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The Bailout Bait and Switch: DOJ's Last-Ditch Attempt to Rescue Section 5 of the Voting Rights Act

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Abstract: *In its Northwest Austin Municipal Utility District Number One v. Holder (NAMUDNO) decision, the Supreme Court of the United States cast grave doubt on the constitutionality of the Voting Rights Act's Section 5, which requires certain jurisdictions to submit all changes in voting-related practices for federal approval. With two new cases challenging Section 5 now pending, the Department of Justice has abandoned its decades-long opposition to jurisdictions seeking "bailouts" from Section 5 coverage in an attempt to convince the courts that the bailout option renders the preclearance requirement reasonably tailored to address discrimination and therefore constitutional. But old habits die hard, and DOJ is imposing onerous conditions on jurisdictions seeking bailouts as the price of not objecting in court—a plain abuse of power. Because Section 5 is divorced from the current reality of voting practices, no number of bailouts will save the preclearance requirement.*

In *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*, 2009), the Supreme Court of the United States came within a whisker of striking down as unconstitutional the supposedly "emergency" provision of the Voting Rights Act (VRA) that requires certain states and localities to get advance permission, or "preclearance," from the U.S. Department of Justice (DOJ) or the United States District Court for the District of Columbia before making any changes in their voting-related practices and procedures, no matter how innocuous.[1] The Court avoided the constitutional issue when it held that DOJ was misinterpreting the provision—Section 5 of the VRA—by

Talking Points

- Section 2 of the Voting Rights Act bars all voting practices or procedures that result in denial or abridgement of the right to vote on account of race or color. Its constitutionality is not in doubt.
- Section 5, however, imposes an onerous preclearance requirement on an arbitrary group of covered jurisdictions in contravention of state sovereignty and the tradition of treating states equally.
- While appropriate as a temporary measure in 1965, Section 5 is unconstitutional when voting discrimination in covered jurisdictions has become rare.
- Two cases challenging Section 5 have led the Department of Justice and liberal activist groups to push "bailouts" to rescue the preclearance requirement from invalidation by the courts.
- These bait-and-switch bailouts will not rescue Section 5. If it is struck down, the biggest change will be to curb the abuses of federal bureaucrats who use the law to advance a political agenda.

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objecting to the Northwest Austin Municipal Utility District's attempt to "bail out" of Section 5 coverage. Although Section 5 received a temporary reprieve, a majority of the Court cast serious doubt on its continued constitutionality.

Since then, the civil rights community has embarked on a strange and uneasy campaign to save Section 5. Liberal civil rights advocates and their allies in DOJ's Civil Rights Division, which administers the VRA, are urging some municipalities throughout the country to attempt to bail out of Section 5 coverage.[2] This approach is a complete reversal from decades of intimidation and pressure by activists and the Division against officials of jurisdictions considering bailouts.

With two cases challenging the constitutionality of Section 5 making their way toward the Supreme Court, DOJ's efforts have become all the more urgent as it seeks to create the appearance that jurisdictions can bail out of the draconian preclearance requirement. But what DOJ is offering covered jurisdictions is a cynical bait and switch. While touting bailouts from onerous Section 5 requirements, DOJ is requiring jurisdictions to submit to burdensome conditions, found nowhere in the VRA, simply to obtain the relief to which they are entitled under law. Jurisdictions covered by Section 5 should not be fooled by this ploy.

Understanding Section 5

Section 5 of the VRA was enacted as an emergency provision intended to be in operation for only five years, at which point it was expected that the Act's core provisions would be sufficient to protect Americans' right to vote. The heart of the VRA is Section 2, a permanent nationwide prohibition on any voting practice or procedure that "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 1973b(f)(2) [protecting "language minority groups"]."[3]

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This is a broad and powerful protection against discrimination. If any state or local government makes a change in voting law or procedures that appears to be discriminatory, either DOJ or an affected party can sue to have it overturned; indeed, the DOJ and public-interest groups bring many such lawsuits.

