Voting Rights and Democracy Forum

Volume 1 | Issue 1

2022

Making it Harder to Challenge Election Districting

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MAKING IT HARDER TO CHALLENGE ELECTION DISTRICTING

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On October 4, 2022, the U.S. Supreme Court heard oral arguments in *Merrill v. Milligan*.[1] The case has the potential to be enormously important with regard to the Voting Rights Act ("VRA") and race discrimination in districting.[2] But a ruling that already occurred in the case, as part of the Court's "shadow docket,"[3] is also likely to have a significant impact in the future.

The Supreme Court's ruling in *Merrill*, on February 7, 2022, makes it more difficult for federal courts to enjoin illegal voting practices.[4] A three-judge federal district court panel—which included two judges appointed by President Donald Trump and one appointed by President Bill Clinton—found that the congressional districts drawn by the Alabama legislature violated the VRA.[5] But the Supreme Court, in a five-to-four ruling, with Chief Justice John Roberts joining the three liberal Justices in dissent, stayed the lower court ruling and allowed the discriminatory Alabama map to be used in the 2022 elections.[6]

This Essay provides a brief analysis of the Court's stay and contends that *Merrill* should be understood as a continuation of conservative efforts to gut the VRA.

I. ASSESSING *MERRILL V. MILLIGAN*

The three-judge panel in Alabama heard seven days of testimony, read over 1,000 pages of briefing, and concluded that the congressional map drawn by the Alabama legislature violated Section 2 of the VRA.[7] This provision prohibits state and local governments from employing election systems that discriminate against minority voters.[8] When an application for a stay came

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[1] SCOTUSBLOG, *Merrill v. Milligan*, https://www.scotusblog.com/case-files/cases/merrill-v-milligan-2 [https://perma.cc/YY27-HHGP] (last visited Oct. 4, 2022).

[2] Congressional district boundaries are required to comply with Section 2 of the VRA. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301).

[3] The "shadow docket" refers to orders issued by the Supreme Court when matters come to it for emergency relief.

[4] 142 S. Ct. 879 (2022).

[5] Singleton v. Merrill, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022), *cert. granted sub nom.* Merrill v. Milligan, 142 S. Ct. 879 (2022).

[6] 142 S. Ct. 879 (2022).

[7] *See Singleton*, 582 F. Supp. 3d at 935-36.

[8] 52 U.S.C. § 10301(a).

before the Supreme Court, none of the nine Justices disagreed with the lower court's conclusion about the discriminatory effect of the Alabama legislature's districting. Nevertheless, a majority granted it. In her dissent, Justice Elena Kagan explained, "Alabama's population is 27% Black, but under the plan, Black voters have the power to elect their preferred candidates in only one of the State's seven congressional districts."[9]

One of the most basic rules of appellate procedure is that a stay of a lower court decision should be granted only if there is a substantial likelihood that the appellant will prevail on the merits.[10] This, of course, is a general requirement for any form of equitable relief. Yet here, none of the five conservative Justices pointed to any error of law or fact by the three-judge panel. Nor did any of the Justices claim that the three-judge federal court misapplied the law in finding a violation of the VRA. As Chief Justice Roberts explained in his dissent, "the District Court properly applied existing law in an extensive opinion with no apparent errors for our correction."[11]

Why, then, did the conservative Justices stay the ruling by the three-judge panel? There was no opinion by the Court, but Justice Kavanaugh, who was in the majority, wrote an opinion explaining the rationale behind the stay. He invoked the principle—commonly referred to as the "*Purcell* principle"—that federal courts should not issue changes to state and local election practices just before an election.[12] Justice Kavanaugh wrote: "The stay order follows this Court's election-law precedents, which establish (i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle."[13]

Purcell v. Gonzalez[14] also was a Supreme Court order, handed down without briefing or oral argument. The issue in *Purcell* was whether the Court should stay an order by the Ninth Circuit to enjoin an Arizona law that required proof of identification for voting. The district court had found that the plaintiffs failed to show "a strong likelihood" of prevailing on the merits, but the Ninth

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[9] *Merrill*, 142 S. Ct. at 884 (Kagan, J., dissenting).
[10] *See* Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).
[11] *Merrill*, 142 S. Ct. at 882 (Roberts, C.J., dissenting). *See also id.* at 889 (Kagan, J., dissenting).
[12] The term "*Purcell* principle" was coined by Professor Richard L. Hasen. *See* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016).
[13] *Merrill*, 142 S. Ct. at 879 (Kavanaugh, J., concurring) (citing Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam)).
[14] 549 U.S. 1 (2006) (per curiam).

Circuit reversed.[15] The Supreme Court said, "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules."[16]

The Court has invoked *Purcell* many times in the last fifteen years as establishing that federal courts should not enjoin state and local election practices "on the eve of an election."[17] For example, in *Republican National Committee v. Democratic National Committee*,[18] a federal district court in Wisconsin issued an order, five days before the scheduled primary election, that absentee ballots postmarked after election day, April 7, would still be counted so long as they were received by April 13.[19] The district court did this because of the dramatic increase in absentee ballots in April 2020 at the height of concern over the COVID-19 pandemic. Wisconsin law had previously required that they be received by election day.[20]

The Supreme Court said that "[e]xtending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election."[21] The Court invoked *Purcell* and said, "[t]his Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."[22]

The Court, however, has never explained what is sufficiently close to the election to justify the application of the *Purcell* principle.[23] The *Merrill* case was not a situation where the federal court was acting days or even weeks before the election. The federal district court issued its order in February 2022, but the Alabama primary was not until May and the general election is in November.

