overinclusion.<sup>143</sup> Jurisdictions guilty of discrimination in voting might escape coverage while jurisdictions not guilty might be included. The first problem was dismissed by the Court as irrelevant because the Act was designed to deal with discrimination in voting by the misuse of tests and devices. While discrimination was possible by other means, Congress was not required to deal with all phases of the problem in the same way or at the same time.<sup>144</sup> With respect to the second objection—that of overbreadth—Congress provided a special termination process (early bailout) for jurisdictions covered by the formula that had not used tests and devices with a discriminatory purpose or effect for a specified period (initially five years) prior to the adoption of the Act.<sup>145</sup> According to the *Katzenbach* Court, the bailout standard was predicated on the assumption that if voting discrimination, intentional or effective, had not occurred within the preceding five years, there was no need to apply the Act's special provisions (the suspension of the right to use tests and devices and the preclearance mandate).<sup>146</sup> The key to the bailout mechanism was, obviously, congressional insistence that the burden of proof on the issue whether the tests or devices were used with a discriminatory purpose or effect rest with the covered jurisdiction. If the objection to the *Gaston County* decision was that early bailout was made impossible for most of the jurisdictions originally covered, such impossibility was the direct result of the selection of an "effects" standard of proof by Congress and the congressional mandate that the jurisdiction seeking early termination of coverage carry the burden of proof.

The entire scheme of the original Voting Rights Act, including the bailout process, was arbitrary in the sense that unique remedies and limited standards for coverage were imposed.<sup>147</sup> Early bailout was made possible for those jurisdictions caught by the coverage formula for which effective discrimination in voting either was not present or was the result of factors other than the use of tests and devices. It was not the bailout standard which was unfair (if unfairness inhered in any

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143. *Id.* at 330-31.

144. *Id.* at 331.

145. *Id.*

146. *Id.*

147. *See supra* text accompanying notes 14-25.

aspect of the Act); it was, instead, the coverage formula, and the congressional desire to eradicate voting discrimination produced by the use of tests and devices (as opposed to other means of discrimination) that arguably was unfair or unwise. Once Congress had targeted the use of tests and devices as the primary evil, and had imposed an effects standard of proof for early bailout the burden of which had been placed on the coverage jurisdiction, the result reached in *Gaston County* necessarily followed.

This is not to say that Congress was unable to select an alternative method of exempting covered jurisdictions from the Act's special provisions. Clearly, the early bailout standard did not necessarily follow from the coverage formula and the remedial measures imposed. Congress might well have utilized a test for early bailout other than one which, effectively, was tied to the mere passage of time. Congress might well have made termination subject to some affirmative sign of a change in attitude or of tangible and positive steps taken to eradicate the remaining vestiges of discrimination in voting. It must be recalled that the original scheme of the Act both suspended the right to use tests and devices and required preclearance for new or different voting practices and procedures in the covered jurisdictions. Under the original version of the Act, termination of coverage would return the right to use tests and devices as well as eliminate the preclearance mandate.<sup>148</sup> Beginning in 1970, the prohibition on the use of test and devices was made national in scope, and in 1975, this prohibition became permanent;<sup>149</sup> thus, after 1970, bailout no longer would restore the right of covered jurisdictions to use tests and devices as a prerequisite to registration and voting. After 1970, the emphasis of the Act as concerns the provisions applicable to the covered jurisdictions had shifted to the preclearance requirement; there was no longer any concern that termination of coverage would result in a new round of voting discrimination through the misuse of test and devices. Accordingly, a new bailout standard—one which placed greater emphasis on compliance with the preclearance mandate and the remaining features of the Act rather than one which focused on the prior misuse of test and devices and the fear of further abuse once the right to use them was restored—was warranted. Moreover, linking bailout to the mere passage of time, while arguably appropriate when the waiting period was five and ten years,

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148. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 438 (amended 1970).

149. See *supra* text accompanying notes 34 & 43.

became indefensible and unduly arbitrary once the waiting period had reached seventeen years and the debate was over whether to extend it for ten more years or even longer. Finally, the original bailout mechanism made no provision for local political subdivisions within a state covered in its entirety to seek termination of coverage independently of the state.<sup>150</sup> While this policy may have been desirable initially, it also may have had the effect of providing little incentive for compliance at the local level. Some method of providing such incentive was thus desirable.

Representative Hyde's desire to construct a wholly new bailout standard was, therefore, both appropriate and overdue. The focus of voting rights concerns had changed since the adoption of the Act; a whole new generation of black voters had emerged as a result of the Act's initial remedial measures. Congress responded to the new environment and changing concerns with the adoption of the 1982 amendments, including the new standard for bailout. The remainder of this Article will be devoted to a critical examination of the new bailout standard.

### III. THE REVISED BAILOUT STANDARD: PROCEDURAL REQUIREMENTS

#### A. *General Background*

It is clear that the changes made in the bailout mechanism by the 1982 amendments are tied closely to the substantive changes made in section 2 of the Act; that is, while a change in the bailout mechanism was appropriate for its own sake, it is unlikely that it would have occurred absent the pressure generated by the *Bolden* decision<sup>151</sup> and the specific problem of allegedly discriminatory electoral systems that were unaffected by the 1965 Act. The original Act, it must be recalled, was limited in impact in the following respects. First, section 2 of the Act, of general, nationwide applicability, prohibited the abridgment of the right to vote on account of race or color.<sup>152</sup> Second, section 2 was interpreted by *Bolden* as co-extensive with the reach of the fifteenth amendment, which in turn was interpreted in *Bolden* as requiring proof that a challenged voting practice was conceived or maintained with a discrim-

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150. See *City of Rome v. United States*, 446 U.S. 156, 167-69 (1980).

151. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

152. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (amended 1975); see *supra* note 9.

inatory purpose or intent.<sup>153</sup> Third, the Act's special provisions were limited in geographic scope to areas designated for coverage by the coverage formulas,<sup>154</sup> and in such covered jurisdictions the Act merely (1) suspended the use of tests and devices (specifically defined) as prerequisites to registration and voting,<sup>155</sup> and (2) required preclearance of any new or different voting practice or procedure under a purpose or effects standard of proof.<sup>156</sup>

In the opinion of many civil rights proponents, a large loophole existed in the Act. No jurisdiction, even one subject to the Act's special provisions, was required to change or eliminate existing voting practices or procedures, other than those practices which constituted a test or device, as defined by the Act, or which violated section 2. While it was true that changes in voting practices and procedures in covered jurisdictions were subject to the preclearance mandate with its attendant stringent purpose or effects standard of proof, unless the covered jurisdiction sought to change its system or unless the system violated section 2 (and, a fortiori, the fifteenth amendment), the practices were immune from challenge even though they might have a patently discriminatory impact or effect. Litigation aimed at eliminating such practices and procedures (whether under the fourteenth and fifteenth amendments or under section 2 of the Act), while burdensome since case-by-case adjudications were required, did achieve limited success,<sup>157</sup> at least until the *Bolden* decision. One of the major problems with the Act, therefore, at least in the view of some, was that it had the effect of freezing electoral systems in the covered jurisdictions as they existed in 1965. These systems, it was argued, often had a discriminatory effect on minority voters.

Congress had several options it could have pursued if it had believed that certain voting practices, such as the maintenance of at-large methods of electing officials, constituted an impediment to the achievement of truly nondiscriminatory electoral systems. It might have simply prohibited the use of at-large systems, whether nationwide or in the covered jurisdictions, just as it did with various electoral practices in

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153. See *supra* notes 71-75 and accompanying text.

154. See *supra* text accompanying notes 16, 33 & 46.

155. See *supra* text accompanying note 17.

156. See *supra* text accompanying notes 18-24.

157. See cases cited *supra* note 69.

the nature of tests and devices as defined by the Act.<sup>158</sup> Alternatively, it might have amended section 2 of the Act to provide that existing electoral practices and procedures would be judged by a purpose or effect standard. The latter proposal, however, would suffer from the same defect which was present in earlier legislative attempts to deal with voting discrimination—the need for case-by-case adjudication.<sup>159</sup> Finally, Congress might have sought an entirely new method of dealing with the problem, one which provided an enticing incentive for jurisdiction with at-large systems to abandon voluntarily their continued use. It was Representative Henry Hyde who first proposed a new approach to bailout, one that would permit covered jurisdictions to terminate coverage upon showing a genuine record of nondiscrimination. Although Representative Hyde was dismayed by the bailout standard finally adopted, it was he who first introduced the idea that the Act should allow for a “good conduct ribbon” for those jurisdictions that had “cleaned up their act,”<sup>160</sup> and should provide some “incentives for jurisdictions to continue to respect the constitutional right to vote by all of our citizens.”<sup>161</sup> Although the new bailout standard is not free from ambiguity, the most reasonable interpretation of the new system will include a requirement that covered jurisdictions have voluntarily abandoned electoral systems, such as multimember districts, that have discriminatory effects.<sup>162</sup> While section 2 has been amended to prohibit

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158. The Supreme Court's decision in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), recognized that Congress intentionally chose to limit the impact of the Act to those jurisdictions where there was evidence of discrimination through the use of tests and devices, as statutorily defined. When passing on the constitutionality of the Act, the Court noted that it was irrelevant that the coverage formula excluded jurisdictions not employing tests and devices, but for which there was evidence of voting discrimination by other means. *Id.* at 330-31.

159. One of the principal objectives of the Act was to eliminate the need for case-by-case adjudication of voting discrimination claims. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). See also 1965 SENATE REPORT, *supra* note 123, at pt. 3, 6-9; 1965 HOUSE REPORT, *supra* note 8, at 9-11.

Prior to the 1980 decision in *City of Rome v. United States*, 446 U.S. 156 (1980), there was some doubt whether Congress possessed the legislative power under § 2 of the fifteenth amendment to prohibit electoral practices having only discriminatory effects. *City of Rome*, however, held that under § 2, Congress may prohibit practices that in and of themselves do not violate § 1 of the amendment (that is, practices which do not constitute purposeful discrimination), and at least in certain cases, may prohibit practices that are discriminatory only in their effect. *Id.* at 173-76.

160. 1981 House Hearings, *supra* note 54, at 1822.

161. *Id.* Representative Hyde recognized, however, that the incentive aspects of the revised bailout system were highly theoretical. *Id.*

162. The new bailout system includes a provision that requires covered jurisdictions to eliminate “voting procedures and methods of election which inhibit or dilute equal access to the electro-



the maintenance of electoral systems having a discriminatory impact or effect, the burden of proof of showing a violation of section 2 still rests with the party challenging the system.<sup>163</sup> It is likely, therefore, that some or even most challenges to multimember districts will fail. Bailout, on the other hand, requires the covered jurisdiction to carry the burden of proof on all issues,<sup>164</sup> including the requirement that it has eliminated all voting procedures and methods of election that inhibit or dilute equal access to the electoral process. Thus, it can be seen that the bailout criteria are inextricably linked to congressional efforts to eliminate the loophole that existed under the original version of the Act, whereby covered jurisdictions were permitted to maintain electoral practices in effect in 1965 which had a discriminatory effect on minority voters.

The criteria for termination of coverage under the 1982 amendments, however, include more than the requirement that the covered jurisdictions abandon electoral systems thought to dilute minority participation in the electoral process. There are numerous additional requirements that must be met, most of which relate to the covered jurisdiction's record of compliance with the Act's special provisions. Because the new bailout mechanism will place a new and heavy burden on the Department of Justice, the effective date of the new bailout process has been deferred until August 6, 1984, in order to allow the Department to develop standards and regulations for the new system.<sup>165</sup>

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ral process." Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(4)(F)(i), 96 Stat. 131 (codified at 42 U.S.C. § 1973b(a)(4)(F)(i) (1982)). See *infra* text accompanying notes 294-321.

The Senate Judiciary Committee described the purpose of this requirement as follows:

In determining whether procedures or methods inhibit or dilute equal access to the electoral process the standard to be used is the results tests. . . . In other words, the test would be the same as that for a challenge brought under Section 2 . . . as amended . . . except that the burden of proof would be on the jurisdiction seeking to bail out.

1982 SENATE REPORT, *supra* note 77, at 54.

163. See, e.g., *United States v. Dallas County Comm'n*, 548 F. Supp. 875, 915 (S.D. Ala. 1982).

164. There is no explicit burden of proof allocation in the 1982 amendments. The Supreme Court, however, when construing the original bailout provision, allocated the burden of proof to the covered jurisdiction. See *South Carolina v. Katzenbach*, 383 U.S. 301, 332 (1966). The Senate Judiciary Committee Report strongly supports this interpretation of the 1982 amendments. See 1982 SENATE REPORT, *supra* note 77, at 56, 69; 1981 HOUSE REPORT, *supra* note 76, at 39; see also *infra* text accompanying notes 181-83.

165. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b), 96 Stat. 131.

According to the Senate Judiciary Committee, the delay "is essential for the Department of Justice to prepare for the heavy load of litigation under the new standards" and "will permit the Department, the covered jurisdictions, and local civil rights groups to review the law and to pre-

Prior to the effective date of the new bailout mechanism, the previous bailout criteria remain in effect; that is, the Act was amended to extend from seventeen to nineteen years the period of time a covered jurisdiction is required to show that no test or device has been used with a discriminatory purpose or effect.<sup>166</sup>

## *B. Procedural and Evidentiary Requirements*

### *1. Venue*

Bailout under the 1982 amendments continues to be a process requiring judicial approval through the declaratory judgment process. Moreover, Congress has retained the provision in the original Act that jurisdiction to hear bailout suits is limited to a three-judge panel of the District Court for the District of Columbia.<sup>167</sup> The bailout provision originally proposed by Representatives Hyde and Lungren would have permitted any "appropriate" federal district court to hear bailout requests.<sup>168</sup> Although Representatives Hyde and Lungren later agreed to an amendment to limit jurisdiction to the District of Columbia District Court,<sup>169</sup> the retention of the limited venue requirement drew substantial opposition from other members of Congress.

