

*Voting Rights Act of 1965 — Vote Dilution —
Fourteenth Amendment — Allen v. Milligan*

America was founded on ideals of democracy, freedom, and political equality.¹ It was also founded with racialized slavery, and for most of its history was devoted to a caste system that kept minorities from their rights through discriminatory laws and extralegal violence.² Much of the nation’s history has been a struggle to reconcile these two sides of the American story — to build, at last, a true multiracial democracy. At the post-Reconstruction high point of this campaign stands the Voting Rights Act of 1965³ (VRA), “the crown jewel of the civil rights movement.”⁴ In recent years, this landmark statute has periodically been hauled into the Roberts Court. Almost every time, it has come back with a hole punched in it.⁵ The Court declared the VRA’s coverage formula unconstitutional in *Shelby County v. Holder*.⁶ It made it harder for plaintiffs to win vote-denial claims in *Brnovich v. Democratic National Committee*.⁷ And last Term, in *Allen v. Milligan*,⁸ the Court looked set to deliver the knockout blow by declaring that the VRA grants racial minorities only as much political influence as they would have under race-blind districts.⁹

Then a shocking thing happened. In *Milligan*, the Court affirmed its decades-old, more expansive reading of the relevant section of the VRA.¹⁰ That holding preserved the Voting Rights Act as an important shield for racial minorities’ ability to elect their preferred representatives.¹¹ But it did not settle a lurking clash between the VRA and the Fourteenth Amendment and even seemed to invite a case squarely presenting that issue.¹² *Milligan* reiterated that the VRA sometimes requires states to consider race when redistricting; next, the Court will

¹ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 14 (2005).

² See generally Frederick Douglass, “What to the Slave Is the Fourth of July?,” Oration Delivered in Corinthian Hall, Rochester, New York (July 8, 1852), reprinted in THE OXFORD FREDERICK DOUGLASS READER 108 (William L. Andrews ed., 1996); AMAR, *supra* note 1, at 20.

³ 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702.

⁴ Eric H. Holder, Jr., Keynote Address, *MLK 50 Symposium: Where Do We Go from Here?*, 49 U. MEM. L. REV. 33, 38 (2018).

⁵ In addition to the cases discussed in text accompanying notes 6–7, see *Bartlett v. Strickland*, 556 U.S. 1, 14–20 (2009) (plurality opinion); *Abbott v. Perez*, 138 S. Ct. 2305, 2324–26 (2018); and *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 443–46 (2006) (opinion of Kennedy, J.).

⁶ 570 U.S. 529 (2013); see *id.* at 557.

⁷ 141 S. Ct. 2321 (2021); see *id.* at 2338–40.

⁸ 143 S. Ct. 1487 (2023).

⁹ See Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 YALE L.J. 862, 864–65 (2021).

¹⁰ See *Milligan*, 143 S. Ct. at 1507.

¹¹ See Chen & Stephanopoulos, *supra* note 9, at 867.

¹² See Ellen Katz, “[T]he Whole Point of the Enterprise,” ELECTION L. BLOG (June 9, 2023, 5:42 AM), <https://electionlawblog.org/?p=136723> [<https://perma.cc/KN28-MH4W>].

need to decide whether a race-conscious VRA can live with a colorblind Fourteenth Amendment.

Milligan was a dispute about section 2 of the VRA.¹³ The section's current version dates from 1982,¹⁴ when Congress repudiated a Supreme Court decision holding that section 2 prohibits only voting rules that intentionally discriminate on the basis of race.¹⁵ In response, Congress clarified that the law prohibits rules whose *effects* discriminate based on race, whether or not that discrimination is intentional.¹⁶ The resulting text bars any “voting qualification”; voting “prerequisite”; or “standard, practice, or procedure” that, “based on the totality of the circumstances,” results in “political processes leading to nomination or election [that] are not equally open” to voters of all races.¹⁷ Elections are “not equally open” if voters of a certain race “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”¹⁸ While “one circumstance which may be considered” to determine whether section 2 has been violated is whether members of the relevant race are underrepresented in elected office, the statute specifies that “nothing in this section establishes a right” for racial minorities to be elected “in numbers equal to their proportion in the population.”¹⁹

