Merrill v. Milligan

- The Purcell Principle &
- Section 2 of the Voting Rights Act
Voting Rights Act Background

- The 2020 redistricting cycle was the first to take place without the VRA’s Section 5 Preclearance formula which the Supreme Court struck down in *Shelby County v. Holder* in 2013.

- Section 2, however, remains applicable. Section 2 was amended in 1982 and now prohibits voting processes/requirements that result in the curtailment of voting rights based on a voter’s race, color or language minority status. (Disparate Impact)

- In deciding Section 2 claims, courts must consider the “totality of the circumstances”

- One type of Section 2 claim related to redistricting is minority vote dilution.

- Vote dilution refers to the practice of dispersing minorities into many districts where they will make up an ineffective minority voting group (“cracking”) or concentrating minorities into a small number of districts where they make up an excessive majority (“packing”).
For vote dilution claims, like that of *Merrill v. Milligan*, the Supreme Court held in *Thornburg v. Gingles* that in addition to considerations for “totality of circumstances,” the plaintiff must show:

1. the affected minority group “is sufficiently numerous and compact to form a majority in a single-member district.”
2. the minority group is “politically cohesive;” and
3. The “majority votes sufficiently as a bloc to enable it…usually to defeat the minority group’s preferred candidates.”
Over the past several years the Supreme Court has ruled in favor of stricter standards for succeeding in a Section 2 claim.

**Brnovich v. Democratic National Committee (2021)**

- DNC challenged two of Arizona’s state laws regarding voting – arguing the laws violated VRA
  - Voting outside of voter’s assigned precinct – must be thrown out
  - “ballot harvesting” – collecting early ballots and turning them in on others’ behalf
- Justice Alito wrote the opinion upholding Arizona’s laws and laying out a set of “guideposts” for assessing discrimination in election laws:
  1. the size of the burden imposed by a challenged voting rule is highly relevant
  2. the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982 is a relevant consideration
  3. The size of any disparities in a rule’s impact on members of different racial or ethnic groups
  4. courts must consider the opportunities provided by a State’s entire system of voting when assessing the burden imposed by a challenged provision
  5. the strength of the state interests served by a challenged voting rule is also an important factor
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Alabama’s 2020 Redistricting Cycle

- November 2021 – Alabama enacted congressional redistricting plan with one majority Black district
- About 1/4 of Alabama’s population is Black, and for decades there has only been one majority Black district in the state.
- Three groups of Plaintiffs filed suits against Secretary of State John Merrill and the House and Senate redistricting chairmen challenging Alabama’s congressional map
  - Singleton v. Merrill – raised Equal Protection Clause claims
  - Milligan v. Merrill – raised Equal Protection and VRA claims
  - Caster v. Merrill – raised only a VRA claim
- Singleton and Milligan were assigned to a three-judge district court panel
- Caster was assigned to just one of the judges on the three-judge panel
- Caster was combined with the other two cases for resulting injunction
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Alabama’s 2020 Redistricting Cycle

• *Milligan/Caster* plaintiffs argued that the congressional map violated Section 2 of the Voting Rights Act because the plan concentrated ("packed") Black voters into the 7th Congressional District and split up ("cracked") Black voters into three other districts. Thereby diluting power of Black voters in Alabama.

• Plaintiffs asked court to strike down the congressional map and order a new map to be drawn that includes a second majority Black district
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District Court Decision

- January 24, 2022 - the three-judge district court panel (2 appointed by President Trump) unanimously agreed that Alabama’s plan violates the plaintiffs' rights under Section 2 of the Voting Rights Act.
  - Finding that the plan denies Black voters in AL equal opportunity “to participate in the political process and to elect representatives of their choice.”
  - Plaintiffs established all three Gingles Factors:
    1 - “Each set of Section Two plaintiffs has submitted remedial plans that strongly suggest that Black voters in Alabama are sufficiently numerous and reasonably compact to comprise a second majority-Black congressional district.”
    2 & 3 - “Voting in Alabama, and in the districts at issue in this litigation, is racially polarized for purposes of the second and third Gingles requirements.
  - Therefore, the court held, the plaintiffs are substantially likely to prevail on totality of circumstances factors as well.
Alabama’s Argument

• Alabama appealed to the Supreme Court in *Milligan* arguing:
  • there was not enough time to redraw congressional districts before election
  • their map drawing process was race neutral and no obligation exists to create an additional majority-minority district
  • “Throughout the proceedings, one undisputed fact stood out. Millions of illustrative maps generated by some of the plaintiffs' own experts-using algorithms programmed *not* to consider *race-never* resulted in a plan with two majority-minority black districts.”
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Supreme Court

- February 7, 2022 – The Supreme Court stayed the preliminary injunction that the three-judge panel issued. Thereby allowing Alabama to use its enacted congressional plan for 2022 elections.

- Also granted petition for a writ of certiorari – will hear the case next term

- There’s no opinion, however, Justice Kavanaugh wrote a concurrence (joined by Justice Alito) which provides some reasoning for their decision.

- Chief Justice Roberts and Justice Kagan wrote dissents
Justice Kavanaugh’s Concurrence

The Purcell Principle

- Says the stay allows Court to decide the merits in an orderly fashion with full briefing (after election)
- There’s no time to redraw the maps (Citing Purcell v. Gonzalez)
- “This Court has repeatedly stated that federal courts ordinarily should not enjoin a state’s election laws in the period close to an election, and this Court in turn has often stayed lower federal court injunctions that contravened that principle.” (Purcell Principle)
- Emphasized fact that district court wouldn’t stay the injunction even though 2022 primary elections absentee voting begins 7 weeks from then (general election-9months away)
- “I would think that the Purcell principle thus might be overcome even with respect to an injunction issued close to an election if a plaintiff establishes at least the following:
  - the underlying merits are entirely clearcut in favor of the plaintiff;
  - the plaintiff would suffer irreparable harm absent the injunction;
  - the plaintiff has not unduly delayed bringing the complaint to court; and
  - the changes in question are at least feasible before the election without significant cost, confusion, or hardship.”
- “At this preliminary juncture, the underlying merits appear to be close and, at a minimum, not clearcut in favor of the plaintiffs.”
- “And in any event, the plaintiffs have not established that the changes are feasible without significant cost, confusion, or hardship. Therefore, the plaintiffs cannot overcome even a more relaxed version of the Purcell principle.”
Similar case - *Ardoin v. Robinson*

- June 28, 2022 - Supreme Court granted cert and stay to the case *Ardoin v. Robinson*.
- Louisiana legislature enacted congressional plan with 1 majority Black district out of 6
- Louisiana’s Black population = 30%.
- Supreme Court put this case on hold pending decision in *Merrill*
Potential Consequences for Section 2 of VRA

- Voting rights groups are concerned that the Supreme Court may use the Alabama case to further weaken the Voting Rights Act.
- If the Court embraces Alabama’s argument regarding application of race-neutral principles in redistricting, plaintiffs will have a more difficult time succeeding on Section 2 claims.