Section 5 takes a very different approach from Section 2. In its current form, which is even broader than the original version passed in 1965,[4] it requires nine states—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia—and all jurisdictions within those states to seek approval from the Attorney General or a three-judge federal district court in Washington, D.C., before implementing any voting-related changes. This preclearance requirement also applies to jurisdictions in parts of seven other states: California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. The Supreme Court has defined the changes subject to preclearance as those that (1) change the method of voting, (2) change candidacy requirements and qualifications, (3) change the composition of the electorate

1. 557 U.S. __, 129 S. Ct. 2504 (2009). Cited hereafter as *NAMUDNO*.
2. 42 U.S.C. § 1973c (2006).
3. 42 U.S.C. § 1973.
4. The original Section 5 allowed preclearance of a voting change if it had neither the purpose nor the effect of "denying or abridging the right to vote." 42 U.S.C. § 1973c (2006). In its present form, Section 5 allows preclearance only if the change does not have "the purpose of or will have the effect of diminishing the ability of any [minority group]…to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b) (2009). This amendment was intended to overturn the Supreme Court's decisions in Georgia v. Ashcroft, 539 U.S. 461 (2003), and Reno v. Bossier Parish, 528 U.S. 320 (2000). *See* H.R. REP. NO. 109-478, at 93–94 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618, 678–79, And it transformed Section 5 from a law promoting full access to the voting process to one that guarantees election success for the candidates chosen by certain racial groups.

that may vote for a candidate for a given office, or (4) affect the creation or abolition of an elective office.[5]

Section 5 is different from traditional anti-discrimination protections like Section 2 in at least four significant respects.

First, it effectively presumes that all voting-related actions by certain states and jurisdictions are discriminatory and therefore requires that they obtain pre-approval from the federal government for otherwise ordinary and routine actions, such as moving a polling station from a school that is under renovation to another one down the street or drawing new redistricting plans. This is a major and unusual imposition on state sovereignty.

Second, Section 5 reverses the traditional burden of proof that applies in anti-discrimination suits. Whereas under nearly all other antidiscrimination laws a party claiming discrimination must prove it, under Section 5, the burden is on the covered jurisdiction to prove that a change in procedure has neither the purpose nor the effect of discriminating against any of a variety of groups.

Third, this federal statutory presumption of discriminatory motive, originally intended as a temporary emergency measure, is seemingly unending in duration. Based on voting practices and data from the 1964, 1968, and 1972 presidential elections, it is unrelated to anything that has happened in actual elections over the past 40 years.

Fourth, after so many years, the list of covered jurisdictions has become arbitrary, and there is no longer any valid basis upon which to differentiate between those states and jurisdictions that happen to be covered and those that do not.

Section 5's constitutionality is suspect because of its prophylactic nature. While Congress may police certain violations of constitutional rights by the states, it would usually violate constitutional federalism for Congress to presume that the states will act unlawfully and, on that basis, require them to seek permission from the national government to administer changes in their election systems—a core incident of state sovereignty.

Congress has continued to renew Section 5's "emergency" provisions, largely for political reasons, even as the types of practices that Section 5 was created to target have faded into history.

In 1966 (one year after its original enactment), Section 5 was first upheld by the Supreme Court as an appropriate *temporary* measure in light of the "historical experience" of voting discrimination and the efforts by some states to evade other, less imposing measures to protect voting rights.[6] Despite this limited holding, Congress has continued to renew Section 5's "emergency" provisions, largely for political reasons, even as the types of practices that Section 5 was created to target have faded into history.

As a result, Section 5 coverage has become divorced from current political conditions. Coverage was always imprecise due to the original coverage formula, which used turnout and registration rates as a proxy for discrimination even though low rates of voter registration and turnout have many causes besides discrimination. In New York, for example, Queens is not required to seek preclearance, but the Bronx is. The counties of Monterey and Merced in California are subject to Section 5's dictates, but San Benito County—sandwiched in between them—is not.[7] But imprecision has given way to arbitrariness as the data driving coverage determinations have aged.[8] Indeed, as the Supreme Court recently observed, "the registration gap between white and black voters is in single digits in the covered States; in some of those States, blacks now register and vote at higher rates than whites."[9]

5. Presley v. Etowah County Commission, 502 U.S. 491, 502–503 (1992).
6. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).
7. *See* Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 CFR 51, Appendix.
8. 42 U.S.C. § 1973b(b). Coverage is based on the presence of a prohibited voting test or device and registration or turnout below 50 percent in the 1964, 1968, or 1972 presidential elections.
9. *NAMUDNO*, 129 S.Ct. at 2511.