In 1986's *Thornburg v. Gingles*,²⁰ the Supreme Court converted section 2's grand principles into a legal test. There, a group of Black voters alleged that North Carolina could have created majority-Black districts where Black voters could elect their preferred candidates.²¹ Instead, the State had submerged them in multimember districts where white majorities dominated, allegedly violating section 2²² by giving Black voters “less opportunity . . . to elect representatives of their choice.”²³ The Supreme Court agreed and announced the test that has governed these vote-dilution claims ever since.²⁴ To prove that a districting scheme violates section 2, a plaintiff must first show that (1) a state could create a reasonably configured district where the racial minority would form a

¹³ See *Milligan*, 143 S. Ct. at 1502.

¹⁴ See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2, 96 Stat. 131, 134 (codified at 52 U.S.C. § 10301).

¹⁵ *City of Mobile v. Bolden*, 446 U.S. 55, 60–61, 65 (1980) (plurality opinion).

¹⁶ See *Milligan*, 143 S. Ct. at 1500.

¹⁷ 52 U.S.C. § 10301.

¹⁸ *Id.* § 10301(b).

¹⁹ *Id.*

²⁰ 478 U.S. 30 (1986).

²¹ See *Gingles v. Edmisten*, 590 F. Supp. 345, 349 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom. Gingles*, 478 U.S. 30.

²² See *id.* at 349–50.

²³ 52 U.S.C. § 10301(b).

²⁴ See *Gingles*, 478 U.S. at 50–51.

majority;²⁵ (2) the racial minority usually prefers the same political candidates; and (3) the white majority prefers different candidates and votes as a bloc, so that it can usually prevent the minority from electing its candidates of choice.²⁶ Together, these preconditions show that a state could create a majority-minority district that would satisfy its redistricting criteria and would allow minority voters with shared political interests to elect the candidates who will best represent them — and that if the state does not, then a politically opposed white majority will block the minority from electing its preferred representatives.²⁷ If a plaintiff proves the preconditions, then the court examines the totality of the circumstances to determine whether creating another majority-minority district is necessary to make the political process “equally open.”²⁸

But almost forty years after *Gingles*, racial minorities’ share of the population far exceeds the share of districts where they form a majority.²⁹ As a result, “minority voters are disproportionately underrepresented (and white voters are disproportionately overrepresented) almost everywhere.”³⁰ Take Alabama. In 2021, it enacted a congressional map in which only 14% of districts were majority Black, even though Black people make up 27% of the state’s population.³¹ Four groups of plaintiffs sued in the U.S. District Court for the Northern District of Alabama, alleging that the map diluted the influence of Black voters in violation of section 2 and was a racial gerrymander in violation of the Fourteenth Amendment.³²

A three-judge district court held that the plaintiffs were likely to succeed in their VRA claim. Applying *Gingles*, the panel found that

²⁵ Wis. Legislature v. Wis. Elections Comm’n, 142 S. Ct. 1245, 1248 (2022) (per curiam) (citing *Gingles*, 478 U.S. at 50–51). A district is “reasonably configured” if it respects traditional redistricting criteria like compactness. See *Cooper v. Harris*, 137 S. Ct. 1455, 1463–64 (2017).

²⁶ See *Gingles*, 478 U.S. at 51.

²⁷ For simplicity, this comment refers to section 2 defendants as “states.” In reality, section 2 applies to all state and local government entities that use electoral districts. See, e.g., *Harding v. County of Dallas*, 948 F.3d 302, 306 (5th Cir. 2020) (county); *Gonzalez v. City of Aurora*, 535 F.3d 594, 596 (7th Cir. 2008) (city); *Dixon v. Lewisville Indep. Sch. Dist.*, No. 22-CV-304, 2022 WL 4477320, at *1 (E.D. Tex. Sept. 26, 2022) (school district).

²⁸ See *Milligan*, 143 S. Ct. at 1503 (quoting *Gingles*, 478 U.S. at 45).

²⁹ See Brief of Amici Curiae Professors Jowei Chen et al. in Support of Appellees/Respondents at 3–4, *Milligan*, 143 S. Ct. 1487 (No. 21-1086).

