

# **ALLEN V. MILLIGAN: A VICTORY FOR MINORITY VOTING RIGHTS**

*Zachary Roseman, Articles Editor, Vol. 31<sup>1</sup>*

## I. INTRODUCTION

Since its founding, the United States of America has an unfortunate history of tolerating the unequal treatment of minorities within its borders. Congress' first attempt to meaningfully combat this problem came after the conclusion of the American Civil War.<sup>2</sup> Between 1865 and 1870, Congress passed the 13th, 14th, and 15th Amendments, which are collectively referred to as the "Reconstruction Amendments."<sup>3</sup> Specifically, the 15th Amendment was enacted to ensure that the federal government and the individual states would not deny the right to vote to citizens based on race qualifications.<sup>4</sup> Sadly, the purpose of the 15th Amendment was not fulfilled to the extent contemplated by its drafters. In response to the 15th Amendment's enactment, southern states passed Jim Crow laws which, in part, continued to allow for the unequal treatment of minorities concerning their voting rights.<sup>5</sup>

As a result of such laws, nearly 100 years after the enactment of the 15th Amendment, Congress was once again called upon to address the disparate treatment of minorities in the context of voting rights. In an attempt to enforce the 15th Amendment's protections, Congress passed the

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<sup>2</sup> (1865) *Reconstruction Amendments, 1865-1870*, BLACKPAST, <https://www.blackpast.org/african-american-history/reconstruction-amendments/> (last visited Nov. 21, 2023).

<sup>3</sup> *Id.*

<sup>4</sup> Dr. Meghan Bailey, *The Fifteenth Amendment*, NATIONAL PARK SERVICE, <https://www.nps.gov/articles/the-fifteenth-amendment.htm> (last visited Nov. 21, 2023).

<sup>5</sup> Farrell Evans, *How Jim Crow-Era Laws Suppressed the African American Vote for Generations*, HISTORY (May 13, 2021), <https://www.history.com/news/jim-crow-laws-black-vote>.

Voting Rights Act of 1965 (“VRA”).<sup>6</sup> The purpose of the VRA was to enforce the 15<sup>th</sup> Amendment by prohibiting all racially based discrimination in voting.<sup>7</sup> Relevant to this blog post, Section 2 of the VRA (“Section 2”) states:

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...<sup>8</sup>

Unfortunately, the VRA also did not produce a result to the extent intended. Similar to their actions following the enactment of the 15th Amendment, southern states began employing tactics to circumvent the restrictions enumerated in the VRA.<sup>9</sup> One such tactic used to circumvent Section 2 is known as “racial gerrymandering.”<sup>10</sup> Racial gerrymandering involves the drawing of congressional districts in ways that dilute the voting strength of minority voters.<sup>11</sup> Racial gerrymandering is a practice that has been employed to the present day, especially in southern states.<sup>12</sup>

## II. OVERVIEW OF *ALLEN V. MILLIGAN*

In 1992, Alabama’s then-existing congressional districting map was challenged under Section 2.<sup>13</sup> The 1992 challenge to Alabama’s districting map led to the redrawing of the map, which resulted in the election of Alabama’s first black Representative since 1877 and the State’s first majority-black congressional district.<sup>14</sup> Subsequent to the 1992 litigation, Alabama’s

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<sup>6</sup> Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CONG. RSCH. SERV., <https://crsreports.congress.gov/product/pdf/R/R43626/15> (last updated July 20, 2015).

<sup>7</sup> *Id.*

<sup>8</sup> 42 U.S.C. § 1973.

<sup>9</sup> Evans, *supra* note 5.

<sup>10</sup> Megan B. Kelly, *You Can't Have Your Vote and Dilute It Too: Closing the Voting Rights Act Loophole in Gerrymandering Claims*, WM. & MARY L. REV., Feb. 2022, at 1015, 1018.

<sup>11</sup> *Id.*

<sup>12</sup> LaQuita Howard, *Racial Gerrymandering and the 2021-2022 Redistricting Process*, LEAGUE OF WOMEN VOTERS, <https://www.lwv.org/blog/racial-gerrymandering-and-2021-2022-redistricting-process> (last updated Mar. 31, 2022).

<sup>13</sup> *Allen v. Milligan*, 599 U.S. 1, 6 (2023).