The justification for the limited venue provision in the 1982 amendments was identical to that advanced in 1965 when limited venue was provided for both bailout and the judicial aspect of preclearance: the desirability of the development of judicial expertise to hear and resolve the complex issues presented under the Act and the need for uniform interpretation of the Act's provisions.<sup>170</sup> It was the opinion of the Senate Judiciary Committee that the justifications for the retention of the limited venue provision were even more compelling under the 1982 amendments since the new bailout criteria are more complex than they

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pare for proceedings." 1982 SENATE REPORT, *supra* note 77, at 59; *see also* 1981 HOUSE REPORT, *supra* note 76, at 39.

166. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(a), 96 Stat. 131 (codified at 42 U.S.C. § 1973b(a) (1982)).

167. 42 U.S.C. § 1973b(a) (1976).

168. The original proposal of Representatives Hyde and Lungren to modify the bailout system, H.R. 3948, may be found at 1981 *House Hearings*, *supra* note 54, at 1856-61.

169. *See* 1981 HOUSE REPORT, *supra* note 76, at 55 (supplemental views of Reps. Hyde and Lungren).

170. *See* 1982 SENATE REPORT, *supra* note 77, at 58-59; 1981 HOUSE REPORT, *supra* note 76, at 36. In *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966), the Supreme Court upheld the constitutionality of the original version of the Act limiting jurisdiction to hear bailout requests to a single court in the District of Columbia.

were under the bailout mechanism of the original Act.<sup>171</sup> Finally, the Senate Judiciary Committee noted the historic problem in voting rights litigation when relief was sought in “local district courts.” The Committee’s report recognizes that while the difficulty in obtaining relief may have abated somewhat in recent years, the problem still exists.<sup>172</sup>

The criticisms of the limited venue provision were familiar. Senator East described the provision as “an abuse of that power that is contrary to the basic principles of justice.”<sup>173</sup> Both Senator East and Representative Butler objected to the added costs associated with limited venue: the added expense and impracticability of bringing witnesses from the locality to Washington to testify and the need to retain Washington counsel who would be familiar with litigation in the District of Columbia.<sup>174</sup> Both also condemned the implicit conclusion that Congress could not trust the local district courts to enforce the Act fairly.<sup>175</sup>

Congressman Butler, however, identified two additional major problems with the limited venue provision that may prove troublesome and which were not present under the original bailout mechanism. First, he correctly noted that the new bailout standard will require numerous and explicit findings of fact that will be made more difficult by vesting jurisdiction in a court far removed from the unique circumstances which may have shaped the electoral affairs of the jurisdiction seeking bailout.<sup>176</sup> Bailout under the original Act was relatively simple and the findings of fact required were not especially complex.<sup>177</sup> The bailout criteria under the 1982 amendments, as will be demonstrated later,<sup>178</sup> are dependent upon findings of fact with respect to some highly ambiguous standards. The second problem identified by Con-

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171. 1982 SENATE REPORT, *supra* note 77, at 58.

172. *Id.* The Committee identified the Mississippi reapportionment litigation that lasted 14 years as an example of a case where local federal courts were reluctant to provide appropriate relief. *Id.* at 58-59. The procedural history of this extraordinary case is contained in *Connor v. Finch*, 431 U.S. 407, 411-13 (1977).

173. 1982 SENATE REPORT, *supra* note 77, at 220 (minority views of Sen. East).

174. *Id.*; 1981 HOUSE REPORT, *supra* note 76, at 66-67 (dissenting view of Rep. Butler).

175. 1982 SENATE REPORT, *supra* note 77, at 220 (minority views of Sen. East); 1981 HOUSE REPORT, *supra* note 76, at 66-67 (dissenting views of Rep. Butler).

176. *See* 1981 HOUSE REPORT, *supra* note 76, at 66 (dissenting views of Rep. Butler).

177. The bailout standard under the 1975 version of the Act was whether the covered jurisdiction had used a test or device during the preceding seventeen years. *See supra* text accompanying note 42.

178. *See infra* notes 214-344 and accompanying text.

gressman Butler<sup>179</sup> could prove even more troublesome. Under the original Act, political subdivisions within states covered in their entirety could not bail out independently of the state. This limitation was removed by the 1982 amendments.<sup>180</sup> At least until the new bailout criteria are interpreted by the courts and more specific standards are set by judicial interpretation, large numbers of bailout suits are likely to be filed. A single court may lack the capacity to hear the cases within a reasonable period of time. As a result, a significant backlog of cases may develop, thus frustrating the intent of Congress to permit localities with good records of compliance to obtain early termination.

## 2. *Burden of Proof*

In addition to the retention of limited venue for bailout suits, Congress has retained the requirement that a jurisdiction seeking bailout carry the burden of proving that the criteria for bailout have been met.<sup>181</sup> Recall that the *Gaston County* decision under the Act's original bailout standard turned largely on the inability of the jurisdictions to establish that segregated school systems did not have an "appreciable discriminatory effect" on the ability of black voters to meet literacy requirements.<sup>182</sup> The locus of the burden of proof, therefore, played an important role under the original Act in making bailout difficult, if not impossible, for most covered jurisdictions.

The new bailout mechanism, which involves more numerous and ambiguous standards, undoubtedly will make bailout more difficult because of the requirement that the covered jurisdiction carry the burden of proof. The Senate Judiciary Committee's report, moreover, made it clear that this burden must be met by objective and factual evidence and cannot be satisfied by mere "assertions and conclusory declarations."<sup>183</sup>

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179. 1981 HOUSE REPORT, *supra* note 76, at 67 (dissenting views of Rep. Butler).

180. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(2), 96 Stat. 131 (codified at 42 U.S.C. § 1973b(a)(2) (1982)); *see also infra* text accompanying notes 197-213.

181. *See supra* note 164.

182. 395 U.S. 285 (1969); *see supra* text accompanying note 133.

183. 1982 SENATE REPORT, *supra* note 77, at 56. The Senate Judiciary Committee asserted that "protestations of good faith administration of voting procedures, or declarations that local practices are nondiscriminatory would not, standing alone, be enough to meet the jurisdiction's burden of proof." *Id.* at n.187.

### 3. Evidentiary Requirements

The locus of the burden of proof is not the only procedural proof problem presented by the 1982 amendments. The covered jurisdiction seeking to bail out is required to present evidence of minority participation in the electoral process to aid the court in determining whether to grant the bailout request.<sup>184</sup> The evidence that must be presented by the covered jurisdiction includes data on the levels of minority group registration and voting, changes in such levels over time, and disparities between minority group and non-minority group participation.<sup>185</sup> The House Judiciary Committee Report asserted that evidence of participation levels should include election results because such results are often “sound indicators” of whether minorities have a fair opportunity in the elective process.<sup>186</sup>

While this requirement is stated in terms of an evidentiary burden rather than a bailout criterion, both the House and Senate Judiciary Committee Reports suggested that evidence of low minority participation in the voting process should preclude bailout.<sup>187</sup> The Senate Committee Report stated that a “low level of [minority] participation is central to the formula that triggers section 5 coverage” and that such evidence “is one reliable indicator of whether section 5 is still needed.”<sup>188</sup> The House Judiciary Committee Report stated that it would be “anomalous to terminate coverage where continued depressed levels of minority participation show that voting discrimination is still a problem.”<sup>189</sup> This reading of the statute—that evidence of low minority participation in the electoral process, standing alone, will bar bailout—appears to be contrary to the statutory framework of the 1982 amendments. This evidentiary burden is prefaced by the statement that the information is needed “[t]o assist the court in determining whether to issue a declaratory judgment,”<sup>190</sup> and what is required is evidence of minority participation both on absolute levels and in comparison with participation levels for non-minority voters. The statutory

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184. Voting Right Act Amendments of 1982, Pub. L. No. 97-205, § 2(a)(2), 96 Stat. 132 (codified at 42 U.S.C. § 1973b(a)(2) (1982)).

185. *Id.*

186. 1981 HOUSE REPORT, *supra* note 76, at 44.

187. *See* 1982 SENATE REPORT, *supra* note 77, at 55; 1981 HOUSE REPORT, *supra* note 76, at 44.

188. *See* 1982 SENATE REPORT, *supra* note 77, at 55.

189. 1981 HOUSE REPORT, *supra* note 76, at 44.

190. 42 U.S.C. § 1973b(a)(2) (1982) (emphasis added).

language does not state or even imply that low or disparate levels of participation, standing alone, will preclude bailout, and the Senate Judiciary Report acknowledged that the bailout requirements do not mandate a specific level of minority participation.<sup>191</sup> As will be demonstrated in the next section dealing with the substantive bailout criteria, one bailout requirement mandates that covered jurisdictions make constructive efforts to increase minority participation in the electoral process.<sup>192</sup> While it is clear that some evidence of the efficacy of such efforts would be relevant, even this specific requirement does not provide that low or disparate levels of participation will preclude bailout.

#### 4. *Publicity and Intervention*

The final procedural requirement of the bailout process is the mandate that a state or political subdivision seeking to bail out publicize the intended commencement of its declaratory judgment action in the media serving such state or political subdivision and in appropriate United States post offices.<sup>193</sup> In addition, similar publicity must be given in the event of any proposed settlement.<sup>194</sup> Finally, the 1982 amendments provide that any "aggrieved party" may intervene at any stage in the declaratory judgment action.<sup>195</sup> The House Judiciary Committee Report states that an aggrieved party should be construed to include "any person who would have standing under law."<sup>196</sup>

#### C. *Local Bailout and the "All or Nothing" Requirement*

One of the most significant changes made by the 1982 amendments is the authorization for political subdivisions to obtain bailout even though the state as a whole is covered by the Act's special provisions and is not eligible for bailout.<sup>197</sup> The new bailout mechanism, in this respect, is a consequence not only of a change in the philosophy of

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191. 1982 SENATE REPORT, *supra* note 77, at 56.

192. *See infra* text accompanying notes 336-44.

193. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(2), 96 Stat. 132-33 (codified at 42 U.S.C. § 1973b(a)(1) (1982)).

194. *Id.*

195. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(9), 96 Stat. 133 (codified at 42 U.S.C. § 1973b(a)(9) (1982)).

196. 1981 HOUSE REPORT, *supra* note 76, at 45.

197. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b), 96 Stat. 131 (codified at 42 U.S.C. § 1973b(a)(1) (1982)).

bailout, as evidenced by the new criteria, but also of the method by which Congress constructed the coverage formula and of the judicial interpretation given the Act's special provisions, including the preclearance mandate.

Recall that the coverage formula of section 4 conceived by Congress for the Act's special provisions permitted coverage on two levels. If a state as a whole met the coverage formula, coverage was statewide;<sup>198</sup> in the event the state as a whole was not covered, political subdivisions within the state could be independently covered.<sup>199</sup> The term "political subdivision" was defined in section 14(c)(2)<sup>200</sup> to include "any county or parish except 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."

The coverage formula, therefore, in a sense was limited in scope (only states or political subdivisions, as specifically defined, could be covered), but it did result in the coverage of numerous political subdivisions in states not otherwise subject to the Act's special provisions.<sup>201</sup> Bailout under section 4(a) of the Act was linked to the coverage formula; that is, bailout suits could be brought only by a state if the state was covered in its entirety, or by a political subdivision, as defined in section 14(c)(2), if the political subdivision was one for which coverage determination was made as a separate unit.<sup>202</sup> The legislative history of section 4 is unambiguous in the sense that bailout was to be limited with reference to the coverage formula; political subdivisions within a state covered in its entirety could not obtain bailout even though when considered as a separate unit it might have met the bailout standard, nor could any other political unit of government within a covered jurisdiction, state, or political subdivision, obtain bailout independently of the covered jurisdiction.<sup>203</sup>

While section 4 and the legislative history may have been unambigu-

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198. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; *see also supra* note 15.

199. *Id.*

200. Voting Rights Act of 1965, Pub. L. No. 89-110, § 14, 79 Stat. 445 (codified as amended at 42 U.S.C. § 1973(c)(2) (1982)).

201. *See supra* notes 16, 33 & 34.

202. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 438 (codified as amended at 42 U.S.C. § 1973b(a)(1) (1982)); *see City of Rome v. United States*, 446 U.S. 156, 162-69 (1980).

203. *See* 1965 SENATE REPORT, *supra* note 154, at 3, 16; 1965 HOUSE REPORT, *supra* note 8, at 14. The House Report stated:

This opportunity to obtain exemption is afforded only to those States or to those subdivisions as to which the [coverage] formula has been determined to apply as a separate unit;

ous, judicial interpretations of other features of the Act complicated the bailout process and undoubtedly contributed to the shape of the bailout mechanism as modified by the 1982 amendments. In what may have constituted the most significant case interpreting the Act, *United States v. Board of Commissioners*,<sup>204</sup> the Supreme Court held that for purposes of the section 5 preclearance mandate, which requires preclearance by any covered "state" or "political subdivision," the terms "state" or "political subdivision" were intended in a "territorial" or "geographic" sense;<sup>205</sup> any political unit of government within a covered state or political subdivision that possessed the authority to change a "voting practice or procedure" was required to preclear proposed changes. Thus, the term "state" or "political subdivision" under the Act was defined differently depending on the section of the Act being construed. For purposes of both coverage and bailout, the term "political subdivision" meant any county or parish except when registration and voting were conducted by independent cities. If a political subdivision, as so defined, was covered because the entire state was covered, separate bailout was not permitted; if, however, the political subdivision was one for which independent coverage had been mandated, then it could obtain bailout on its own. For purposes of section 5 preclearance, on the other hand, the terms "state" or "political subdivision" included any political unit of government within a covered state or independently covered political subdivision which possessed the authority to promulgate (and proposed to do so) any new "voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting."