³⁰ *Id.* at 10.

³¹ *Singleton v. Merrill*, 582 F. Supp. 3d 924, 935, 1025 (N.D. Ala. 2022) (per curiam).

³² See *id.* at 935. The four groups of plaintiffs filed four separate cases. See *id.* The district court consolidated the two cases filed by plaintiffs Evan Milligan and Bobby Singleton into a single proceeding for a preliminary injunction. *Id.* at 934–35, 938, 966. That injunction was granted, then appealed and upheld in *Allen v. Milligan*. See *Milligan*, 143 S. Ct. at 1502. Separately, the district court issued a preliminary injunction in the case filed by plaintiff Marcus Caster. See *Caster v. Merrill*, No. 21-cv-1536, 2022 WL 264819, at *2, *37 (N.D. Ala. Jan. 24, 2022). The case filed by plaintiff James Thomas moved more slowly. It had not reached a merits decision when the district court issued the injunctions in *Milligan* and *Caster*, and was stayed pending the Supreme Court’s decision in *Milligan*. See *Thomas v. Merrill*, No. 21-cv-1531, at 1 (N.D. Ala. Mar. 21, 2022) (stay order).

Alabama could create an additional reasonably configured majority-Black district,³³ that Black Alabamians are politically cohesive, and that voting in Alabama is racially polarized.³⁴ Moving to the totality of the circumstances, the court held that the map was likely illegal.³⁵ Having decided the case on statutory grounds, the court declined to reach the plaintiffs' claim that Alabama's map was an unconstitutional racial gerrymander.³⁶ The court immediately enjoined Alabama's Secretary of State from conducting congressional elections under the challenged maps and handed the matter back to the legislature to enact VRA-compliant districts before the next election.³⁷

In an emergency order, the Supreme Court stayed the injunction and granted certiorari before judgment.³⁸ Although it gave no explanation, the Court likely believed that it was too close to the next election to create new districts.³⁹ While the injunction was stayed, Alabama conducted its 2022 congressional elections — using the map the district court had held was likely illegal in a ruling whose merits the Supreme Court had not disturbed.⁴⁰ As a result, the congressional votes of hundreds of thousands of Black Alabamians were diluted by a politically opposed white majority.

The Supreme Court then affirmed. Writing for a 5–4 majority, Chief Justice Roberts reaffirmed *Gingles* and declined Alabama's urging to overrule or significantly narrow it.⁴¹ Alabama had proposed three limits to the first step of a vote-dilution case — when plaintiffs must show that they are underrepresented and that the state could reduce that underrepresentation by creating another reasonably configured majority-minority district. First, even though plaintiffs must produce a map with an additional majority-minority district, Alabama argued that plaintiffs could not draw that district by considering or prioritizing race (the Court was not sure which one Alabama meant).⁴² Second, instead of showing that they are underrepresented compared to their share of the population, racial minorities would need to show that they are

³³ See *Singleton*, 582 F. Supp. 3d at 1004.

³⁴ See *id.* at 1016.

³⁵ *Id.* at 1018. Since the plaintiffs were seeking a preliminary injunction, *id.* at 935, the court did not issue a definitive ruling but found only that the plaintiffs were likely to prevail on their claim, *see id.* at 1026.

³⁶ See *id.* at 937.

³⁷ See *id.* at 1033–34.

³⁸ *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (mem.).

³⁹ See *id.* at 882 (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)); Michael Wines, *Maps in Four States Were Ruled Illegal Gerrymanders. They're Being Used Anyway.*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/2022/08/08/us/elections/gerrymandering-maps-elections-republicans.html> [<https://perma.cc/Y7XR-LUY4>].

⁴⁰ See Wines, *supra* note 39.

⁴¹ See *Milligan*, 143 S. Ct. at 1507. Chief Justice Roberts was joined in full by Justices Sotomayor, Kagan, and Jackson, and joined by Justice Kavanaugh for all but one part of the opinion.