<sup>14</sup> *Allen*, 599 U.S. at 6.

population increased dramatically.<sup>15</sup> However, although Alabama’s population vastly increased since the 1992 litigation, Alabama’s congressional map remained nearly identical.<sup>16</sup>

In 2020, Alabama conducted a decennial census which indicated the extent to which Alabama’s population had grown.<sup>17</sup> Following the 2020 census, a group of plaintiffs sued Alabama arguing that the growth of Alabama’s population “rendered the existing congressional map malapportioned and racially gerrymandered...”<sup>18</sup> In 2021, while the 2020 litigation was proceeding, Alabama redrew its congressional districting map for the purpose of reflecting the distribution of the prior decade’s population growth.<sup>19</sup> However, similar to previous congressional maps following the 1992 litigation, the 2021 redistricting map resulted in only one majority-black congressional district.<sup>20</sup>

Following Alabama’s redrawing of its congressional districts in 2021, three separate groups of Plaintiffs brought suit against Alabama’s Secretary of State, Wes Allen. The lawsuits sought a preliminary injunction to prohibit Alabama from conducting congressional elections under the 2021 redistricting map.<sup>21</sup> Two of the actions were consolidated, while the third action proceeded in parallel litigation.<sup>22</sup> The District Court concluded that the question of whether Alabama’s 2021 redistricting map violated Section 2 was not “close.”<sup>23</sup> The District Court granted a preliminary injunction prohibiting Alabama from employing the 2021 redistricting map in congressional elections.<sup>24</sup> However, the Supreme Court of the United States stayed the District

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<sup>15</sup> Allen, 599 U.S. at 7.

<sup>16</sup> *Id.* at 6.

<sup>17</sup> *Id.* at 7.

<sup>18</sup> *Id.*

<sup>19</sup> Allen, 599 U.S. at 7.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 8.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Allen, 599 U.S. at 8.

Court's ruling, thus allowing Alabama to use the 2021 redistricting map in the 2022 congressional elections.<sup>25</sup> An appeal was subsequently filed and the actions eventually reached the Supreme Court for final adjudication.<sup>26</sup>

In 2023, the Supreme Court decided *Allen v. Milligan*. In *Milligan*, the Supreme Court affirmed the District Court's decision and struck down the 2021 Alabama redistricting map.<sup>27</sup> Relying on the three-part test established in *Thornburg v. Gingles*, the Supreme Court held that Alabama's 2021 redistricting map violated Section 2.<sup>28</sup>

### III. PUBLIC PERCEPTION OF *ALLEN V. MILLIGAN* LEADING UP TO THE SUPREME COURT'S DECISION

The Supreme Court's decision in *Milligan* came as a surprise to the public.<sup>29</sup> Leading up to the *Milligan* decision, the public assumed that the Court would overrule the District Court's finding that Alabama's 2021 redistricting map violated Section 2.<sup>30</sup> The public's assumption was based on a variety of factors, however, two are worth noting.

The first noteworthy reason for the public's assumption was that the Supreme Court had previously stayed the District Court's decision before the case was ultimately decided.<sup>31</sup> The stay suggested a belief from the Court that the District Court had erred in their decision and that the Court may be inclined to overrule the District Court's finding upon further review.<sup>32</sup>

The second noteworthy reason for the public's assumption was that the Supreme Court had narrowed the scope of the VRA in previous cases and would likely continue to do so based upon

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<sup>25</sup> *Allen*, 599 U.S. at 9.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 34.

<sup>28</sup> *Id.* at 16.

<sup>29</sup> Ellen Katz, *5Qs: Katz on the Allen v. Milligan Decision and the Future of the Voting Rights Act*, UNIV. OF MICH. L. SCH. (June 19, 2023), <https://michigan.law.umich.edu/news/5qs-katz-allen-v-milligan-decision-and-future-voting-rights-act>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

the Court’s current political composition.<sup>33</sup> For example, in *Shelby County Ala. v. Holder*, a 2013 decision, the Court held that Section 4(b) of the VRA was unconstitutional.<sup>34</sup> Following the change in the Supreme Court’s political composition from liberal to conservative, the public assumed that subsequent decisions concerning the VRA would mirror decisions like *Holder*.<sup>35</sup>

Ultimately, the decision in *Milligan* proved the public wrong in their assumptions as the Supreme Court declined to displace the District Court’s decision. The *Milligan* decision signaled that Section 2 “would continue to be understood...to prohibit redistricting plans like Alabama’s” 2021 redistricting map.<sup>36</sup>

#### IV. ACTUAL AND POTENTIAL EFFECTS OF *ALLEN V. MILLIGAN*

The surprising decision in *Milligan* had immediate profound positive effects around the United States regarding the disparate treatment of minority voters. Additionally, the *Milligan* decision is likely to result in several future effects which will be felt across the country.