In *NAMUDNO*, the Supreme Court criticized the continued use of this outdated formula as offensive to the long-standing tradition that the states enjoy "equal sovereignty" and must be treated equally. Nonetheless, it declined to strike down the Section 5 preclearance provision, ruling narrowly so as to avoid the constitutional question. It granted the petitioner, a utility district in Texas, the alternative relief that it had requested—namely, a rebuke of the Justice Department for interpreting the law too stingily and thereby depriving the district of the opportunity to seek a bailout of Section 5 coverage. The Justice Department's pinched interpretation, explained the Court, had "helped to render the bailout provision all but a nullity."[10]

Pending Challenges to the Constitutionality of Section 5

Two cases now pending in federal court in the District of Columbia challenge the constitutionality of the renewal of Section 5 in 2006.

In *LaRoque v. Holder*, voters and potential candidates in Kinston, North Carolina, sued DOJ after the Department objected to the outcome of a referendum that would have changed Kinston's local town council elections from partisan to nonpartisan.[11] DOJ claimed that the "elimination of party affiliation on the ballot" would reduce the ability of blacks to elect their candidates of choice, thereby violating Section 5.[12] Despite DOJ's charge that the change would injure black voters, the referendum had been approved by Kinston voters by a two-to-one margin and by a majority of black voters, who constituted 65 percent of the registered voters.

The case was dismissed on December 20, 2010, after the federal district court determined that the plaintiffs, as mere proponents of the referendum and potential political candidates, lacked standing to challenge DOJ's objection or to "raise facial challenges to the constitutionality of Section 5."[13] The case is now on appeal to the Court of Appeals for the District of Columbia Circuit.

Section 5 coverage has become divorced from current political conditions.

Shelby County v. Holder is a challenge by an Alabama county to the facial constitutionality of Section 5.[14] The county argues that neither Shelby County nor the state of Alabama would be covered if Congress, when it renewed Section 5 in 2006, had updated the triggering formula to reflect turnout and registration data from "any of the last three presidential elections instead of data from November 1964." Section 5, the county argues, is unconstitutional under the greatly changed and improved conditions that exist today.

DOJ attempted to delay consideration of Shelby County's constitutional arguments by asking the federal district court to impose a lengthy period for discovery. The court refused, agreeing with Shelby County that no "extensive fact discovery is warranted to evaluate the facial constitutionality of congressional legislation."[15] The parties are now awaiting the court's ruling on Shelby County's motion for summary judgment. Whatever the outcome, its decision is certain to be appealed.

Barriers to Bailouts

In theory, states and municipalities have always been free to seek an exemption from Section 5, but historically, exemptions have been granted so rarely that the so-called bailout provision might as well have been omitted from the statute.[16] This

10. *Id*. at 2516.
11. No. 10-0561, 2010 U.S. Dist. LEXIS 134464 (D.D.C. Dec. 20, 2010).
12. Letter from Loretta King, Acting Assistant Attorney General, U.S. Dept. of Justice, Civil Rights Division, to James P. Cauley III (Aug. 17, 2009) (*available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_081709.php).
13. *LaRoque*, 2010 U.S. Dist. LEXIS 134464, at *92.
14. 270 F.R.D. 16, 2010 U.S. Dist. LEXIS 96970 (D.D.C. Sept. 16, 2010).
15. *Id* at *13.
16. For a list of the jurisdictions that have successfully bailed out from coverage, *see* http://www.justice.gov/crt/about/vot/misc/sec_4.php.

was partly because its standards are demanding, partly because the political risks of attempting to secure a bailout can be substantial, and partly because the Civil Rights Division's Voting Section, with the support and at the urging of liberal civil rights activists, has often reacted with palpable hostility to requests by jurisdictions to escape its domination and control. For both DOJ and the activists, Section 5 has been a potent means of intimidating jurisdictions into acceding to their political demands.