⁴² *Id.* at 1510 (opinion of Roberts, C.J.).

underrepresented compared to a race-blind benchmark — created by, say, having a computer generate millions of districting plans without considering race and calculating the average number of majority-minority districts in those plans.⁴³ And third, the state must have created fewer majority-minority districts than the race-blind benchmark only because of race — as opposed to, for example, “the State’s naturally occurring geography and demography.”⁴⁴

The Court rejected Alabama’s proposals. First, although acknowledging that the Equal Protection Clause bars districts drawn primarily because of race, four Justices argued that mapmakers may consider race as one criterion among others.⁴⁵ Second — and now writing for a majority again — Chief Justice Roberts poked holes in the purported usefulness and objectivity of the race-blind benchmark. A few million simulations do not reliably summarize the “trillion trillions” of ways to cut a state into reasonable districts.⁴⁶ Moreover, creating simulated districts requires making choices about how to define the program’s criteria (like districts’ compactness) and how to trade those criteria off against each other, choices that cannot be grounded in law but that could shift the benchmark up or down.⁴⁷ Third, recognizing vote dilution only if it arose for racial reasons would resurrect the intent test that Congress had repudiated in its 1982 amendments to the VRA.⁴⁸ Section 2 bans discriminatory effects, the Court reiterated, whatever their motivation.⁴⁹

Having rejected Alabama’s central argument, the Court next disposed of the State’s alternative positions. First, Alabama had argued that section 2 applies only to rules like registration requirements or polling locations, not single-member districts’ borders.⁵⁰ The Court disagreed. Section 2 applies to voting “procedures” and “prerequisites” — and the districts from which people vote are both a voting procedure and a prerequisite to voting.⁵¹ Second, Alabama had argued that since the Fifteenth Amendment prohibits only intentional discrimination, it does not grant Congress the power to prohibit bare discriminatory effects — or at least does not authorize race-conscious districts as a remedy.⁵² The majority countered that “for the last four decades, this Court and the lower federal courts have repeatedly” used the effects test and have often ordered race-conscious districts to remedy violations of it.⁵³

⁴³ See *id.* at 1506–07 (majority opinion).

⁴⁴ *Id.* at 1507 (quoting Brief for Appellants at 46, *Milligan*, 143 S. Ct. 1487 (No. 21-1086)).

⁴⁵ See *id.* at 1510, 1512 (opinion of Roberts, C.J.). Justice Kavanaugh did not join this part of the opinion.

⁴⁶ *Id.* at 1513–14 (majority opinion).

⁴⁷ See *id.* at 1513.

⁴⁸ *Id.* at 1514.

⁴⁹ See *id.*

⁵⁰ *Id.* at 1514–15.

⁵¹ *Id.* at 1515.

⁵² *Id.* at 1516.

⁵³ *Id.* at 1516–17.

“In light of that precedent,” the Court would continue to do so.⁵⁴ The Court therefore applied its longstanding test and affirmed the district court’s findings.⁵⁵

Justice Kavanaugh wrote a solo concurrence. He emphasized that Alabama’s position would require overruling *Gingles*, but precedents interpreting statutes enjoy strong *stare decisis*.⁵⁶ He also acknowledged Justice Thomas’s argument that even if Congress could create race-conscious districting remedies in 1982, subsequent racial progress means that those remedies might no longer be authorized by the Fifteenth Amendment.⁵⁷ Since Alabama did not make this argument, Justice Kavanaugh noted that he “would not consider it at this time.”⁵⁸

Justice Thomas dissented. First, he argued that section 2 governs only whether people can vote and how their votes are counted, not which districts they vote in.⁵⁹ He then largely agreed with Alabama’s position: plaintiffs should have to show that their electoral influence was diluted compared to a race-blind baseline.⁶⁰ Finally, he believed that the district court read section 2 to require a majority-minority district whenever one could be reasonably configured.⁶¹ And that, he argued, would run beyond Congress’s power to enforce the Fifteenth Amendment and would violate the Fourteenth Amendment’s Equal Protection Clause to boot.⁶²

Justice Alito also dissented.⁶³ He noted that, post-*Gingles*, the Court has decided that drawing districts predominantly because of race violates the Equal Protection Clause.⁶⁴ With those decisions now in the background, the Court should construe section 2 to avoid constitutional doubts about whether the statute mandates racial gerrymanders.⁶⁵