Moreover, Justice Kavanaugh's approach would make challenges to election districting almost impossible for the first election after districts are drawn. New districts are not drawn until after the Census, and litigation then takes time. If a legislature just delays districting long enough, then no federal court can hear a challenge in time before the next election. Under Justice

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[15] *Id.* at 3.
[16] *Id.* at 5-6.
[17] Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) (per curiam) (citing Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam)).
[18] *Id*.
[19] *See id.* at 1206-07.
[20] *Id.* at 1209 (Ginsburg, J., dissenting).
[21] *Id.* at 1207 (Kavanaugh, J., concurring).
[22] *Id.*
[23] Nor has the Court explained why judicial noninterference is more important than judicial protection of the right to vote.

Kavanaugh's reasoning, if Alabama drew districts that would have made it unlikely that any Black representative could have been elected, then there still could have been no relief from the federal court before the election.

Justice Kavanaugh stressed that the Court was not ruling on the merits, but its action did not preserve the status quo since the maps from prior elections are not being used. Instead, it puts in place an electoral map that a three-judge district court panel found to be discriminatory. The result of the ruling is that the map drawn by the Alabama legislature, which lessens the strength of Black voters in violation of the VRA, was used in the 2022 primary and general elections, as the Court has yet to decide the case. The almost certain result, which no one disputes, is an additional Republican seat in the House of Representatives—at the expense of Black Alabamians.

II. *MERRILL*, THE VOTING RIGHTS ACT, AND THE SUPREME COURT'S 2022-23 TERM

At its core, *Merrill* should be viewed as a continuation of conservative efforts to gut the VRA. Unfortunately, it appears that the conservative Justices are ready to limit the use of the VRA to prohibit discrimination in redistricting.[24] But its use of the *Purcell* principle to limit federal judicial power is quite significant in itself.

On June 28, the Court took a similar action with regard to districting in Louisiana.[25] A federal district court found that the districting in Louisiana for seats in the U.S. House of Representatives likely violated the VRA by diluting Black voting strength and ordered the creation of a second majority Black congressional district in Louisiana.[26] The Supreme Court, in a six-to-three decision split along ideological lines, stayed the judge's order imposing the new districts until *Merrill* has been decided.[27] The result, as with Alabama, is that the Supreme Court's order means that midterm elections in Louisiana will take place this year using maps that a lower court found are likely to hurt the power of Black voters.

The Court has already greatly weakened the VRA when it ruled that Section 4's preclearance formula was unconstitutional. In

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[24] I made this argument the day after the Court issued the stay in *Merrill*. Erwin Chemerinsky, Opinion, *So Much for Nonpartisan. Republican Supreme Court Justices are Helping Elect Republicans*, L.A. TIMES (Feb. 8, 2022, 11:50 AM), https://www.latimes.com/opinion/story/2022-02-08/supreme-court-alabama-voting-map [https://perma.cc/EUT9-3AP3].

[25] Ardoin v. Robinson, 142 S. Ct. 2892, 2892-93 (2022).

[26] Robinson v. Ardoin, 2022 WL 2012389, at *1 (M.D. La. June 6, 2022), *cert. granted before judgement*, 142 S. Ct. 2892 (2022).

[27] *Ardoin*, 142 S. Ct. at 2892-93.

2013, in *Shelby County v. Holder*,[28] the Court rendered inoperative the preclearance requirement in Section 5, the requirement that mandates jurisdictions with a history of race discrimination in voting get preclearance from the U.S. Department of Justice before making changes in their election systems.[29] By invalidating Section 4, no jurisdictions are currently covered by Section 5's preclearance requirement—although it still exists. Moreover, in 2021, in *Brnovich v. Democratic National Committee*,[30] the Court made it much harder to use Section 2 of the VRA to challenge racially discriminatory electoral processes.

There is every reason to be concerned that the conservatives' hostility to the VRA will cause them to lessen the ability to use the law to challenge racial discrimination in drawing election districts. The Court's decisions on the merits in the Alabama and Louisiana cases are likely to further reduce the viability of the VRA to challenge the use of race in congressional districting.

CONCLUSION

There are two very different narratives about voting in the United States. Conservatives believe that voting fraud is a major problem and see race discrimination in voting as largely a thing of the past. Liberals see disenfranchisement of voters of color as a serious issue and think voting fraud is rare. The current Court is clearly split six-to-three with a conservative majority, and this is especially evident in its elections and voting cases. As Justice Kagan lamented in a 2021 dissent, the Court "in the last decade . . . has treated no statute worse" than the VRA.[31] The Court's current Term will likely have serious implications for the future of the VRA.

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[28] 570 U.S. 529 (2013).
[29] *Id.* at 557.
[30] 141 S. Ct. 2321 (2021).
[31] *Id.* at 2351 (Kagan, J., dissenting).