While this construction of the Act may have strained credulity<sup>206</sup> and

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subdivisions within a State which is covered by the formula are not afforded the opportunity for separate exemption.

*Id.*

204. 435 U.S. 110 (1978).

205. *Id.* at 120, 126. Sheffield, Alabama, a city that did not conduct voter registration, was therefore required to obtain preclearance of changes in its registration and voting practices and procedures because it was geographically within the state of Alabama, a covered State. *Id.* at 124-29. See also *Board of Educ. v. White*, 439 U.S. 32, 43-47 (1978) (holding that independent school board within covered state was required to obtain preclearance of rule requiring its employees to take unpaid leave-of-absence when running for public office).

206. See *City of Rome v. United States*, 446 U.S. 156, 198 (1980) (Powell, J., dissenting) ("The court thus construes the identical words in § 4(a) to have one meaning in one situation and a wholly different sense when applied in another context. Such a protean construction reduces the statute to irrationality.").



led to the anomalous result that a political unit of government had to comply with section 5 but could not obtain bailout even though, standing alone, it met the bailout criteria, the consequences under the original bailout mechanism were consistent with congressional intent. Under the new bailout mechanism, the situation is entirely different. Congress specifically has authorized bailout by a "political subdivision" (as defined for coverage purposes) within a state covered in its entirety (as the political subdivision existed on the date such determinations were made with respect to the state)<sup>207</sup> even though no separate coverage determinations were made with respect to such subdivision "as a separate unit." The bailout criteria, however, provide with respect to several requirements that not only must the jurisdiction seeking termination of coverage meet the criteria, but "all governmental units within its territory" likewise must have met the requirements.<sup>208</sup> One of the bailout requirements is that the covered jurisdiction (and all governmental units within) have complied with the section 5 preclearance mandate.<sup>209</sup>

This facet of the new bailout mechanism appropriately might be labeled an "all or nothing" approach. In order for a state to terminate coverage, for example, it would have to demonstrate that it and each governmental unit within it had satisfied all bailout requirements. The failure of any governmental unit within a state to meet the requirements, such as the timely submission for preclearance of a proposed change in voting practices and procedures, would preclude the state from bailing out. This linkage undoubtedly will contribute to a multiplicity of bailout suits by political subdivisions, because the failure of even one local government to meet the criteria will bar the entire state

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207. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(2), 96 Stat. 131 (codified at 42 U.S.C. § 1973b(a)(1) (1982)).

208. *See, e.g.*, Voting Rights Act of 1965, Pub. L. No. 97-205, § 2(b)(4)(F), 96 Stat. 132 (codified at 42 U.S.C. § 1973b(a)(1)(F) (1982)).

209. *Id.* at § 2(b)(4)(D), 96 Stat. 132 (1965) (codified at 42 U.S.C. § 1973b(a)(1)(D) (1982)).

The Senate Judiciary Committee asserted that, despite this all or nothing approach to bailout, fully 25% of the political subdivisions within the seven southern states covered in their entirety by the 1965 coverage formula will be able to bail out beginning in 1984. *See* 1982 SENATE REPORT, *supra* note 77, at 60. The 25% figure was obtained from information supplied by the Joint Center for Political Studies. *See* 1982 Senate Hearings, *supra* note 19, at 823-28, 830-32, 1664, 1827-44. For an analysis of the projections, see O'Rourke, *supra* note 92, at 791 n.130.

Assistant Attorney General Reynolds testified, however, that according to Department of Justice assessments, "very few, if any, jurisdictions . . . would be able to bail out . . . for a considerable period of time." 1982 Senate Hearings, *supra* note 19, at 1707.

*qua* state, but will not necessarily bar bailout by all other political subdivisions within a state. Should a political subdivision attempt to bail out, it also would have to assume responsibility for all governmental units within its territory.<sup>210</sup>

The theory of "all or nothing" bailout is, of course, that the "greater" jurisdiction has responsibility for the conduct of the "lesser" units within. In the case of state government, such a theory may be justified. State governments do have significant statutory and practical control over the activities of local governments,<sup>211</sup> and historically have been treated as the units of government responsible for protecting the right to vote.<sup>212</sup> Thus, conditioning bailout for an entire state on activity at the local level is arguably both theoretically sound and practically justified. Very little consideration, however, appears to have been given to the "all or nothing" approach to bailout for political subdivisions.<sup>213</sup> While the state properly may be held accountable for the activities of its local governmental units, it is quite another matter for the Act to require a county government seeking bailout to assume responsibility for the activities of, for example, an independent school board within its geographic (but not political) territory. This aspect of bailout undoubtedly will contribute to the view that while the bailout rules have been liberalized in theory (by extending bailout to political subdivisions within a state covered in its entirety), the conditions for termination of coverage have been made so restrictive that bailout will continue to be impossible for most jurisdictions.

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210. 42 U.S.C. § 1973b(a)(1)(D) (1976).

211. The Senate Judiciary Committee noted that except for South Carolina and Texas, the covered states do not have "home rule," in the sense that counties are empowered to perform legislative functions concerning their activities. Even in those states with some form of "home rule," the interaction between state laws and local laws is complex and the activities of local governments often are preempted by state law or authorized by state legislative action. 1982 SENATE REPORT, *supra* note 77, at 57.

212. *Id.* at 56-57. The Senate Judiciary Committee asserted that the fifteenth amendment places on the states the responsibility of protecting voting rights, and that the states have broad power to determine the conditions under which the right of suffrage may be exercised. *Id.*

213. Neither the House nor the Senate Judiciary Committee report addresses the rationale for subjecting political subdivisions to the all or nothing approach. The House report simply asserts that "because jurisdictions may bail out together, the committee believes that they should all satisfy the bailout requirements." 1981 HOUSE REPORT, *supra* note 76, at 41.

#### IV. THE REVISED BAILOUT STANDARD: SUBSTANTIVE REQUIREMENTS

The substantive requirements for bailout can be divided into two separate categories. One set of requirements is designed to monitor compliance with the specific mandates of the Act for the ten-year period preceding the filing of the bailout suit (hereinafter the “specific compliance component”). The second set of criteria is more general and is designed to require covered jurisdictions to take affirmative steps beyond those otherwise mandated by the Act to eliminate the last vestiges of voting discrimination (hereinafter the “affirmative action component”).

##### *A. The Specific Compliance Component*

The specific compliance component of the Act that must be demonstrated for a ten-year period prior to the filing of the suit for bailout contains three separate elements. First, the jurisdiction (including all governmental units within) must show that it has not lost in voting rights litigation; that it has not entered into certain kinds of consent decrees, settlements or agreements; and that it has no actions pending against it for voting rights violations. Second, it must show that no federal examiners have been sent into the jurisdiction by the Attorney General pursuant to the authority conferred by section 6 of the Act. Third, it must show that it and all governmental units within its territory have complied with the preclearance requirements of the Act.

##### *1. Final Judgments, Consent Decrees, Settlements, and Pending Litigation*

Under the original bailout mechanism, in addition to the requirement that the covered jurisdiction show that it had used no test or device for the requisite time period, a state or political subdivision was prohibited from bailing out if a final judgment had been entered against it in which it was found to have denied or abridged the right to vote on account of race or color through the use of tests or devices (or in the case of jurisdictions covered by the 1972 coverage formula because of language minority provisions, that no final judgment had been entered against it in which it was found to have acted contrary to the specific minority language requirements).<sup>214</sup> The “no final judgment”

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214. 42 U.S.C. § 1973b(a) (1976) (amended 1982).

aspect of the bailout test has been retained in the 1982 amendments, but the nature of the final judgment that will bar bailout has been changed. Any judgment of discrimination in voting will bar bailout, regardless of the nature of the discrimination;<sup>215</sup> there is no longer a requirement that the discrimination be through the use of a test or device. According to the Senate Judiciary Committee, this requirement was added because of the belief that the judgment constitutes persuasive evidence that the covered jurisdiction has not "abided by the principles" upon which the Act was grounded and has not acted in "good faith."<sup>216</sup> In testimony given before the Senate Judiciary Committee, it was noted that as of August, 1984 (the effective date of the new bailout standard), at least seventeen jurisdictions will be precluded from bailout solely as a result of this requirement.<sup>217</sup> For purposes of this requirement, "final judgment" means a final decision of any court; interlocutory judgments or orders are not included, but a final decision of a district court will constitute a "final judgment" even though an appeal might be pending.<sup>218</sup>

The "consent decree" ban also is new. Under this provision, bailout will be denied if the jurisdiction has entered into a "consent decree, settlement, or agreement . . . resulting in any abandonment of a voting practice" challenged on the grounds that it abridged or denied the right to vote on account of race or color or in contravention of the special language minority provisions.<sup>219</sup>

The "no consent decree" requirement engendered substantial opposition and is likely to cause numerous interpretative problems. Some members of Congress argued that to bar bailout solely because the jurisdiction has entered into a consent decree will encourage prolonged litigation and discourage public officials from resolving disputed voting practices through voluntary conciliation.<sup>220</sup> Recall, however, that a consent decree will bar bailout only when it includes the abandonment

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215. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(4)(B), 96 Stat. 131 (codified at 42 U.S.C. § 1973b(a)(1)(B) (1982)).

216. 1982 SENATE REPORT, *supra* note 77, at 50.

217. 1982 Senate Hearings, *supra* note 19, at 1704 (statement of Assistant Attorney General Reynolds). The Assistant Attorney General added, however, that he did not consider the provision to impose an "onerous requirement." *Id.*

218. 1982 SENATE REPORT, *supra* note 77, at 70.

219. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(4)(B), 96 Stat. 131 (codified at 42 U.S.C. § 1973b(a)(1)(B) (1982)).

220. 1982 SENATE REPORT, *supra* note 77, at 161-62; 1981 HOUSE REPORT, *supra* note 76, at 67 (dissenting views of Rep. Butler).

of the challenged practice. Construed literally, the limitation would cover even a slight modification in the challenged practice negotiated through the consent decree process since the practice would be “abandoned,” albeit in the form of a new, slightly modified, practice. A more reasonable interpretation of the term would be that the jurisdiction must have agreed to abandon the “essence” or “fundamental principle” of the challenged practice.

The justification for inclusion of the requirement is set out in the Senate Judiciary Committee Report. The committee noted that it is unlikely that a covered jurisdiction would agree to a major change in its electoral system simply to avoid the nuisance of a suit unless the practice was thought to be vulnerable to a legal challenge.<sup>221</sup> If the practice is legally vulnerable—subject to challenge under section 2 of the Act, for instance—it is difficult to argue that a settlement which results in its abandonment in principle or in its fundamental aspects should be treated differently from a final judgment finding the practice to be discriminatory. An amendment on the House floor to limit the consent decree prohibition to those decrees that the bailout court found to have involved a practice reflecting underlying discrimination was defeated because it was thought to be impracticable.<sup>222</sup>

The new provision, however, covers more than consent decrees resulting in the abandonment of a voting practice. Also included are “settlements” or “agreements” to abandon practices “challenged” on the specified grounds. As Representative Butler argued in his minority report, it is unclear whether this prohibition refers only to “agreements” or “settlements” reached between litigants in a formal judicial proceeding, and whether the word “challenged” constitutes an operative limitation.<sup>223</sup> Would a citizen’s oral complaint voiced to local government officials objecting to the location of a polling place constitute the type of challenge that would bar bailout if the officials agreed to change the location in response to the complaint, even though the citizen might not have articulated specifically the view that the practice constituted “discrimination” on the basis of race or color or was in violation of the language minority provisions of the Act? On the one hand, a broad interpretation of these terms simply will fuel further the

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221. 1982 SENATE REPORT, *supra* note 77, at 50; *see also* 1981 HOUSE REPORT, *supra* note 76, at 40 (“traditionally consent decrees are treated as the functional equivalent of final judgments”).

222. 1982 SENATE REPORT, *supra* note 77, at 51.

223. 1981 HOUSE REPORT, *supra* note 76, at 67 (dissenting views of Rep. Butler).

argument that the provision discourages settlement and is thus contrary to public policy. A broad interpretation will preclude bailout when a challenged practice has been ended by agreement prior to institution of litigation, and not just when such a practice has been withdrawn before the expense of trial. Moreover, a broad interpretation will present difficult problems of proof, especially when it is recalled that the covered jurisdiction must show the absence of proscribed action for a ten-year period and must carry the burden of proof on all issues. On the other hand, to limit interpretation of the provision to formal settlements of judicial proceedings of record might frustrate congressional intent by allowing bailout to turn on the seemingly irrelevant fact whether the complainant first sought informal relief or, instead, filed suit or a complaint with the Department of Justice before opening discussions regarding possible settlement. The most reasonable interpretation of the provision, therefore, would be that bailout would be precluded by the abandonment of a voting practice or procedure when the jurisdiction is unable to show by a preponderance of the evidence that the abandonment of a voting practice or procedure did not occur because (1) some citizen or organization had made a reasonably specific objection to the voting practice or procedure later abandoned; (2) which objection was based on the ground that the practice or procedure was discriminatory on the basis of race or color or on the ground that it was in contravention of the Act's special language minority provisions; (3) which objection was communicated to officials responsible for the practice or procedure; and (4) which objection or complaint was proximately related in time to the abandonment of the practice or procedure.

