THE *PURCELL* PRINCIPLE AND THE ANTIBLACKNESS OF CONSTITUTIONAL FUNDAMENTALISM

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In Milligan v. Merrill*, a district court in Alabama found that the state legislature designed Alabama's new congressional district map in a way that diminished Black political power, and ordered the legislature to redraw its map to remedy the violation. Two weeks later, the Supreme Court stayed the district court's order, allowing Alabama's congressional elections to proceed under the discriminatory maps. The only stated rationale, offered by Justices Kavanaugh and Alito in a concurring opinion, was the so-called* Purcell *principle – the notion that federal courts should not enjoin a state's election laws in the period close to an election. While the opinion discussed the state's hardship at length, it failed to discuss the hardship to Black voters at all. This dominant reading of* Purcell *advances the core ideological investment of constitutional fundamentalism whereby Black citizens are stripped of rights, made to exist in the body politic as unrepresented subjects, and then dispossessed in the name of the public interest.*

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INTRODUCTION

In *Milligan v. Merrill*,[1] a federal court in the Northern District of Alabama found that the state legislature designed Alabama's 2021 congressional district map in a way that diminished Black political power.[2] The state legislature packed one out of seven congressional districts with as many Black neighborhoods as possible, while distributing the remaining Black neighborhoods among the remaining six majority-white districts where Black-preferred candidates stood no chance of being elected. In doing so, the Alabama legislature inflated white residents' voting power, giving them an outsized role in determining Alabama's representation in Congress. The district court concluded that the *Milligan* plaintiffs were substantially likely to establish, and prevail on their claim, that Alabama's redistricting plan violated section 2 of the Voting Rights Act.[3] Specifically, the court held that:

> (1) Black Alabamians [were] sufficiently numerous to constitute a voting-age majority in a second congressional district . . . (2)

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1. No. 2:21-cv-1530-AMM, slip op. at 4, 216–17 (N.D. Ala. Jan. 24, 2022), https://www.naacpldf.org/wp-content/uploads/PRELIMINARY-INJUNCTION-MEMORANDUM-OPINION-AND-ORDER.-Signed-by-Judge-Anna-M-Manasco-on-1_24_2022.-1.pdf [https://perma.cc/XS9P-HPXW] (this case was combined with three other cases for the purpose of expedited preliminary injunction proceedings because they contained similar issues of fact and law; Singleton v. Merrill, No. 2:21-cv-1291-AMM; Thomas v. Merrill, No. 2:21-cv-1531-AMM; Caster v. Merrill, No. 2:21-cv-1536-AM).

2. *Id.* at 4.

3. *Id.*

> Alabama's Black population in the challenged districts [was] sufficiently geographically compact to constitute a voting-age majority in a second reasonably configured district . . . (3) voting in the challenged districts [was] intensely racially polarized [which the court identified as a fact not genuinely in dispute]; and (4) that under the totality of the circumstances, including the factors that the Supreme Court instructed [them] to consider, Black voters [had] less opportunity than other Alabamians to elect candidates of their choice to Congress.[4]

As a result, the district court ordered the Alabama legislature to draw a map that included "either an additional majority-Black congressional district or an additional district in which Black voters otherwise [had] an opportunity to elect a representative of their choice."[5] The court gave the legislature fourteen days to do so.[6] The district court was confident that this was a reasonable allocation of time, as the legislature had not only drawn its original enacted map in just five days, but had been on notice since litigation commenced that a new map might be required.[7] However, upon Alabama's appeal of the district court's order, the Supreme Court stayed the decision, allowing the state's discriminatory map to remain in effect for the 2022 elections.[8]