In *Milligan*, the Supreme Court rebuffed a long-gathering statutory challenge to the VRA: that section 2 does not require race-conscious districting.⁶⁶ But the Court left open another, more existential argument: that if section 2 does require race-conscious districting, then it is unconstitutional. First, the majority avoided the question of whether race-conscious districting remedies are racial classifications that trigger strict scrutiny under the Fourteenth Amendment. Second, Justice Kavanaugh — the fifth vote in *Milligan* — suggested that Congress’s

⁵⁴ *Id.* at 1517.

⁵⁵ *Id.* at 1504–06.

⁵⁶ *Id.* at 1517 (Kavanaugh, J., concurring).

⁵⁷ *Id.* at 1519.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1519–20 (Thomas, J., dissenting). This portion of the dissent was joined only by Justice Gorsuch.

⁶⁰ *Id.* at 1523–24. This portion of the dissent was joined by Justices Alito, Gorsuch, and Barrett.

⁶¹ *See id.* at 1535.

⁶² *See id.* at 1539–41.

⁶³ Justice Alito was joined by Justice Gorsuch.

⁶⁴ *Milligan*, 143 S. Ct. at 1554 (Alito, J., dissenting).

⁶⁵ *Id.*

⁶⁶ *See* Chen & Stephanopoulos, *supra* note 9, at 864–65.

constitutional authority to require race-conscious districts may have an expiration date. As a result, while Alabama argued that section 2 is race blind as a matter of statutory interpretation, future defendants will likely argue that section 2 must be race blind as a matter of constitutional law. It is not clear how the Court would rule in that challenge. What is clear is that *Milligan* left the door open.

Section 2 and the Equal Protection Clause have long had an uneasy coexistence.⁶⁷ Section 2 sometimes requires states to move areas into or out of districts partly because of the race of voters who live there. As a result, it requires states to take race-conscious action — which the Equal Protection Clause usually prohibits.⁶⁸ For decades, individual Justices have fretted about the tension between section 2 and the Equal Protection Clause.⁶⁹ But the Court has never squarely addressed it.

It again declined to in *Milligan*. Alabama raised this issue in its brief, urging that if section 2 means what the district court (and, ultimately, the Supreme Court) said it means, “then § 2 as applied to single-member districts is unconstitutional. Section 2 cannot trump the Equal Protection Clause’s guarantee that all citizens will be free from invidious discrimination.”⁷⁰ But the Court could not agree on what to do about it. In the lead opinion, four Justices recited that there is a difference between considering race and being primarily motivated by it, and that states may do the former but not the latter.⁷¹ Four Justices in dissent argued that comparing enacted plans to race-conscious ones raises serious constitutional doubts and so courts should avoid interpreting section 2 to require it.⁷² And Justice Kavanaugh did not join either position or offer his own.⁷³ To be fair, Alabama mostly argued that section 2 is

⁶⁷ See *id.* at 874–75; Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1665–67 (2001); Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 288 (2020).

⁶⁸ *E.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2162–63 (2023).

⁶⁹ See, e.g., *Holder v. Hall*, 512 U.S. 874, 905–06 (1994) (Thomas, J., concurring in the judgment); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment, and dissenting in part); *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (Alito, J.); *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (Kennedy, J.) (plurality opinion); *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (O’Connor, J.).

⁷⁰ Brief for Appellants, *supra* note 44, at 78.

⁷¹ See *Milligan*, 143 S. Ct. at 1510 (opinion of Roberts, C.J.).

⁷² See *id.* at 1524 (Thomas, J., dissenting).

⁷³ See *id.* at 1517–19 (Kavanaugh, J., concurring). That said, Justice Kavanaugh did join the portion of the opinion holding that the Fifteenth Amendment authorizes race-based redistricting as a remedy for section 2 violations, see *id.* at 1516–17, as well as a statement explaining that courts should expect section 2 plaintiffs to choose an illustrative map based on its districts’ racial composition, *id.* at 1513 n.7. Election lawyers can only scratch their heads about why he would join these statements and not others from the majority — until a future case forces him to clarify. See Katz, *supra* note 12.

colorblind as a matter of statutory interpretation.⁷⁴ So the Court understandably used *Milligan* to resolve that statutory claim. But by firming up section 2 as a race-conscious statute without deciding whether that offends the Equal Protection Clause, the Court set the stage for a case that makes this collision its centerpiece.