The final requirement of this element of the specific compliance component is perhaps the most controversial. Bailout is precluded during the "pendency of an action commenced before the filing of an action [for bailout] . . . alleging such denials or abridgments of the right to vote."<sup>224</sup> The House Judiciary Committee Report argued that the "interests of judicial economy dictate that pending suits alleging denials of voting rights be adjudicated before bailout is permitted."<sup>225</sup> The Senate Judiciary Committee Report states that a pending suit raises "substantial questions" about whether a jurisdiction is in full compliance, and since the purpose of bailout is to permit covered jurisdictions

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224. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(4)(B), 96 Stat. 132 (codified at 42 U.S.C. § 1973b(a)(1)(B) (1982)).

225. 1981 HOUSE REPORT, *supra* note 76, at 40.

with a “clean slate” and “history of compliance” to exempt themselves from coverage, to allow bailout when it might be found soon thereafter that the jurisdiction was guilty of discrimination would be unacceptable.<sup>226</sup>

There are both interpretive and practical problems with this requirement. The provision was amended on the House floor to make it clear that complaints filed after the bailout suit has commenced will not count as pending suits for purposes of preventing bailout.<sup>227</sup> It is unclear, however, whether the prohibition covers suits filed prior to the bailout suit and which are still pending on appeal. Presumably, an action will be interpreted as pending until such time as final judgment has been entered and all appeals have been exhausted or the time for appeal of a final judgment has passed. This interpretation is supported indirectly by the statement in the Senate Judiciary Committee Report that existing expeditious methods of dealing with appeals will negate the potential for substantial delay.<sup>228</sup>

The potential for delay of the bailout determination during the pendency of a suit alleging discrimination is significant, unless (as proponents of the provision argued) existing procedural devices ensure prompt disposition of frivolous or insubstantial complaints and appeals. The Senate Judiciary Committee expressed the view that provisions for the assessment of costs, including attorneys’ fees, against parties filing frivolous complaints constitute a substantial safeguard, and that the procedural devices of summary dismissal, summary judgment, and expedited appeals confer additional protection against abuses.<sup>229</sup>

## 2. *Federal Examiners*

The second major aspect of the specific compliance component requires the covered jurisdiction to show that for the ten-year period preceding the bailout suit “no federal examiners under [the] Act have been

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226. 1982 SENATE REPORT, *supra* note 77, at 51. According to the Senate Judiciary Committee, the risk of allowing a jurisdiction to bail out when it may be found soon thereafter to have discriminated outweighs the “mere delay” in obtaining the bailout judgment. *Id.*

227. 127 CONG. REC. H6939, H6945 (daily ed. Oct. 5, 1981) (amendment offered by Rep. Edwards).

228. 1982 SENATE REPORT, *supra* note 77, at 51 n.178. Representative Butler also interpreted the provision as barring bailout during the pendency of an appeal. 1981 HOUSE REPORT, *supra* note 76, at 68 (dissenting views of Rep. Butler).

229. 1982 SENATE REPORT, *supra* note 77, at 51 n.178.

assigned" to the jurisdiction.<sup>230</sup> Section 6 of the Act, which is one of the special provisions applicable only to covered jurisdictions, permits the appointment of federal examiners upon the certification of the Attorney General.<sup>231</sup> The Attorney General may authorize the appointment of examiners upon receipt of twenty "meritorious" written complaints from citizens in the covered jurisdiction claiming that their right to vote has been denied or abridged on account of race or color or contrary to the Act's language minority provisions, or if the Attorney General believes the examiners are necessary to enforce the guarantees of the fourteenth or fifteenth amendment.<sup>232</sup> The duties of federal examiners include interviewing and listing people eligible to vote and being available during an election and within forty-eight hours after the polls close to receive complaints that qualified voters have been denied the right to vote.<sup>233</sup>

In connection with the designation of a covered jurisdiction for the appointment of federal examiners, the Attorney General may also appoint federal observers.<sup>234</sup> Federal observers, who traditionally work with attorneys from the Department of Justice, are assigned to polling places for the purpose of observing whether persons entitled to vote are being permitted to vote and whether the votes cast are being properly counted.<sup>235</sup> The designation of a jurisdiction for the appointment of federal examiners under section 6, therefore, can be both for the purpose of conducting registration and for the purpose of establishing a federal presence (in the person of the examiner as well as the observer) to monitor the conduct of an election and to receive complaints.

In recent years, the Department of Justice has made very few designations for the purpose of listing eligible voters. From the adoption of the Act through December 31, 1981, 110 counties (some of which also are included in the count for the appointment of federal observers) were designated for the appointment of examiners for the purpose of listing eligible voters or receiving complaints, but most such designa-

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230. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(4)(C), 96 Stat. 131 (codified at 42 U.S.C. § 1973b(a)(1)(C) (1982)).

231. Voting Rights Act of 1965, Pub. L. No. 89-110, § 6, 79 Stat. 439 (codified as amended at 42 U.S.C. § 1973d (1976)). The selection and appointment of examiners is handled by the Office of Personnel Management. *Id.*

232. *Id.*

233. *Id.*; see also UNFULFILLED GOALS, *supra* note 47, at 9.

234. 42 U.S.C. § 1973f (1982).

235. UNFULFILLED GOALS, *supra* note 47, at 9-10.



tions occurred prior to 1975.<sup>236</sup> The designation for the purpose of appointing federal observers, on the other hand, continues to be regularly employed. From 1975 through 1980, 74 political subdivisions were designated for the appointment of federal examiners as precursors for the appointment of federal observers.<sup>237</sup>

There are, therefore, substantial numbers of political subdivisions that have been designated by the Attorney General for the appointment of federal examiners. Once a jurisdiction has been listed, the designation continues until such time as the Attorney General or the District Court for the District of Columbia in a declaratory judgment action determines that more than fifty percent of the nonwhite persons of voting age are registered to vote; that all persons listed for registration by federal examiners have been placed on the registration rolls; and that there is no longer any reason to believe that persons will be deprived of their right to vote on account of race or color or in contravention of the Act's minority language guarantees.<sup>238</sup>

Objection to the "no federal examiners" requirement was based primarily upon the argument that the Attorney General's decision to designate a jurisdiction for examiners is not subject to judicial review.<sup>239</sup> According to Senator East, a future Attorney General might designate examiners merely to prevent a covered jurisdiction from escaping the Act's special provisions through the bailout process.<sup>240</sup> While it is true that the Attorney General's decision to designate an area for the appointment of examiners is a purely administrative action not subject to judicial review, the Act did set standards for the appointment.<sup>241</sup> The Supreme Court upheld the provision in *South Carolina v. Katzenbach*, finding that the statute protected against arbitrary use of the appointment process.<sup>242</sup> Moreover, in connection with the designation of a jurisdiction for the appointment of examiners for the purpose of sending

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236. 1982 Senate Hearings, *supra* note 19, at 1806-08 (attachment K to statement of Assistant Attorney General Reynolds). There have been only 35 such designations since 1975, and 11 of these were in the state of Texas, which was not covered in its entirety until 1975. *Id.*

237. See UNFULFILLED GOALS, *supra* note 47, at 10; see also 1982 Senate Hearings, *supra* note 19, at 1806-17 (attachment K to statement of Assistant Attorney General Reynolds).

238. 42 U.S.C. § 1973k (1982).

239. 42 U.S.C. § 1973d makes no provision for judicial review, and the sole method of terminating the designation is through the declaratory judgment proceeding provided in 42 U.S.C. § 1973k. See 1982 SENATE REPORT, *supra* note 77, at 162.

240. 1982 SENATE REPORT, *supra* note 77, at 215 (minority views of Sen. East).

241. See *supra* text accompanying note 232.

242. 383 U.S. 301, 336-37 (1966).

in federal observers,<sup>243</sup> the Attorney General has established internal guidelines which, in the opinion of the Senate Judiciary Committee, protect a covered jurisdiction against unjustified designation.<sup>244</sup> Both the House and Senate Judiciary Committees concluded that the appointment of federal examiners constitutes strong evidence of continuing voting rights violations, thus justifying the denial of bailout, and that there has been no past abuse of the process by the Attorney General.<sup>245</sup>

### 3. Section 5 Compliance

The final element of the specific compliance component is perhaps the most controversial of all the new bailout requirements. Under the 1982 amendments, the covered jurisdiction must demonstrate that for the preceding ten-year period it and all governmental units within its territory have complied with section 5 of the Act, including the requirements that no changes in voting practices or procedures have been enforced without preclearance and that all such proposed changes to which objection ultimately was made have been repealed.<sup>246</sup> Moreover, the covered jurisdiction must show that no submissions were made during the period to which objection successfully was made by the Attorney General, or, in the event preclearance was sought through the declaratory judgment process, that no declaratory judgment was denied during the period.<sup>247</sup> Finally, bailout is precluded during the period in which the covered jurisdiction is seeking preclearance of a change.<sup>248</sup>

With the adoption of the nationwide ban on the use of tests and devices under the 1970 amendments to the Act,<sup>249</sup> the section 5 preclearance requirement became the primary feature of the Act's spe-

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243. Assistant Attorney General Reynolds was not certain whether the designation of a covered jurisdiction for the appointment of examiners as the statutory precursor for the appointment of federal observers would bar bailout. *1982 Senate Hearings, supra* note 19, at 1704-05.

244. 1982 SENATE REPORT, *supra* note 77, at 52 n.180; *see also* UNFULFILLED GOALS, *supra* note 47, at 9-10.

245. 1982 SENATE REPORT, *supra* note 77, at 52; 1981 HOUSE REPORT, *supra* note 76, at 40.

246. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(4)(D), 96 Stat. 132 (codified at 42 U.S.C. § 1973b(a)(1)(D) (1982)).

247. *Id.* § 2(b)(4)(E), 96 Stat. 132 (codified at 42 U.S.C. § 1973b(a)(1)(E) (1982)).

248. *Id.*

249. *See supra* note 34 and accompanying text. The nationwide ban on the use of tests and devices, imposed on a temporary basis in 1970, was made permanent in 1975. *See supra* note 43 and accompanying text.

cial provisions applicable to the covered jurisdictions. When extensions of the Act were considered in 1970 and 1975, substantial evidence of noncompliance with section 5 was presented to Congress, and this evidence constituted a major justification for the first two extensions of the Act.<sup>250</sup> While the evidence presented during consideration of the 1982 amendments demonstrated that compliance had improved, in the sense that the number of submissions of proposed changes had increased dramatically since 1975, additional evidence was presented that a number of covered jurisdictions had continued to defy the Act either by failing to submit proposed changes or by implementing changes to which objections had been made by the Attorney General.<sup>251</sup> Moreover, the number of objections made by the Attorney General since 1975 had been in excess of 500, including numerous recent objections to such fundamental concerns as statewide reapportionment and annexations.<sup>252</sup> Since the primary benefit to be gained by bailout is the elimination of the preclearance mandate, it is understandable that a past track record of compliance with section 5 would be deemed relevant to the question whether continued coverage is necessary and appropriate. The inquiry into section 5 compliance, moreover, logically would include both the record of timely submissions of proposed changes as well as the record of action taken in response to such submissions by the Attorney General (or the District of Columbia District Court, if preclearance were sought through the declaratory judgment process).

Under the new bailout standard, a covered jurisdiction and all governmental units within must demonstrate a ten-year record of having enforced no changes in voting practices and procedures without preclearance. The Senate Judiciary Committee concluded that the efficacy of section 5 depends almost entirely on voluntary and timely submissions of proposed changes by the covered jurisdictions.<sup>253</sup> The Department of Justice has no independent mechanism to monitor section 5 compliance.<sup>254</sup> Although voluntary compliance since 1975 ap-

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250. 1975 SENATE REPORT, *supra* note 40, at 15-20; 1970 HOUSE REPORT, *supra* note 30, at 9.

251. See 1982 SENATE REPORT, *supra* note 77, at 47-48. See generally 1982 Senate Hearings, *supra* note 19, at 374-89 (statement of Laughlin McDonald); *id.* at 611-18 (statement of Steve Suits); *id.* at 1258-69 (statement of Julius L. Chambers); *id.* at 1365-80 (testimony of Drew S. Days).

252. 1981 HOUSE REPORT, *supra* note 76, at 11-12 (table).

253. 1982 SENATE REPORT, *supra* note 77, at 47.

254. *Perkins v. Matthews*, 400 U.S. 379, 396 (1971) ("Failure of the affected governments to

parently has increased,<sup>255</sup> if bailout were not made dependent on a record of timely submission, as noted earlier, there would be no incentive for jurisdictions to improve or maintain a record of compliance, thus further hindering efforts to enforce section 5.