The only explanation offered for the Court's stay was Justice Kavanaugh's concurrence, joined by Justice Alito.[9] Justice Kavanaugh reasoned that "[t]the District Court's order would require heroic efforts by those state and local authorities in the next few weeks—and even heroic efforts likely would not be enough to avoid chaos and confusion."[10] He said that the traditional test for determining whether to stay a lower court's judgment as well as the Court's consideration of equities and the public interest—did not apply in election cases where the lower court had issued an injunction of a state's election law in the period close to an election.[11]In such cases, there was no test at all. The Court simply followed the *Purcell* principle—"[w]hen an election is

4. *Id.* at 4–5.
5. *Id.* at 5–6.
6. *Id.* at 6.
7. *Id.*
8. Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (staying the district court's order in *Milligan*, slip op. at 4).
9. *Id.* (Kavanaugh, J., concurring).
10. *Id.* at 880.
11. That the applicant be able to show "(i) a reasonable probability that [the Court would] eventually grant review and a fair prospect that the Court would reverse, and (ii) that [they] would likely suffer irreparable harm absent a stay"; *Id.*

close at hand, the rules of the road must be clear and settled"—to resolve issues that arose.[12] The problem, of course, is that in the name of practicality, this "sensible refinement of ordinary stay principles" forecloses relief for those disenfranchised by election rules in close proximity to an election.[13] Making the objective of this foreclosure unambiguous, Justice Kavanaugh proposed a test that shifted the burden of proof from the party asking the Court for a stay to the plaintiff.[14] In so doing, he introduced four prerequisites by which plaintiffs might overcome the *Purcell* principle:

> (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship.[15]

This Article argues that Justices Kavanaugh and Alito's determination that protecting Black voting rights is impractical when weighed against the interests of states reveals why constitutional fundamentalism is essential to understanding the *Purcell* jurisprudence.

I. TIME AS A TOOL OF CONSTITUTIONAL DEPRIVATION

A. Purcell*'s Per Curiam Opinion*

In 2004, Arizona voters approved Proposition 200, a voter suppression measure that sought to "combat voter fraud" by requiring voters to provide proof of citizenship when registering to vote as well as proof of identification when voting on election day.[16]

Two years later, in May 2006, residents of Arizona, Native American tribes, and various community organizations challenged Proposition 200's identification requirements seeking a preliminary injunction. The district court denied the request without fact-finding or explanation.[17] The Clerk of the court of appeals scheduled the subsequent appeal for two weeks after the November 7th election, which resulted in the plaintiffs requesting an injunction. After reviewing written responses and in the absence of oral arguments, a

12. *Id.* at 880–81.
13. *Id.* at 881.
14. *Id.*
15. *Id.*
16. Purcell v. Gonzalez, 549 U.S. 1, 2 (2006) (per curiam).
17. *Id.* at 3.

two-judge panel enjoined Arizona's Proposition 200 provisions in a four-sentence order with no explanation or justification.[18] Similarly, the court gave no rationale in denying a motion for reconsideration four days later.[19]

Finally, in October, the district court issued findings of facts and conclusions of law reasoning that "plaintiffs have shown a possibility of success on the merits of some of their arguments, but the Court cannot say that at this stage they have shown a strong likelihood."[20] The district court ultimately concluded "the balance of the harms and the public interest counseled in favor of denying the injunction."[21]

The Supreme Court concluded that the court of appeals erred because it did not defer to the district court's discretion.[22] Its rationale was that court orders, particularly conflicting ones, can create confusion and deter people from the polls. The closer to an election the greater the risk; thus, the court of appeals "may have deemed this consideration to be grounds for prompt action."[23] Additionally, the ability to seek en banc review, which consumes more time, was also a consideration. However, the Court was clear "[T]hese considerations, however, cannot be controlling here. It was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court."[24] Yet, the court of appeals issued its order absent factual findings from the district court it owed deference to and provided no reasoning for why it issued the order.[25] Ultimately, the Court found error because there was no indication that this deference was given.[26]

The Court further determined that, despite the short window of opportunity to act before the upcoming election, the plaintiffs' claims were so charged that the court of appeals should have refrained from acting.[27] In the Court's view, the risk of voter confusion caused by court orders affecting elections was a more important consideration than the

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 4.
22. *Id.* at 5.
23. *Id.*
24. *Id.*
25. *Id.* at 5.
26. *Id.*
27. *Id.* at 5–6.

closeness of the election.[28] In this context, "[g]iven the imminence of the election *and* the inadequate time to resolve the factual disputes," the Court vacated the order.[29] As a result, the election proceeded without an injunction suspending these new voter identification rules.