When that day comes, defendants will likely argue that section 2 requires racial classifications that trigger strict scrutiny. Under current doctrine, states may consider voters' race when drawing districts.⁷⁵ But if race is the predominant reason that a state drew a district the way it did, then the district is a racial classification.⁷⁶ Scholars have long criticized this test as incoherent.⁷⁷ But it makes sense if one steps back to take a general view of equal protection law. A law is a racial classification if it (1) classifies by race on its face, or (2) is facially neutral but is "motivated by a racial purpose or object" or "unexplainable on grounds other than race."⁷⁸ Since a district's borders just split up geographic territory, they do not classify by race on their face.⁷⁹ And if the legislature shaped the district while considering race as only one of many criteria, while also taking care to ensure that it was compact and respected communities of interest, then the district could be explained on nonracial grounds. But if race predominated, then the legislature enacted this district because of a racial motivation, making it a racial classification.

Under that rule, a race-conscious district required by section 2 would seem to trigger strict scrutiny. The state would not enact this district otherwise, but it must because the district is majority minority. Even if the district's particulars were worked out according to race-blind criteria like compactness, it still would not have been adopted but for its racial composition. It is therefore hard to escape the conclusion that whenever section 2 has bite, the resulting district was "motivated by a racial purpose or object" and so is a racial classification.⁸⁰

If the Court agreed, it would then have to answer corollary questions that the Justices have so far waved away. To survive strict scrutiny, a law must be narrowly tailored to a compelling interest.⁸¹ The Court has long assumed that complying with the VRA is a compelling interest but

⁷⁴ In its brief, Alabama devoted the first twenty-two pages of argument to its statutory position. See Brief for Appellants, *supra* note 44, at 32–53. It appended only five pages at the end on the Fourteenth Amendment. See *id.* at 75–79.

⁷⁵ See *Milligan*, 143 S. Ct. at 1510 (opinion of Roberts, C.J.).

⁷⁶ *Cooper v. Harris*, 137 S. Ct. 1455, 1463–64 (2017).

⁷⁷ See, e.g., Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1202 (1996); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 484–85 (1993).

⁷⁸ *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (quoting *Miller v. Johnson*, 515 U.S. 900, 913 (1995); *Shaw v. Reno*, 509 U.S. 630, 644 (1993)).

⁷⁹ *Id.* at 547.

⁸⁰ *Id.* at 546 (quoting *Miller*, 515 U.S. at 913).

⁸¹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

has never come out and held so.⁸² Regardless, that assumption applies only when a state defends a majority-minority district by arguing that it was necessary to comply with section 2.⁸³ If a state instead attacked the constitutionality of requiring majority-minority districts at all, then section 2's defenders would need to point to an independent compelling interest that the statute achieves.

That challenge would serve up another opportunity to narrow section 2. For a law remedying discrimination to serve a compelling interest, it must respond to "specific, 'identified discrimination.'"⁸⁴ Under *Gingles*'s preconditions, section 2 remedies the placement of a large group of minority voters in a district where they cannot elect their preferred representatives.⁸⁵ That might constitute specific, identified discrimination. But the Roberts Court is often skeptical that race-blind laws, like districts created without considering race, discriminate on the basis of race.⁸⁶ Under that approach, section 2's race-consciousness — reaffirmed in *Milligan* only as a matter of statutory interpretation — would be vulnerable as a matter of constitutional law.