While the requirement appears both necessary and appropriate as a condition of bailout, several operative limitations should be emphasized. First, the requirement assumes that the preclearance mandate is clearly and widely understood by governmental units in covered jurisdictions. The Senate Judiciary Subcommittee Report argued that complete compliance with the preclearance requirement is practically impossible and that, as a result, bailout effectively will be impossible for most jurisdictions.<sup>256</sup> The full Senate Judiciary Committee responded, however, that preclearance requirements are well-publicized, that assistance is readily available, and that "common sense" will continue to prevail to negate the effect of "de minimis" violations.<sup>257</sup> Second, because the bailout mechanism is written in "all or nothing" terms, where the right of the greater jurisdiction to bailout is linked to compliance by lesser governmental units within, a form of vicarious responsibility is placed upon covered jurisdictions seeking bailout;<sup>258</sup> thus, while the covered jurisdiction seeking bailout itself may demonstrate a ten-year record of total compliance, bailout will be denied if any unit of local government within the territory of the covered jurisdiction has enforced a proposed change in voting practices or procedures without obtaining approval. This will be so even though the covered jurisdiction seeking bailout possesses no lawful authority to control the activities of the local government officials responsible for noncompliance.

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comply with the statutory requirement [of voluntary submissions] would nullify the entire scheme since the Department of Justice does not have the resources to police effectively all the States and subdivisions covered by the Act.").

When the Department of Justice receives information that a jurisdiction may have implemented changes without preclearance, it sends a "please submit" letter to the covered jurisdiction. In 1980, the Department sent 124 such letters. The Department received responses from 79 such jurisdictions that indicated the 78 changes had been made without preclearance. 1981 HOUSE REPORT, *supra* note 76, at 13; UNFULFILLED GOALS, *supra* note 47, at 72.

255. Between 1975 and September 30, 1981, 39,837 preclearance submissions were received. 1982 Senate Hearings, *supra* note 19, at 1745. From 1965 through 1974, only 4,476 submissions were received. *Id.* at 1744.

256. 1982 SENATE REPORT, *supra* note 77, at 163.

257. *Id.* at 48.

258. *Id.* at 163; *id.* at 216 (minority views of Sen. East).

Finally, this provision will preclude bailout whenever a change has been implemented prior to obtaining preclearance. Bailout will be barred even though a submission ultimately was made and approved; or even though an objection to the change ultimately was withdrawn by the Department of Justice; or even though a decision of the District of Columbia District Court denying a declaratory judgment for the proposed change was vacated on appeal.<sup>259</sup> Section 5 prohibits enforcement of changes prior to obtaining approval, and bailout will be denied for a period of ten years from the last day upon which an implemented change was in effect before approval was obtained; this is so even though the change ultimately may be determined to have had no discriminatory purpose or effect.<sup>260</sup>

The 1982 amendments also require that the covered jurisdiction “have repealed all changes . . . to which the Attorney General has successfully objected or to which the United States District Court for the District of Columbia has denied a declaratory judgment.”<sup>261</sup> It is unclear what this requirement added to the bailout standard. Because section 5 requires prior approval before a change lawfully can be implemented, why should it be considered significant that the jurisdiction repealed the provision if the Attorney General objected to it and, therefore, blocked its lawful implementation?<sup>262</sup> The enforcement of a change without prior federal approval—an unlawful act that bars bailout in itself—is indistinguishable from the continued use of the change after submission and disapproval; both are in violation of section 5 and would be covered by the language barring bailout whenever a change has been “enforced without preclearance.”

The House Judiciary Committee Report states that the covered jurisdiction must “repeal all legislation and other voting changes that were objected to before they are permitted to bail out so that they will not be able to enforce any such legislation once they are exempted from the Act’s coverage.”<sup>263</sup> This language suggests that significance is to be attached to a formal repeal of the disapproved legislation or administrative action. This largely symbolic act could cause interpretive problems

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259. *Id.* at 48; 1981 HOUSE REPORT, *supra* note 76, at 42.

260. 1981 HOUSE REPORT, *supra* note 76, at 42.

261. Voting Rights Act amendments of 1982, Pub. L. No. 97-205, § 2(b)(4)(D), 96 Stat. 131 (codified at 42 U.S.C. § 1973b(a)(1)(D) (1982)).

262. 1981 HOUSE REPORT, *supra* note 76, at 68 (dissenting views of Rep. Butler).

263. *Id.* at 41.

when the action disapproved was a result of administrative or executive action that was never formalized by legislation or administrative rule or regulation. There are changes in voting practices and procedures that may require preclearance that can be implemented by informal executive or administrative action;<sup>264</sup> the "repeal" of such changes may take the form of nothing more than informal action to restore the status quo and cease enforcement of the change.

More importantly, the House Judiciary Committee's justification for the repeal requirement was that it is necessary to ensure that the change cannot be implemented once bailout is granted.<sup>265</sup> This argument appears to be misplaced, and does not justify inclusion of the requirement. It is true, of course, that a provision still on the books but unenforceable because of Justice Department disapproval, could be revived and enforced once bailout has been obtained and preclearance is no longer required. It is also true that even if the provision is formally repealed, it could be reenacted following bailout and enforced without preclearance; but, as will be demonstrated later, the 1982 amendments also apparently contain a recapture provision that will preclude reenactment of previously rejected changes.<sup>266</sup> The formal repeal of the change, therefore, accomplishes nothing of substance and simply will add to the uncertainty regarding the bailout criteria.

Finally, note that the repeal requirement applies only to those submissions to which the Attorney General has "successfully" objected.<sup>267</sup> If the covered jurisdiction, following Department of Justice disapproval, submits exactly the same change to the District Court for the District of Columbia for approval through the declaratory judgment process, which it may do,<sup>268</sup> and the District Court approves the change, repeal apparently will not be required and the jurisdiction can enforce the change thereafter.<sup>269</sup>

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264. *See, e.g.*, *Board of Educ. v. White*, 439 U.S. 32 (1978) (decision by county school board requiring employees to take unpaid leave of absence while running for political office); *NAACP v. Georgia*, 494 F. Supp. 668 (D. Ga. 1980) (decision by county board of elections not to consider registration drives conducted by other persons or organizations).

265. *See supra* note 263 and accompanying text.

266. *See infra* text accompanying note 354.

267. 42 U.S.C. § 1973b(a)(1)(D) (1976)).

268. *Perkins v. Matthews*, 400 U.S. 379, 391 (1971); *see also* *United Jewish Orgs. v. Carey*, 430 U.S. 144, 175 (1977) (Brennan, J., concurring in part). The district court will undertake a de novo review of the purpose or effect of the submission, but some deference will be paid to the prior administrative judgment of the Department of Justice. *Id.*

269. Enforcement of the change after Justice Department disapproval but before the same

In addition to the prior submission and repeal requirements, the covered jurisdiction also must demonstrate that for the ten-year period prior to the bailout suit the “Attorney General has not interposed any objection that has not been overturned by a final judgment of a court and no declaratory judgment has been denied under section 5.”<sup>270</sup> This bar to bailout is premised on the assumption that rejection of proposed changes evinces the need for continued coverage.<sup>271</sup> In addition, bailout is not permitted while submissions or declaratory judgment actions are pending.<sup>272</sup>

A number of substantive and interpretive problems have been raised with respect to the “no objection” requirement (this provision alone will operate immediately, beginning with the 1984 effective date of the new bailout standard, to bar bailout until at least 1990 for numerous covered jurisdictions, including the entire states *qua* states of Alabama, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia).<sup>273</sup> One major problem with the “no objection” requirement, according to opponents of the provision, is that objection by the Attorney General to submissions may be made on grounds having nothing to do with whether the proposed change has a discriminatory purpose or effect, and in other cases an initial objection may be withdrawn once the jurisdiction supplies additional data.<sup>274</sup> Another problem noted by opponents is that a covered jurisdiction may be unable in advance to determine whether a proposed change is objectionable, despite good faith efforts to comply with the section 5 standard of no discriminatory purpose or effect; this problem would appear to be especially prevalent in redistricting submissions.<sup>275</sup> Finally, opponents of the requirement argued that a “politically motivated” Attorney General could sabotage a covered jurisdiction’s right to bailout by filing objections to a submis-

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change was approved by the district court, however, would be a violation of the Act and would bar bailout for a ten-year period thereafter. *See supra* text accompanying notes 259-60.

270. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(4)(E), 96 Stat. 132 (codified at 42 U.S.C. § 1973b(a)(1)(E) (1982)).

271. 1982 SENATE REPORT, *supra* note 77, at 48-49; *see also* *City of Rome v. United States*, 446 U.S. 156, 181 (1980).

272. 42 U.S.C. § 1973(b)(1)(E) (1976).

273. 1981 HOUSE REPORT, *supra* note 76, at 68 (dissenting views of Rep. Butler); *see also* 1982 *Senate Hearings*, *supra* note 19, at 1742-84 (statistics showing extent of covered jurisdictions’ compliance with Act through 1981).

274. 1982 SENATE REPORT, *supra* note 77, at 163-64; *id.* at 218 (minority views of Sen. East); 1981 HOUSE REPORT, *supra* note 76, at 68 (dissenting views of Rep. Butler).

275. 1982 SENATE REPORT, *supra* note 77, at 49.

sion solely to preclude bailout.<sup>276</sup>

As noted previously, one of the problems identified by opponents of the requirement was that the Attorney General may enter an objection to a submission solely because the covered jurisdiction fails to provide adequate information to allow the Department of Justice to evaluate the impact of the proposed change. The Senate Judiciary Committee Report acknowledges the existence of this problem, but suggests that Department of Justice policy effectively negates adverse consequences in most instances. The report states that only a "handful" of objections have been made on this basis over the life of the Act.<sup>277</sup> The report also asserts that when the jurisdiction supplies the required information within a reasonable time, the Attorney General will withdraw the objection.<sup>278</sup> Finally, the report states that when inadequate information initially is presented, the Attorney General's request for supporting data tolls the statutory period during which the Department of Justice may object, and that formal objection will be entered only if the covered jurisdiction flatly refuses to supply additional necessary information.<sup>279</sup>

The effect of a "withdrawal" of an objection also was considered by the Senate Judiciary Committee. The committee report states that when a covered jurisdiction submits a request for reconsideration of a formal objection by the Attorney General and provides new or additional data, the withdrawal of the objection by the Attorney General will not preclude bailout if the new or additional information is submitted within a "reasonable time" following the initial objection.<sup>280</sup> If, however, following an objection, the covered jurisdiction submits a wholly new or revised change which is approved, the earlier objection will stand and will preclude bailout for a ten-year period.<sup>281</sup> The same result will follow if the reason for a later approval (of the same or a slightly revised plan) was due to changed circumstances which lessened

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276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* A preclearance submission may be enforced unless the Attorney General objects within sixty days. 42 U.S.C. § 1973c (1976). Under Department of Justice regulations, a request for additional information "tolls" the running of the 60-day period, and if the jurisdiction supplies additional information in response to the request, the 60-day period commences anew. 28 C.F.R. §§ 51.8, 51.35(a) (1983). The validity of these regulations has been upheld. *See City of Rome v. United States*, 446 U.S. 156, 171-72 (1980); *Georgia v. United States*, 411 U.S. 526, 541 (1973).

280. 1982 SENATE REPORT, *supra* note 77, at 49.

281. *Id.* at 49-50.



the impact of the proposed change; because the proposed change was objectionable when first proposed, it will preclude bailout.<sup>282</sup>

The Senate Judiciary Committee also expressed concern about cases in which the Department of Justice withdraws objections to proposed changes long after the initial objection and without documentation of the changed circumstances which led to the reconsideration.<sup>283</sup> The Senate Judiciary Committee Report expresses the view that withdrawal of an objection, if it is to negate the impact of an earlier objection, must be limited to cases in which reconsideration is requested "shortly" after the objection and to cases in which there is a "documented basis of substantially changed circumstances."<sup>284</sup>

The Senate Judiciary Committee also considered the argument that ignorance of section 5 standards may contribute to objections and that it is unfair to preclude bailout for a ten-year period when a proposed change that was rejected was submitted in good faith. This problem was alleged to be especially critical in the case of small, local political units that may not have counsel capable of analyzing the nuances of section 5 standards.<sup>285</sup> The fact of "all or nothing" bailout, where the failure of a lesser governmental unit to meet bailout standards will preclude bailout for the greater jurisdiction, exacerbates the problem.<sup>286</sup> According to the Senate Judiciary Committee, jurisdictions subject to section 5 can and often do informally discuss proposed changes with the Department of Justice, and will receive input from the Department prior to a formal submission.<sup>287</sup> Moreover, the Senate Judiciary Committee Report suggests that local governments can seek assistance from the state Attorney General.<sup>288</sup> In sum, the Senate Judiciary Committee

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282. *Id.* at 50 n.172.

283. *Id.* at 50.

284. *Id.*

285. *Id.* at 49.

286. *See supra* notes 197-213 and accompanying text. If a small, local unit of government submits a change that is objectionable, both the entire state and the political subdivision in which it is located will be barred from bailout for a ten-year period. *See* 1982 SENATE REPORT, *supra* note 77, at 49.

287. 1982 SENATE REPORT, *supra* note 77, at 49. Senator East disputed this assertion by the Committee, arguing that "little if any opportunity exists to clear changes in advance . . . or to have formal presubmission consultations." *Id.* at 219 (minority views of Sen. East). Both Senator East and Representative Butler argued that the effect of this provision will be to discourage needed changes in election laws. *See id.*; 1981 HOUSE REPORT, *supra* note 76, at 67 (dissenting views of Rep. Butler).

288. 1982 SENATE REPORT, *supra* note 77, at 49.

concluded that any jurisdiction desiring to avoid the submission of objectionable changes can do so.