The bailout requirements in the text of the VRA are already extremely rigorous on their own. The statute provides that a state or municipality wishing to bail out of Section 5 coverage must show that, during the previous 10 years, it has:

- Not used any forbidden voting test or device;
- Not been subject to any valid objection under Section 5;
- Not been found liable by a federal court for any other voting rights violations;
- Eliminated "voting procedures and methods of election which inhibit or dilute equal access to the electoral process";
- Demonstrated that it has "engaged in constructive efforts to eliminate intimidation and harassment" of voters; and
- Undertaken "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."[17]

Further, even if all of the statutory requirements for bailout are satisfied, the VRA provides that the District Court for the District of Columbia retains jurisdiction over the bailout decree for *10 years* and may reinstate coverage in response to *any* violation, no matter how minor.[18]

The political costs of seeking a bailout also cannot be discounted. Covered jurisdictions are the victims of a pernicious political reality.[19] The reason many local officials refrain from seeking bailout is that it would be political suicide to do so. Countless local officials whose jurisdictions have perfect records on voting matters and could easily meet the statutory requirements for bailout dare not apply because they are afraid of being labeled as racists by the NAACP and other civil-rights organizations that would seek to prove, in court and to the public, that the jurisdiction does not qualify or could not be trusted to be free of federal supervision.

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It is little surprise, then, that both Justice Antonin Scalia and Justice Anthony Kennedy separately remarked at the oral argument in *NAMUDNO* that bailout is impracticable for most governmental entities.[20]

Bait-and-Switch Bailouts

Now, however, these same activist groups and DOJ—entities that for decades have sought to minimize the availability of bailouts—are encouraging local governments to seek them. Their about-face is understandable. Demonstrating that bailouts are readily available to eligible jurisdictions may be their only hope of saving Section 5 from being struck down as unconstitutional when *Shelby County* and *LaRoque* reach the Supreme Court.

DOJ and its allies, however, have found it hard to give up their old ways. Rather than simply allow covered jurisdictions that are seeking a bailout to enjoy a future exemption from preclearance obligations, the Civil Rights Division has attempted

17. 42 U.S.C. § 1973b(a)(1).
18. 42 U.S.C. § 1973b(a)(5).
19. Hans A. von Spakovsky, *Voting Rights and the Other Bailouts*, THE CORNER (May 5, 2009, 5:56 PM), http://www.nationalreview.com/blogs/print/181399.
20. Transcript of Oral Argument at 37 and 45, *NAMUDNO*, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-322.pdf.

to impose on them additional onerous conditions that have no basis in the VRA. These mandates not only undermine the force and intended effect of a bailout, but also represent an abuse of power by the bureaucrats who insist on them as the price for Justice Department acquiescence to a federal court bailout decree. In effect, the Division is exacting what amounts to legal extortion from jurisdictions seeking to bail out from Section 5 coverage.

A perfect example is the consent decree entered last October for Sandy Springs, Georgia.[21] Sandy Springs was not even incorporated as a city until 2005, decades after the passage of Section 5, and has a very small black population of just 9.93 percent of residents.[22] It has never conducted voter registration or election activities; for now, such matters are handled exclusively by the county government. Nonetheless, DOJ refused to allow the jurisdiction a bailout from Section 5 under the applicable terms of the statute.

Rather than simply allow covered jurisdictions to enjoy a future exemption from preclearance obligations, the Civil Rights Division has attempted to impose on them additional onerous conditions that have no basis in the Voting Rights Act.

Instead, because the city had expressed a possible "desire" to administer elections at some unspecified future date, DOJ demanded "constructive measures" above and beyond what the VRA requires. These measures are particularly intrusive and burdensome.