Concerning the immediate effects of *Milligan*, the Alabama legislature was forced to redraw its congressional districting maps with fairer districts.<sup>37</sup> In redrawing Alabama’s congressional districting maps, the Alabama legislature created a second majority-black congressional district, which is expected to result in the election of black voters’ preferred candidate.<sup>38</sup>

Further, similar cases in other jurisdictions, which were stayed pending the result in *Milligan*, have resumed and could result in analogous actions being taken by their respective state

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<sup>33</sup> Katz, *supra* note 29.

<sup>34</sup> *Shelby County, Ala. v. Holder*, 570 U.S. 529, 557 (2013).

<sup>35</sup> *Voting Rights Act of 1965-Vote Dilution- Fourteenth Amendment-Allen v. Milligan*, 137 Harv. L. Rev. 480, 488 (2023).

<sup>36</sup> Katz, *supra* note 29.

<sup>37</sup> Caroline Sullivan, *Two Weeks Later, Allen v. Milligan Has Impacted These States*, DEMOCRACY DOCKET (June 22, 2023), <https://www.democracydocket.com/analysis/two-weeks-later-allen-v-milligan-has-impacted-these-states/>.

<sup>38</sup> Stephan Bisaha, *Alabama Finally has a New Congressional Map After a Lengthy Legal Fight*, NPR (Oct. 5, 2023), <https://www.npr.org/2023/10/05/1203309716/alabama-2024-congressional-map>.

legislatures.<sup>39</sup> There are currently thirty-one pending cases in federal court alleging violations of Section 2.<sup>40</sup> Most of the thirty-one cases involve a challenge to redistricting maps drawn by other southern states including Louisiana, Georgia, Texas, and Mississippi.<sup>41</sup> Following the decision in *Milligan*, such states are expected to be forced to redraw their congressional maps in ways that reflect principles of fairness towards minority voters.<sup>42</sup>

Regarding the future effects of *Milligan*, two potential effects are probable. First, the *Milligan* decision is likely to result in transitive effects regarding the balance of power in the House of Representatives.<sup>43</sup> Specifically, recent elections have resulted in very slim margins concerning control of the House of Representatives.<sup>44</sup> Thus, the impact on elections that newly created minority districts could have may prove to be decisive in the near future.<sup>45</sup>

Second, the decision in *Milligan* signaled a resurgence of Section 2 being used as a tool to limit suspect conduct employed by state legislatures. Based upon the Court's narrowing of the scope of the VRA prior to the *Milligan* decision, *Milligan* embodies the concept that Section 2 will remain a "meaningful restraint" on state legislative conduct in the future.<sup>46</sup>

## V. CONCLUSION

As seen by the immediate and potential future effects of the *Milligan* decision, *Milligan* has signaled a step in the right direction of providing minority voters with a vote that carries the

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<sup>39</sup> Madeline Greenburg & Rachel Selzer, *How the U.S. Supreme Court's Decision in Allen v. Milligan Will Impact Ongoing Redistricting Litigation*, DEMOCRACY DOCKET (June 8, 2023), <https://www.democracymilligan.com/analysis/how-the-u-s-supreme-courts-decision-in-allen-v-milligan-will-impact-ongoing-redistricting-litigation/>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See JoAnn Goedert, *A Surprise Win for Voting Rights*, NETWORK LOBBY (June 16, 2023), <https://networklobby.org/allen-v-milligan-is-a-surprise-win-for-voting-rights/>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Katz, *supra* note 29.

same weight as all other votes in the United States electoral system. *Milligan* has assured minority voters that vote diluting practices, such as racial gerrymandering, have no place in our society and will not be tolerated by the highest court in the United States. Concepts of equal treatment and democracy remain crucial to the functioning of the United States' political and legal systems. However, in a time of division and uncertainty in such systems, the concepts of equal treatment and democracy become of heightened importance. Although the extent of the implications of *Milligan* have not been completely felt, *Milligan* should be classified as a victory for minority voting rights that has confirmed the principles of equal treatment and democratic representation.