Finally, the Senate Judiciary Committee rejected the argument that a politically motivated Attorney General could preclude bailout at will by objecting to a submission. Since the Attorney General's decision under section 5 is not, as such, subject to judicial review, abuses could occur. The Committee responded by observing that while judicial review of the decision is not available, the covered jurisdiction may seek an independent *de novo* review of the proposed change in the District Court for the District of Columbia.<sup>289</sup> Approval of a submission through a declaratory judgment action after rejection of the submission by the Attorney General would negate the effect of the objection, and bailout still would be available.<sup>290</sup>

### *B. The Affirmative Action Component*

In addition to the bailout criteria previously described, the 1982 amendments prescribe a series of additional requirements that a covered jurisdiction must fulfill in order to be exempted from the Act's special provisions. These bailout requirements are designed to force covered jurisdictions to eliminate certain voting practices and procedures as a condition to bailout that may not, as such, constitute a violation of the Act. In order to obtain bailout, the covered jurisdiction must demonstrate that it and all governmental units within its territory (1) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (2) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under the Act; and (3) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.<sup>291</sup>

Two important preliminary considerations are relevant to an evalua-

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289. *See supra* note 269 and accompanying text.

290. *Id.* Neither the House nor the Senate Judiciary Committee addressed the issue whether denial of a declaratory judgment in the district court that was vacated on appeal would preclude bailout. As long as the proposed change had not been implemented prior to the appellate decision, it would seem logical to infer that bailout would not be precluded.

291. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(4)(F), 96 Stat. 132 (codified at 42 U.S.C. § 1973b(a)(1)(F) (1982)).

tion of these requirements. First, the “all or nothing” approach to bailout is continued. The state or political subdivision seeking to bail out must assume responsibility for the actions (or lack thereof) of all political units of government within its geographic territory, even though it may not have the legal authority to compel actions required by the Act.<sup>292</sup> Second, the burden of proof rests with the jurisdiction seeking to bail out.<sup>293</sup> This requirement will be particularly burdensome with respect to the first of the affirmative action criteria—the requirement that the covered jurisdiction eliminate all voting procedures and methods of election which inhibit or dilute equal access to the electoral process. While the existence of a particular voting practice or procedure in a covered jurisdiction may not be subject to successful challenge under other provisions of the Act, such as section 2, because the burden of proof would be on the challenging party in such action, the burden of proof will be reversed in the bailout suit, and the covered jurisdiction will be required to prove that the particular voting practice or procedure is nondiscriminatory (i.e., that it does not dilute or inhibit equal access to the electoral process).

It is the locus of the burden of proof in the bailout suit, more than any other single factor, that contributes to the view held by some members of Congress that the affirmative action criteria constitute unreasonable bailout requirements. Unlike the specific compliance requirements, which simply evaluate compliance with the existing mandates of the Act, the affirmative action requirements introduce wholly new features to the Act. Although a covered jurisdiction is not required under the Act, for example, to demonstrate that it has made affirmative efforts to eliminate discriminatory practices, it is required to do so in order to bailout from the Act’s special provisions. In a very real sense, the 1982 bailout amendments introduced new substantive requirements for covered jurisdictions, albeit under the guise of the bailout standard.

*1. Elimination of Voting Procedures and Methods of Election  
Which Inhibit or Dilute Equal Access*

The first aspect of the affirmative action component provides that a covered jurisdiction must prove that it and all governmental units

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292. *Id.*

293. 1982 SENATE REPORT, *supra* note 77, at 56; *see supra* notes 181-83 and accompanying text.

within its territory have eliminated "voting procedures and methods of election which inhibit or dilute equal access to the political process."<sup>294</sup> There are numerous interpretive and practical problems with the requirement. Read literally a covered jurisdiction would be required to demonstrate that each and every "voting procedure" and "method of election" employed within the covered jurisdiction did not "inhibit or dilute" equal access. Aside from the problem of identification of the varied and myriad practices and procedures to be tested (and it is indeed unclear what would be covered) is the additional problem of proving a negative; that is, proving that each and every voting practice and method of election does *not* inhibit or dilute equal access to the political process.

The Senate Judiciary Committee Report suggests that a covered jurisdiction will not be required to offer affirmative proof (and, presumably, to plead) with respect to each and every voting practice or method of election. Instead, the covered jurisdiction will be required to assume the burden of proof with respect to a given voting practice or method of election only when the Department of Justice or an intervenor alleges that a specific voting procedure or election method discriminates.<sup>295</sup> Once a voting practice or method of election has been challenged, however, the Senate Judiciary Committee Report states that a covered jurisdiction will have to present empirical evidence of non-discriminatory purpose or effect.<sup>296</sup> Nothing in the text of the amendments, however, purports to place the burden of raising the issue on the Department of Justice (or on an intervenor), and the language of the Act does not support this interpretation by the committee. Unless the committee's view is accepted, however, the covered jurisdiction will be required to assume a nearly impossible burden of pleading and proof—an analysis of each and every voting procedure and method of election to ensure that none inhibit or dilute equal access to the electoral process. The House Judiciary Committee Report also suggests that the range of voting practices and methods of election subject to consideration are broad indeed, and include such practices as voter registration proce-

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294. 42 U.S.C. § 1973b(a)(1)(F)(i) (1976).

295. 1982 SENATE REPORT, *supra* note 77, at 54.

296. *Id.*; see also 1981 HOUSE REPORT, *supra* note 76, at 43 ("This requirement cannot be met . . . simply by claims that the jurisdiction has no structural barriers, but rather calls for empirical evidence that its methods of election and voting procedures have neither the purpose nor the effect of discriminating.").

dures, at-large or multimember districts, majority vote requirements, anti-single-shot laws, and the means by which officials are elected.<sup>297</sup>

Perhaps more significant is the uncertainty created by the standard "inhibit or dilute equal access to the electoral process." Assistant Attorney General William Bradford Reynolds, testifying before the Senate Judiciary Committee, indicated that the language was likely to produce a "great deal" of litigation.<sup>298</sup> Both the House and Senate Judiciary Committee Reports suggest that this language was intended to impose a "results" oriented test; that is, a voting procedure or method of election which "inhibits or dilutes equal access to the electoral process" is one which produces a discriminatory result.<sup>299</sup> More specifically, the Senate Judiciary Committee Report states that the test is the same as that for a challenge to a voting procedure or method of election under section 2 of the Act, except that the burden of proof is on the covered jurisdiction seeking to bail out.<sup>300</sup>

This bailout requirement, therefore, must be read in the context of the recent litigation under and statutory amendments to section 2. The use of the bailout standard as a method of dealing with the problem of at-large methods of electing local officials is potentially of great significance. As the recent Supreme Court decisions in *City of Mobile v. Bolden*<sup>301</sup> and *Rogers v. Lodge*<sup>302</sup> make clear, a primary obstacle to a

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297. 1981 HOUSE REPORT, *supra* note 76, at 42-43.

298. 1982 Senate Hearings, *supra* note 19, at 1706.

299. 1982 SENATE REPORT, *supra* note 77, at 54 ("In determining whether procedures or methods inhibit or dilute equal access to the electoral process, the standard to be used is the results test. . . ."); 1981 HOUSE REPORT, *supra* note 74, at 42 ("The Committee believes that the jurisdiction seeking to bailout should meet certain positive and results oriented requirements. . . .").

300. 1982 SENATE REPORT, *supra* note 77, at 54.

301. 446 U.S. 55 (1980); *see supra* note 70.

302. 458 U.S. 613 (1982). *Rogers* involved section 2 and fourteenth and fifteenth amendment challenges to the maintenance of an at-large system of electing the Board of Commissioners in Burke County, Georgia. The Supreme Court affirmed the district court's judgment that the method of election was maintained for a discriminatory purpose or intent. The district court's conclusion that the at-large system was maintained for a discriminatory purpose was based upon an evaluation of the factors outlined in *Zimmer v. McKeithen*, 485 F.2d 1297 (6th Cir. 1973), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 363 (1975) (*per curiam*). Justice Stewart's plurality opinion in *Bolden* held that "the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose but the mere existence of this criteria was not a substitute for a finding of discriminatory purpose. *City of Mobile v. Bolden*, 446 U.S. 55, 73 (1980). In *Rogers*, the Supreme Court held that although the district court employed the *Zimmer* mode of analysis it used the criteria as the basis for concluding that the at-large system was maintained for a discriminatory purpose. 458 U.S. at 620-21.

successful challenge to an at-large system is that of proof.<sup>303</sup> While it is clear that the locus of the burden of proof was even more critical when the standard was that of proof of intentional or purposeful discrimination (as it was prior to the 1982 amendments), it is likely that problems of proof will continue under a results or effects standard. Section 2 challenges to a jurisdiction's use of an at-large or multimember system may be brought nationwide and without regard to a jurisdiction's coverage under the Act's special provisions;<sup>304</sup> in fact, however, most such actions have been brought in covered jurisdictions.<sup>305</sup> The burden of proof in a section 2 challenge to an at-large system rests with the plaintiff-challenger.<sup>306</sup> Even with the modification of section 2 to establish a results or effects test, it is likely that many actions will fail, as evidenced by the fact that until the *Bolden* case, some lower federal court decisions considered and rejected challenges to at-large systems under a results or effects test.<sup>307</sup> If, however, the burden of proof is shifted to the jurisdiction maintaining an at-large system, given the vagaries of most such cases a different outcome can be envisioned solely on the basis of the locus of the burden of proof. Covered jurisdictions seeking to bail out may be held hostage to the Act's special provisions by the existence of at-large methods of electing local officials. While an at-large system may be relatively immune to challenge under section 2, a covered jurisdiction may not feel particularly sanguine about its ability to defend its use when it must assume the burden of proving that the system does not inhibit or dilute "equal access to the electoral process."

Because of the clear congressional intent that this bailout requirement is to complement section 2, it is curious that Congress did not employ the language of section 2 to describe the standard by which voting procedures and methods of elections are to be judged in the bailout suit. Section 2, as amended, prohibits voting standards, practices and procedures which result in the denial or abridgment of the

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303. See *infra* notes 306-07 and accompanying text.

304. See *supra* note 9. For a recent example of the application of section 2 in a non-covered jurisdiction, see *Taylor v. Haywood County*, 544 F. Supp. 1122 (W.D. Tenn. 1982).

305. See, e.g., cases cited *supra* note 68.

306. See 1982 SENATE REPORT, *supra* note 77, at 27 ("Plaintiffs must either prove . . . intent, or, alternatively, must show that the challenged system or practice . . . results in minorities being denied equal access to the political process.").

307. See, e.g., *Hendrix v. Joseph*, 559 F.2d 1265 (5th Cir. 1977); *Bradas v. Rapidas Parish Police Jury*, 508 F.2d 1109 (5th Cir. 1975); *Castery v. St. John the Baptist Parish Police Jury*, 485 F. Supp. 236 (E.D. La. 1980).

right to vote on account of race or color or in contravention of the language minority provisions of the Act; the section goes on to provide that a violation of section 2 may be established if

“it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens protected [by the Act] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>308</sup>

The 1982 amendments to section 2 also provide that nothing in the section confers “a right to have members of a protected class elected in numbers equal to their proportion in the population.”<sup>309</sup>

The language of section 2, therefore, speaks in terms of standards, practices and procedures that deny equality of access to the political process by denying to members of a minority group an equal opportunity to participate and to elect representatives of their choice. Without the benefit of knowledge gained through an examination of the judicial treatment of section 2 claims, it would be reasonable to question whether a voting procedure or method of election which “inhibits or dilutes equality of access to the electoral process” (the bailout standard) necessarily is one that also must result in members of a minority group having “less opportunity . . . to participate in the political process and to elect representatives of their choice.” In fact, the history of section 2 litigation involving challenges to at-large methods of election demonstrates that the language of section 2, as amended in 1982, was taken almost verbatim from the leading pre-*Bolden* decision involving a constitutional challenge to at-large election methods. This decision, *White v. Register*,<sup>310</sup> held that a challenge to an at-large method of electing officials could only be sustained when “the political processes leading to nomination and election were not equally open to participation of the group in questions.”<sup>311</sup> Earlier, however, in *Reynolds v. Sims*,<sup>312</sup> the Supreme Court had referred to the right of voters to have their

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308. 42 U.S.C. § 1973(b) (1976). The final version of amended section 2 was proposed by Senator Dole. For a discussion of the events leading to the Dole proposal, see Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach From the Voting Rights Act*, 69 VA. L. REV. 633, 689-701 (1982).

309. 402 U.S.C. § 1973 (1982).

310. 412 U.S. 755 (1973).

311. *Id.* at 766.

312. 377 U.S. 533 (1964).

votes counted without "debasement or dilution."<sup>313</sup> While *Reynolds* involved dilution of voting strength as a result of population disparities among legislative districts, in *Fortson v. Dorsey*<sup>314</sup> the Supreme Court made clear that the use of multimember districts also might produce the prohibited dilution of voting strength. The question left unresolved in both *Reynolds* and *Fortson* was the circumstances under which impermissible "dilution" might be found. Decisions such as *White v. Registrar*<sup>315</sup> and *Whitcomb v. Chavis*<sup>316</sup> held that impermissible dilution in an at-large system cannot be demonstrated simply by showing that minorities have not been elected in proportion to their voting strength; instead, a challenger must show denial of equal access to the processes leading to nomination and election.<sup>317</sup>

It is thus reasonably clear that the language in the new bailout standard requiring a covered jurisdiction to show that elimination of voting procedures and methods of election which "dilute or inhibit equal access to the electoral process" is simply descriptive terminology referring to the kind of dilution prohibited by section 2. A voting procedure or method of election which dilutes or inhibits equal access to the electoral process (and which must be eliminated before bailout is permitted) is one which, under all the circumstances, effectively provides members of minority groups with less opportunity to participate in the political process and to elect representatives of their choice (i.e., one that is maintained in violation of section 2).<sup>318</sup>

Representative Butler objected to this (and the other constructive efforts criteria) on the ground that no rights or safeguards for minority voters are established beyond those which already existed. He argued

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313. *Id.* at 555.