- Sandy Springs must form a citizens' advisory group "that is representative of the City's diversity and that will include at least one member drawn from each racial/ethnic group that comprises at least ten percent of the City's total population." Members of the public must be advised of their opportunity to serve on this advisory group through media announcements, the city's Web site, and community leader contacts. Advisory group meetings must be open to the public, and the minutes of all meetings must be posted on the city's Web site.
- The city must solicit comments from the advisory group regarding planned municipal election procedures, including the selection of poll workers, changes in the location of any polling place, and *any other change* in voting procedures.
- The city also must coordinate with the advisory group to recruit a diverse group of poll workers and to increase voter turnout—notwithstanding the fact that the city's voter turnout is already considerably higher than that of the county.
- For the next 10 years, the city must send a report to Civil Rights Division bureaucrats within 90 days of every city-administered election detailing the total number of persons of each race who served as poll workers in the election, any voting changes since the previous election, and any election-related problems and complaints.
- At least 14 days before any municipal election, the city must mail sample ballots and information regarding election-day polling places to registered voters.

There is no statutory basis for any of these demands. Instead, DOJ demanded them as a condition to support the bailout request in federal court. Because DOJ's opposition to a bailout petition can make the process prohibitively expensive, even jurisdictions that qualify for bailout under the terms of the VRA are likely to accept DOJ's coercive offers.

Perhaps what offended the Department's attorneys assigned to the Sandy Springs matter was the fact that the city's elections are nonpartisan. After all, the Division objected to the proposal by voters in Kinston to adopt nonpartisan elections because they would supposedly hurt the ability of blacks to elect candidates of choice.[23] (Translation: Black voters are apparently not smart enough, in the Obama

21. City of Sandy Springs v. Holder, No. 1:10-cv-01502 (D.D.C. Oct. 26, 2010), *available at* http://www.justice.gov/crt/about/vot/misc/sandy_springs_cd.pdf.
22. *Id*. at 6.
23. Letter from Loretta King, Acting Assistant Attorney General, U.S. Dept. of Justice, Civil Rights Division, to James P. Cauley III (Aug. 17, 2009) (*available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_081709.php).

Administration's view, to know who to vote for if there is not a partisan party designation next to a candidate's name.)

Sandy Springs–type abuses are not a new phenomenon, but they were common during the years of the Clinton Administration. In a 1999 consent decree involving Shenandoah County, Virginia, for example, the Civil Rights Division required, in exchange for its support of bailout, that for the next five years the county would have to make annual reports to the Division "documenting all voting changes adopted by the County as well as the nine governmental units within the County."[24] This type of reporting requirement is completely contrary to the purpose of bailout; if a jurisdiction meets the statutory bailout requirements and is granted a release from Section 5 coverage, then it is entitled to be free from having to report to Washington every time it undertakes a sovereign act related to voting.

Because DOJ's opposition to a bailout petition can make the process prohibitively expensive, even jurisdictions that qualify for bailout under the terms of the VRA are likely to accept DOJ's coercive offers.

Similarly, in a consent decree involving Winchester, Virginia, filed in late 2000, the Division demanded that the city undertake an affirmative action program "to facilitate the selection of minority officials in the election and registration process, and in the appointment of persons to serve on boards, committees, and commissions whose members are appointed by city officials."[25] This was required of a jurisdiction that contained only small minority populations and in which there was no evidence of voting discrimination.[26]

Jurisdictions that have demonstrated their entitlement to a bailout should not have to operate under the presumption of bad faith and discriminatory intent.

Lawyers in the Division have attempted to mandate various unreasonable requirements for bailouts, including that a jurisdiction with no history of any voting-related discrimination must submit any changes affecting voting to the local branch of the NAACP for *its* approval for 10 years after the federal court declared it free from coverage.[27] Such a provision would have been totally inappropriate to include in a consent decree: A private advocacy organization obviously should not have a veto over the actions of the elected representatives of a local government.

Liberals attempt to justify these conditions by arguing that they are actually beneficial to jurisdictions because they help them to differentiate between voting changes that are discriminatory and those that are not. Just like Section 5, however, this assumes that local and state officials will immediately begin to discriminate when given the opportunity. Especially jurisdictions that have demonstrated their entitlement to a bailout should not have to operate under the presumption of bad faith and discriminatory intent.