Moreover, the Court does not need to invalidate a race-conscious section 2 to limit its reach. For example, if most Justices doubted that racial minorities' representation is itself a compelling interest, they could insist that plaintiffs show more in the totality of the circumstances — where courts look for election procedures that are stacked against minorities, racial disparities in economic or social life, campaigns with racial dog whistles, and other evidence of a political system that does not respond to racial minorities' interests.⁸⁷ By making this prong more demanding, the Court could limit section 2 to instances of racially hostile politics that are egregious enough to qualify as discrimination in the Justices' eyes. In short, even if a Fourteenth Amendment challenge does not lead to section 2 being struck down, it could make these cases harder for plaintiffs to win.⁸⁸ Even as *Milligan* ruled against Alabama at every turn, it left these arguments — and this result — available to the next Alabama.

Meanwhile, *Milligan* positively invited a separate constitutional challenge. Justice Kavanaugh — the swing vote in *Milligan* — surfaced the principal dissent's argument that "even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some

⁸² See *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion); *Cooper v. Harris*, 137 S. Ct. 1455, 1469 (2017).

⁸³ E.g., *Bush*, 517 U.S. at 977.

⁸⁴ *Id.* at 982 (quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996)).

⁸⁵ See *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

⁸⁶ See, e.g., Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 86–87 (2019).

⁸⁷ See *Gingles*, 478 U.S. at 44–45 (discussing these so-called Senate factors).

⁸⁸ This is exactly what the Court recently did with vote-denial claims under section 2. See *Brown v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338–40 (2021).

period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future.”⁸⁹ And he pointedly proclaimed that since Alabama had not raised this issue, he “would not consider it at this time.”⁹⁰ The invitation to future defendants seems clear.⁹¹ Especially after *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*⁹² (*SFFA*), which emphasized that race-conscious remedies must have clear endpoints.⁹³ Scholars have argued that *Gingles* builds in an endpoint: because plaintiffs must show that voting is racially polarized, once race no longer divides voters, plaintiffs will never make it past *Gingles*’s preconditions and race-conscious districts will fade into history.⁹⁴ But the Supreme Court might see things differently. It has suggested — including in *Milligan*⁹⁵ — that race-conscious districting itself divides voters by race and makes race play a larger political role.⁹⁶ The Court seems unlikely to accept that section 2 has endpoints if it thinks that the statute makes those endpoints harder to reach.

Already, defendants seem intent on forcing lower courts to address the constitutional issues that *Milligan* avoided. Just one week after the Court decided *SFFA*, Louisiana argued that a district court should reassess whether section 2 is still constitutional.⁹⁷ And Alabama has defied the Supreme Court’s order to draw a second majority-Black district, forcing the case to continue in the lower courts (if only long enough for the State to lose again).⁹⁸ To be sure, *Milligan* put race-conscious districting remedies on the safest ground that they have held for decades. But it did so by holding only that section 2 requires them. It left open, and even encouraged, the claim that a race-conscious section 2 must yield to a race-blind Fourteenth Amendment. If that argument succeeds, it would significantly reduce how much racial minorities can influence politics, elect representatives who will respond to their voices, and create legislatures that look like the state they represent.⁹⁹ After *Milligan*, that challenge is coming next.

⁸⁹ *Milligan*, 143 S. Ct. at 1519 (Kavanaugh, J., concurring).

⁹⁰ *Id.*

⁹¹ Katz, *supra* note 12.

⁹² 143 S. Ct. 2141 (2023).

⁹³ *Id.* at 2165.

⁹⁴ See Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 741 (1998).

⁹⁵ *Milligan*, 143 S. Ct. at 1517.

⁹⁶ See *Shaw v. Reno*, 509 U.S. 630, 648, 657 (1993); *Miller v. Johnson*, 515 U.S. 900, 927 (1995).

⁹⁷ See Letter Filed by Appellants at 2–3, *Robinson v. Ardoin*, No. 22-30333 (5th Cir. July 6, 2023).

⁹⁸ Jane C. Timm, *Alabama Republicans Refuse to Draw a Second Black Congressional District in Defiance of Supreme Court*, NBC NEWS (July 21, 2023, 7:35 PM), <https://www.nbcnews.com/politics/elections/alabama-gop-refuses-draw-second-black-district-supreme-court-order-rcna94715> [<https://perma.cc/9AKU-E69K>].

⁹⁹ See Chen & Stephanopoulos, *supra* note 9, at 947.