314. 379 U.S. 433 (1965). *Fortson* involved a quantitative one-person, one-vote challenge to a multimember district. The plaintiffs alleged that since groups of residents of a multimember district could be outvoted by other groups, their votes were diluted in violation of *Reynolds*. The Supreme Court disagreed, but in the process stated that "[i]t might well be that . . . a multimember apportionment scheme . . . would operate to minimize or cancel out the voting strength of racial or political elements. . . ." *Id.* at 439.

315. 412 U.S. 755 (1973).

316. 403 U.S. 124 (1971). *Whitcomb* was the first case to reach the Supreme Court which involved a racial dilution challenge to the maintenance of a multimember scheme of electing government officials. The Supreme Court held that the plaintiffs had failed to prove unconstitutional dilution of their voting strength. *Id.* at 149-50.

317. 412 U.S. at 766; 403 U.S. at 155.

318. For a discussion of the standard of proof under section 2 and the evolution of the constitutional test, see Blumstein, *supra* note 308, at 661-73, 701-14.



that these requirements state the obvious: in order to bail out, a covered jurisdiction must have complied with the Act.<sup>319</sup> It is true, of course, that the requirement that a covered jurisdiction have eliminated voting procedures and methods of election which dilute or inhibit equal access to the electoral process is, when read in the context of the clear congressional intent, a requirement of compliance with section 2 of the Act. As was mentioned earlier, however, the reversal of the burden of proof on the issue is a significant factor and may affect the result in a given case.

Representative Butler also questioned the substantive content of this requirement. He asserted that the provision requires an examination of such fundamental features of the American political process as voter registration, tabulation of ballots, redistricting, and the administration of at-large systems. The use of these voting procedures and methods of election in an insidious fashion, he argued, is not cause to eliminate them as required by the language of the standard. Instead, such practices should be changed so that they are implemented in accordance with the law.<sup>320</sup> The point that Representative Butler intended to make is not at all clear, especially when the question is the maintenance of an at-large system. How can a covered jurisdiction fairly implement (and yet still maintain) an at-large system so as to negate the denial of equal opportunity to participate that was alleged to exist? On the other hand, at-large voting systems are often utilized together with other devices, such as majority vote requirements, anti-single-shot laws, and placing requirements, all of which tend to magnify the adverse impact of at-large systems on minority voters.<sup>321</sup> The elimination of one or all of these devices may be sufficient to overcome the negative effect of at-large systems. Nevertheless, these "enhancing devices" must be eliminated if found to constitute impermissible dilution; it is difficult to see how they could be implemented in a fashion that would overcome their discriminatory effect. With respect to other voting procedures and methods of election that could prevent bailout because of their dilutive or inhibitory effect, such as racially discriminatory redistricting or the location of voting registration stations, it would be the elimination of the practice, as required by the bailout statute, that would cure the problem. There is no suggestion that Congress intended to prohibit

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319. 1981 HOUSE REPORT, *supra* note 76, at 69.

320. *Id.*

321. *See supra* note 66.

voting registration and certainly no suggestion that redistricting must be prohibited in order to achieve bailout; rather, a covered jurisdiction would be required to change its voting registration scheme or change its districting plan in order to comply with the Act.

## 2. *Efforts to Eliminate Intimidation and Harassment*

The second aspect of the affirmative action component requires a covered jurisdiction to demonstrate that it and all governmental units within "have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under [the Act]."<sup>322</sup> The Senate Judiciary Committee declared that this requirement was necessary to demonstrate a covered jurisdiction's "firm commitment" to minority voting rights, "particularly at a time of renewed concern about violence-prone vigilante or paramilitary organizations, hate groups and other means of physical intimidation."<sup>323</sup> Both the House and Senate Judiciary Committees referred to the "long-term impact" such harassment and intimidation have on minority voters and their communities.<sup>324</sup> Evidence was presented at both the House and the Senate hearings on the 1982 amendments indicating that harassment or intimidation of minority voters and candidates occurs with surprising frequency,<sup>325</sup> and the 1981 report of the Civil Rights Commission documented numerous instances of such unlawful activity.<sup>326</sup>

A covered jurisdiction apparently is not required to show the complete absence of incidents of harassment and intimidation in order to bail out. On the other hand, the Senate Judiciary Committee Report states that "if there is evidence that such intimidation and harassment, *or a credible threat of it occurring*, has been a factor in limited minority participation, then the jurisdiction must take reasonable steps to eliminate that danger and to make it clear that such abhorrent activity . . . will not be tolerated."<sup>327</sup> The quoted material contains two points that are worthy of additional comment. First, the Senate Report appears to

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322. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(4)(F)(ii), 96 Stat. 132 (codified at 42 U.S.C. § 1973b(a)(1)(F)(ii) (1982)).

323. 1982 SENATE REPORT, *supra* note 77, at 54.

324. *Id.*; 1981 HOUSE REPORT, *supra* note 76, at 43.

325. 1982 Senate Hearings, *supra* note 19, at 747-54, 1365-80; 1981 House Hearings, *supra* note 54, at 289, 821, 1566, 1579, 1985.

326. UNFULFILLED GOALS, *supra* note 47, at 22-24, 34-35.

327. 1982 SENATE REPORT, *supra* note 77, at 54 (emphasis added). The Senate Judiciary

endorse a burden of “constructive efforts,” whenever there exists a credible threat of harassment or intimidation. Second, the report suggests that constructive efforts are required only when harassment or intimidation has been a “factor in limited minority participation” in the political process.

With respect to the first point, a genuine ambiguity exists. Does the bailout standard contain an implicit assumption that harassment and intimidation of voters is present in every covered jurisdiction so that constructive efforts will be required of every jurisdiction seeking to bail out? The Senate Judiciary Committee Report states that the requirement is “not meant to imply that the described conduct has occurred in all covered jurisdictions.”<sup>328</sup> On the other hand, it is unclear from the language of the statute what kinds of occurrences will trigger the necessity of demonstrating that constructive efforts were undertaken. The language of the Senate Report further complicates the problem by suggesting that a credible threat of intimidation and harassment will suffice to trigger the requirement. There is no support for this view in the language of the statute. The statute speaks in terms of the need to make constructive efforts to “eliminate” the proscribed conduct; it does not require the covered jurisdiction to make constructive efforts to prevent the occurrence of the activity, at least until such time as incidents of harassment and intimidation have occurred with sufficient frequency that constructive efforts are required. If the requirement is properly construed as requiring constructive efforts to eliminate intimidation and harassment only when they are shown to exist, as opposed to one requiring every covered jurisdiction to make the effort, even when it would only be to prevent their occurrence, some minimum standard must be developed. Further, some standard must be developed to define how long the constructive efforts must continue following the last known incidents of harassment or intimidation, unless the requirement is to be interpreted as mandating a continuing effort until bailout is obtained, even though the last known instance may have occurred many years prior to the bailout suit.

The second problem raised by the Senate Judiciary Committee Report—the suggestion that this constructive efforts requirement arises only when there is evidence that intimidation and harassment is a fac-

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Committee stated that “[c]ommunities are not held absolutely liable for all acts by their private citizens.” *Id.*

328. *Id.* at 55.

tor in limiting minority participation in the electoral process—likewise finds no support in either the language or logic of the statute. All jurisdictions covered by the Act's special provisions were, at the time of coverage, jurisdictions with historically low voter turnout.<sup>329</sup> Since the adoption of the Act, however, voter registration and turnout has increased dramatically in the covered jurisdictions, and in most places approaches the national average.<sup>330</sup> Moreover, continuation of coverage under the Act's special provisions has never been conditioned on the existence of low levels of registration or voting. While harassment and intimidation of minority voters undoubtedly contribute to low voter participation, the major features of the Act—the special provisions—were designed to deal with the use of tests and devices as a prerequisites to voting and to monitor changes in voting practices and procedures regardless of the context. Finally, harassment and intimidation of minority voters is an evil that should be eliminated even if it results in only one minority voter being dissuaded from participating, and one of the Act's original provisions, applicable nationwide, makes it a crime for any person to “intimidate, threaten or coerce” any person exercising the right to vote.<sup>331</sup> In sum, it is the existence of intimidation or harassment of minority voters in any context, and regardless of the result, that is the evil to be eliminated; this bailout requirement should be construed to require constructive efforts to eliminate the prohibited conduct without the need to show, additionally, that such conduct has contributed to low voter turnout.

The final major interpretive feature of this requirement as far as its applicability is concerned is the absence of a “state action” requirement. Both the House and Senate Judiciary Committee Reports state that constructive efforts to eliminate harassment and intimidation are required to ensure that such conduct, whether by government officials or others,<sup>332</sup> will not be repeated. The absence of a state action requirement is consistent with other features of the Act directed at the same problem. Section 11(b) of the Act, applicable nationwide, prohibits the intimidation, threatening, or coercion of any person for voting or at-

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329. See *supra* text accompanying notes 16, 33 & 45.

330. See *supra* text accompanying notes 50-54.

331. 42 U.S.C. § 1973i(b) (1982).

332. 1982 SENATE REPORT, *supra* note 77, at 54-55 (“[T]he jurisdiction must take reasonable steps to eliminate [the] danger and to make it clear that such abhorrent activity by private citizens, officials or public employees, will not be tolerated within its territory.”); 1981 HOUSE REPORT, *supra* note 76, at 43.

tempting to vote by any "person, whether acting under color of law *or otherwise*."<sup>333</sup>

Apart from the coverage problems previously described, there remains the interpretive question of the kind of efforts that are required once the obligation to make constructive efforts has been determined to exist. The House Judiciary Committee Report simply declares that a covered jurisdiction must take steps to ensure that intimidation and harassment "will not be repeated, including giving notice within its territory that such conduct will not be tolerated."<sup>334</sup> The Senate Judiciary Report is equally unilluminating, but does add that the jurisdiction need do no more than "take reasonable steps" to eliminate the problem.<sup>335</sup>

The kinds of efforts that will be required, however, necessarily must vary depending on the nature of the harassment and intimidation that occurs. If actions of government voting registrars or poll workers are involved, the covered jurisdiction seeking bailout should be required to demonstrate that it took prompt action to investigate complaints and to discipline or discharge such officials if harassment or intimidation were found to exist. The covered jurisdiction should also demonstrate that it undertook efforts to instruct election officials concerning the need to avoid actions that might be interpreted as intimidating or constituting harassment. Additionally, to the extent intimidation or harassment of minority voters has occurred through the action of private parties, the covered jurisdiction should be required to investigate complaints promptly and, if found meritorious, to prosecute offenders under state or local law, and to publicize the existence of federal and state laws prohibiting the harassment or intimidation of voters and the intent of the jurisdiction to enforce such laws.

### 3. *Other Constructive Efforts*

The final aspect of the affirmative action component requires a covered jurisdiction to demonstrate that it has "engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all

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333. Voting Rights Act of 1965, Pub. L. No. 89-110, § 11(b), 79 Stat. 443 (codified at 42 U.S.C. § 1973i(b) (1982)) (emphasis added).

334. 1981 HOUSE REPORT, *supra* note 76, at 43.

335. 1982 SENATE REPORT, *supra* note 77, at 54.

stages of the election and registration process.”<sup>336</sup> The House Judiciary Committee Report succinctly summarized this requirement as mandating that a covered jurisdiction demonstrate that it has undertaken constructive efforts “to expand the opportunities for minority citizens to register and vote.”<sup>337</sup>

Evidence was presented at both the House and Senate hearings indicating that restrictive registration practices and procedures, including the practices of periodic purging of voter lists and re-registration requirements, exist in many jurisdictions.<sup>338</sup> The 1981 report of the Civil Rights Commission also documented the existence of barriers to voter registration and the fact that restrictive registration practices are especially burdensome for rural and low income people.<sup>339</sup>

The House and Senate Judiciary Committee Reports suggest that covered jurisdictions can meet this requirement by offering weekend and evening registration hours or by providing for postcard registration.<sup>340</sup> Other suggested examples of efforts that will suffice include the appointment of minority citizens as deputy registrars, pollworkers, and other positions which indicate to minority group members that they are encouraged to participate in the electoral process.<sup>341</sup>

Unlike the previously described constructive efforts requirements, this provision apparently is not triggered by the presence of some practice or situation that needs to be corrected. All covered jurisdictions will be required to demonstrate that constructive efforts have been taken to increase minority participation in the electoral process. The statutory enumeration of the types of activities required does not purport to be exhaustive, and as the Senate Judiciary Committee Report states, this requirement is a “flexible one” depending on the “needs and conditions” within the covered jurisdiction.<sup>342</sup>

Earlier in this Article, it was noted that statements appear in both the House and Senate Judiciary Committee Reports suggesting that low or disparate levels of minority participation in the electoral process should

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336. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(4)(F)(iii), 96 Stat. 132 (codified at 42 U.S.C. § 1973b(a)(i)(F)(iii) (1982)).

337. 1981 HOUSE REPORT, *supra* note 76, at 43.

338. 1982 SENATE HEARINGS, *supra* note 18, at 289-98, 988-93; 1981 HOUSE HEARINGS, *supra* note 54, at 173, 377-79, 820.

339. UNFULFILLED GOALS, *supra* note 47, at 24-28.

340. 1982 SENATE REPORT, *supra* note 77, at 55; 1981 HOUSE REPORT, *supra* note 76, at 43-44.