Moreover, even if jurisdictions did appreciate the "help" of the federal government, it still may not be imposed coercively. As Justice Kennedy explained during the *NAMUDNO* oral argument, "to say that the States are willing to yield their sovereign authority and their sovereign responsibilities to govern themselves doesn't work. We've said…that Congress can't surrender its powers to the President, and the same is true with reference to the States."[28]

24. Shenandoah County, Virginia v. Reno, No. 1-99CV00992 at 7 (D.D.C. Oct. 15, 1999).
25. City of Winchester, Virginia v. Ashcroft, No. 1:00CV03073 at 7–8 (D.D.C. May 31, 2001).
26. *Id*. at 7.
27. This recommendation was made internally by a deputy chief of the Voting Section during the Bush Administration but rejected.
28. Transcript of Oral Argument at 41, *NAMUDNO*, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-322.pdf.

Abusing the Requirements of Federal Law

Section 5 is a continuing badge of infamy that states and their subdivisions should no longer have to wear. If it were struck down, Section 2 of the VRA would remain available for the federal government or any private plaintiff to use as a legal remedy if a state or local government actually engaged in discriminatory behavior in the voting context. The only change would be to curb the abuses of federal bureaucrats and check the power and influence of the liberal activist groups that rely on Section 5 to enforce their agendas.

Continuing to single out states and local governments that may have engaged in discriminatory practices that disappeared long ago and subjecting them to another 25 years of federal supervision is an extraordinary intrusion into state sovereignty.

Ultimately, the fact that the Department's Civil Rights Division so blithely disregards federal law in its enforcement activities is a tragedy of the highest order, but none of this will come as a surprise to those who are familiar with its inner workings. This is the same Division, after all, that was hit with over *$4.1 million* in sanctions for filing frivolous and unwarranted discrimination claims in *11 different cases* during the Clinton Administration.[29]

It is also the same unit that was ordered to pay $587,000 in sanctions in a redistricting case (*Miller v. Johnson*) in which both the Supreme Court[30] and a federal district court[31] characterized the Division's underhanded litigation tactics as "disturbing." In fact, the district court in the *Miller* case went much further, saying that the "considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment."[32] The court added that it was "surprising that the Department of Justice was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote."[33]

The latest revelations of DOJ's bailout-related abuses underscore that the Supreme Court should be highly dubious of any claim that Section 5's bailout provisions can somehow save its preclearance requirement. No rational basis exists for continuing to single out states and local governments that may have engaged in discriminatory practices in the first half of the 20th century—practices that disappeared long ago—and subjecting them to another 25 years of federal supervision that is an extraordinary intrusion into state sovereignty.

As the Supreme Court said in *NAMUDNO*, Section 5 had been upheld in the past as an appropriate exercise of congressional power because "the problems Congress faced when it passed the Act were so dire that 'exceptional conditions [could] justify legislative measures not otherwise appropriate.'"[34] The fact is that electoral conditions in jurisdictions covered by Section 5 are dramatically different today from the conditions encountered 45 years ago. The Court itself recognized as much: "Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[35]

Put simply, the "exceptional conditions" that existed in 1965 that authorized "federal intrusion into sensitive areas of state and local policymak-

29. Letter from William E. Moschella, Assistant Attorney General, U.S. Dept. of Justice, Office of Legislative Affairs, to James Sensenbrenner, Chairman, H. Comm. on the Judiciary (April 12, 2006) (*available at* http://www.scribd.com/doc/48673021/2006-0412-Ltr-to-House-of-Rep-re-Voting-Rights-Act-Procedures).
30. Miller v. Johnson, 515 U.S. 900 (1995).
31. Johnson v. Miller, 864 F. Supp. 1354 (1994).
32. *Id.* at 1368.
33. *Id.*
34. *NAMUDNO*, 129 S.Ct. at 2510 (citations omitted).
35. *Id.*

ing"[36] do not exist today. No number of dubious bailouts, weighted down with draconian conditions, can alter that fact.

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36. *Id.*