341. 1982 SENATE REPORT, *supra* note 77, at 55; 1981 HOUSE REPORT, *supra* note 76, at 43-44.

342. 1982 SENATE REPORT, *supra* note 77, at 55.

preclude bailout.<sup>343</sup> These statements appear in sections of the reports dealing with a covered jurisdiction's statutory obligation to provide the court with data concerning levels of minority participation.<sup>344</sup> As previously stated, while this statutory evidentiary requirement does not appear to impose an independent bailout requirement, the level of minority participation on both an absolute and relative basis would appear to be clearly relevant to the question whether the covered jurisdiction has met the constructive efforts component of the bailout standard. A low level of minority participation in the electoral process would suggest that additional constructive efforts to eliminate the discriminatory structure of the electoral system are needed or that existing activities have not been successful or sufficient. In either case, bailout could be denied, not because of low levels of minority participation as such, but because the jurisdiction failed to meet the constructive efforts requirement.

#### V. POST-BAILOUT PROBATION

The 1982 amendments retain a provision found in the original version of the Act that provided for a probationary period for covered jurisdictions which are successful in their bailout suits. Under the original version of the Act, the court that granted the declaratory judgment terminating coverage retained jurisdiction of the matter for a period of five years, and could reopen the action upon motion of the Attorney General and rescind the bailout order upon a showing that during such five-year period the covered jurisdiction had employed a test or device for the purpose or with the effect of denying or abridging the right to vote on account of race or color or in contravention of the Act's minority language provisions.<sup>345</sup> The original Act, in other words, provided for re-coverage in the event the jurisdiction engaged in any act during the five-year period following termination of coverage that would have precluded bailout if such act had occurred during the five- (later amended to seventeen-) year period prior to the order terminating coverage. This recapture provision was applied prior to the 1982 amendments in the case of three New York counties that had successfully obtained bailout in 1972 and were re-covered two years later upon mo-

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343. See *supra* notes 184-92 and accompanying text.

344. 1982 SENATE REPORT, *supra* note 77, at 55; 1981 HOUSE REPORT, *supra* note 76, at 44; see *supra* text accompanying notes 188-89.

345. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 438 (amended 1970).

tion of the Attorney General.<sup>346</sup>

The recapture provision under the original Act, therefore, was relatively uncomplicated. The sole question under the original bailout standard was whether the covered jurisdiction had used a test or device, as defined by the Act, as a prerequisite to registration or voting during the applicable statutory period.<sup>347</sup> If not, bailout was permitted. Until the 1970 amendments, termination of coverage not only exempted the covered jurisdiction from the preclearance requirement, it also restored the right to use tests or devices as a prerequisite to registration or voting.<sup>348</sup> Beginning in 1970, on a temporary basis, the prohibition on the use of tests and devices was extended nationwide,<sup>349</sup> the ban ultimately was made permanent in 1975.<sup>350</sup> The post-bailout restoration of the right to utilize tests or devices as prerequisites to registration and voting, therefore, was rendered moot by the 1970 and 1975 amendments. A covered jurisdiction's post-bailout use of tests or devices was a violation of the Act in itself, just as it would be for any non-covered jurisdiction. Bailout did, of course, exempt the jurisdiction from the other special provisions of the Act, including the preclearance mandate. The probationary device prior to the 1982 amendments, therefore, simply added an additional disincentive for covered jurisdictions during the five-year period following termination of coverage. The use of a test or device during the five-year period by the jurisdiction not only would constitute a violation of the Act (as it would for any jurisdiction), it would also constitute grounds for restoring the jurisdiction's coverage under the Act's special provisions, including the preclearance requirement.

The 1982 recapture provisions, however, are more complex and contain a major ambiguity. The 1982 amendments provide that the district court retains jurisdiction for ten years after the bailout declaratory judgment and "shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred

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346. TEN YEARS AFTER, *supra* note 5, at 220.

347. *See supra* text accompanying notes 27, 32 & 42.

348. Section 4(a) of the original version of the Act merely suspended the right of covered jurisdictions to use tests and devices. Bailout, under the original version, would restore the right to use tests and devices. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 438 (amended 1970, 1975, 1982). *See Gaston County v. United States*, 288 F. Supp. 678, 681 (D.D.C. 1968), *aff'd*, 395 U.S. 285 (1969).

349. *See supra* text accompanying note 34.

350. *See supra* text accompanying note 43.



which, had that conduct occurred during the [ten-year period preceding bailout], would have precluded [the bailout declaratory judgment].<sup>351</sup>

The recapture provision goes on to provide that the district court:

shall vacate the [bailout] declaratory judgment . . . if . . . a final judgment against the State or subdivision [that obtained the bailout judgment] . . . or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision . . . or if, after the issuance of such [bailout] declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.<sup>352</sup>

This recapture provision, therefore, directs that a bailout order shall be vacated for certain kinds of final judgments, consent decrees, settlements, or agreements. The final judgments, consent decrees, settlements, or agreements that require re-coverage, however, are only four among numerous other previously described criteria that must be met for the ten-year period prior to bailout and which apparently also constitute grounds for reopening the case. The 1982 amendments, therefore, are susceptible to an interpretation that bailout judgments may be reopened for any one of a variety of reasons, while the bailout judgment itself will be set aside only for limited reasons. Such an interpretation is hardly plausible. The more reasonable interpretation of the 1982 amendments is that the bailout declaratory judgment can be reopened *and* set aside, in the discretion of the court, upon allegation and proof that the covered jurisdiction has engaged in any conduct during the ten-year period following bailout which, had that conduct occurred during the ten-year period prior to the bailout declaratory judgment, would have precluded granting the bailout judgment. If, however, the allegation and proof involve the specified types of final judgments, consent decrees, settlements, or agreements during the ten-year period following bailout (all factors which, had they occurred during the ten-year

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351. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(5)(B), 96 Stat. 133 (codified at 42 U.S.C. § 1973b(a)(5) (1982)). The original version of the Act authorized reopening the judgment for a period of five years, and only upon motion of the Attorney General.

352. *Id.* This section also provides that the bailout declaratory judgment shall be vacated in the case of covered jurisdictions subject to the special provisions because of the minority language provisions when a final judgment has been entered anywhere in the territory of the covered jurisdiction determining that the right to vote was denied or abridged in contravention of the special minority language provisions. *Id.*

period preceding the bailout judgment, would have precluded granting the judgment), the court lacks discretion to set aside the bailout order and must vacate the judgment. This interpretation of the language of the 1982 amendments is supported (albeit indirectly) by the House and Senate Judiciary Committee Reports, as both refer to the possibility of recapture for reasons other than the specified final judgments, consent decrees, settlements, or agreements.<sup>353</sup>

Apart from the ambiguity previously described, it is likely that the recapture provision will cause numerous interpretive problems. The test for reopening and, apparently, vacating the order terminating coverage is activity during the ten-year period following bailout that would have precluded bailout had that conduct occurred during the ten-year period prior to the bailout judgment. The previous discussion of both the specific compliance and the affirmative action components of the bailout criteria disclosed the existence of a variety of requirements that must be met to achieve bailout, some of which are highly ambiguous. For example, the absence of constructive efforts to end intimidation and harassment of voters or to increase minority participation in the electoral process will preclude bailout. Does the probationary standard require the continuation of such efforts during the ten-year period following bailout? Will the absence of such efforts following termination of coverage, if such efforts were required as a condition of bailout, constitute conduct that has "occurred" that would have precluded bailout?

More importantly, would a post-bailout change in a voting practice or procedure that would have violated the preclearance standard if implemented prior to termination of coverage constitute grounds for recapture? If so, then the probationary period, in effect, merely constitutes an extension of the preclearance mandate without the formality of prior Justice Department or court approval. The Senate Judiciary Committee Report appears to accept this construction of the Act, as it asserts that recapture will be appropriate if the jurisdiction re-adopts a voting change that has been objected to previously under section 5.<sup>354</sup> The probationary period, therefore, appears to place covered jurisdictions in the posture of complying with the substantive standard of the preclearance mandate for an additional ten-year period follow-

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353. 1982 SENATE REPORT, *supra* note 77, at 56; 1981 HOUSE REPORT, *supra* note 76, at 45. See *infra* text accompanying notes 354-57.

354. 1982 SENATE REPORT, *supra* note 77, at 56.

ing bailout, subject to the qualification that prior approval of changes in voting practices and procedures need not be obtained. A new voting practice or procedure enacted during the probationary period having a discriminatory purpose or effect, as judged by the section 5 standards, will constitute grounds for recapture.

Both the House and Senate Judiciary Committee reports emphasize that a decision to reopen the bailout determination should not automatically result in the setting aside of the bailout order.<sup>355</sup> The decision to reinstate coverage under the Act's special provisions should only be made if the jurisdiction is found to have engaged in the prohibited conduct.<sup>356</sup> The statute makes no provision for the burden of proof in the recapture proceedings; presumably, therefore, the burden of proof will be on the government to establish the grounds for recapture.

#### CONCLUSIONS

The Senate Judiciary Committee asserted that the goal of the revised bailout system "is to give covered jurisdictions an incentive to eliminate practices denying or abridging opportunities for minorities to participate in the political process."<sup>357</sup> The Committee went on to add that "[e]ach and every requirement of the bailout is minimally necessary to measure a jurisdiction's record of non-discrimination in voting."<sup>358</sup> These observations by the Senate Judiciary Committee provide a sound basis for the conclusion that the 1982 revisions to the bailout system mark a major change in the objectives of the Voting Rights Act.

Following the 1970 amendments to the Act, when Congress imposed a nationwide ban on the use of tests and devices as prerequisites to voting, the major objective of the special provisions of the Act was to ensure that covered jurisdictions could not implement new registration or voting practices and procedures which had the purpose or effect of denying the right to vote on account of race or color; that is, the preclearance requirement was the major enforcement device to ensure nondiscriminatory voting practices and procedures in the covered jurisdictions. Moreover, recall that prior to the 1982 amendments, noncompliance with the preclearance requirement exacted no additional

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355. *Id.*; 1981 HOUSE REPORT, *supra* note 76, at 45.

356. 1982 SENATE REPORT, *supra* note 77, at 56; 1981 HOUSE REPORT, *supra* note 76, at 45.

357. 1982 SENATE REPORT, *supra* note 77, at 59.

358. *Id.*

sanction. The sole sanction for noncompliance was invalidation of the change. Finally, section 2, applicable nationwide, could be used to challenge existing registration and voting practices and procedures; but problems of proof, even under an effects or results standard, in all likelihood would prevent successful challenges to many allegedly discriminatory practices.

A straight twenty-five-year extension of the special provisions, therefore, even when joined with an amendment to section 2 to impose a results or effects standard of proof, did not, in the opinion of many, provide an adequate remedy for the most serious discriminatory practices, nor would such changes solve the continuing problem of noncompliance with the preclearance requirement. While it would not be accurate to conclude that maintenance of the preclearance requirement for an additional twenty-five years was not considered by Congress to be important in its own right, it is clear that under the revised bailout system covered jurisdictions will be held hostage to the preclearance requirement for the purpose of securing voluntary action to achieve collateral objectives. It is permissible, therefore, to describe the 1982 bailout amendments as designed to induce action by covered jurisdictions to eliminate certain voting practices and procedures that may not, as such, constitute violations of the Act; that is, release from the special provisions now is conditioned upon voluntary action by covered jurisdictions to eliminate voting practices and procedures that may not in themselves constitute independent violations of law. In this respect, the 1982 amendments may be described as an extension of the special provisions for an additional twenty-five years, but only for those covered jurisdictions that are unwilling or unable to meet the bailout criteria (which, in turn, require covered jurisdictions to meet additional affirmative obligations not otherwise required). It is true, of course, that a significant portion of the bailout criteria attempt to measure compliance with the preclearance and other obligations imposed. The 1982 amendments to the bailout system, therefore, accomplish a twofold change in emphasis: continuation of the special provisions—the preclearance requirement being by far the most important—for an additional twenty-five years, but only for those jurisdictions that do not develop good track records of compliance with the preclearance requirement and those that do not undertake voluntary efforts to eliminate other forms of discriminatory practices.

It remains to be seen, of course, whether the new system of incentives

will work. Both the House and Senate Judiciary Committees asserted that the standards are achievable and that good faith efforts will result in significant numbers of covered jurisdictions securing the exemption.<sup>359</sup> Congress, however, implicitly acknowledged that the criteria might be too stringent, and bailout unachievable in fact, by adding a provision to the Act requiring a review of the law after fifteen years of operation.<sup>360</sup> The foregoing analysis, moreover, demonstrates that the standards are ambiguous in many instances. Judicial interpretation of the criteria will be required and is likely to present a substantial burden for the District of Columbia District Court<sup>361</sup>—not just because of the ambiguity of the standards, but also because of the large number of suits that likely will arise pursuant to the amendment permitting political subdivisions to bailout independently of the covered state.

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359. *Id.* at 60; 1981 HOUSE REPORT, *supra* note 76, at 32.

360. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(7), 96 Stat. 133 (codified at 42 U.S.C. § 1973b(a)(7) (1982)).

361. The 1982 amendments also contain a provision designed to lessen the impact of the expected increase in the number of bailout suits filed. If no hearing is held within two years of the filing of an action, the chief judge of the District Court for the District of Columbia may request additional resources to expedite the actions. *Id.* § 2(b)(6), 96 Stat. 133 (codified at 42 U.S.C. § 1973b(a)(6) (1982)).