A close read of *Purcell* reveals the core principle is not that changes to election procedures should never be made close to an election. To the contrary, the *Purcell* principle is that, despite the closeness of the election, court orders affecting elections should privilege deference to the discretion of the district court so that, especially in the event of time constraints, decisions can be made with the benefit of having the factual disputes resolved. The risk of voter confusion was not caused simply by the act of making changes close to an election. The risk of voter confusion was caused by decisions being made about elections before achieving a clear understanding of the balance of harms and the public interest.[30] Therefore, Justice Kavanaugh's concurring opinion in *Milligan* does two things: (1) betrays *Purcell* by engaging in a highly consequential misreading of its central principle and (2) mirrors *Purcell* by using procedural or "practical considerations" to mask an ideological investment in fundamentalist notions of what it means to be legitimately disenfranchised.

B. Kavanaugh's Milligan *Concurrence*

Citing the district court's "late-breaking injunction," Justice Kavanaugh arrived at a very different conclusion than the lower court, which found the *Milligan* plaintiffs were substantially likely to prevail on their claim under the Voting Rights Act, the statutory framework, Supreme Court precedent, and Eleventh Circuit precedent.[31] Justice Kavanaugh instead determined that the plaintiffs could not satisfy at least two of the four prerequisites put forth in his test—"namely, that the merits be clearcut in favor of the plaintiff, and that the changes be feasible without significant cost, confusion, or hardship."[32] With this new convention, the issue was no longer the threat posed to fundamental constitutional protections by the historically dubious

28. *Id.*

29. *Id.* (emphasis added).

30. *Id.* at 4.

31. *Compare* Merrill v. Milligan, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (finding the district court erred) *with* Milligan v. Merrill, No. 2:21-cv-1530-AMM, slip op. at 4, 216–17 (N.D. Ala. Jan. 24, 2022) (finding the plaintiffs were likely to succeed on the merits).

32. *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

machinations of state governments. Rather, Black voting rights were cast as a threat to the rights of state governments to administer elections as they saw fit. As during the Civil War and civil rights movement, civil rights were again legally positioned in opposition to states' rights. The principle of federalism displaced all other considerations of equities and the public interest:

> Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others. It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election.[33]

However, this was not the kind of proximity to an election contemplated by *Purcell*. There, the court of appeals enjoined Arizona from enforcing its voter identification provisions one month before the election, and the district court issued its findings of fact and conclusions of law about three and a half weeks before the election.[34] Here, at the time of the district court's decision, primary elections were four months away and the general election was nine months away.[35] Explicitly cognizant of the time-sensitive nature of the proceedings, the district court issued its injunction a mere two weeks after a seven-day hearing involving "seventeen witnesses . . . more than 400 pages of prehearing briefing[,] 600 pages of posthearing briefing[,] reports and rebuttal reports from every expert witness[,] more than 350 hearing exhibits[, and] joint stipulations of fact that span seventy-five pages."[36] Despite the concurrence's purported reverence for *Purcell*, it blatantly mischaracterized and dismissed *Purcell*'s clear instruction with respect to giving due deference to the discretion of the district court in such fact-intensive matters as elections:

> But if careful District Court consideration sufficed for an appellate court to deny a stay, then appellate courts could usually end the stay inquiry right there. That is not how stay analysis works. Contrary to the dissent's implication, the fact that the District Court here issued a lengthy opinion after considering a substantial record is the starting point, not the ending point, for our analysis of whether to grant a stay.[37]

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33. *Id.*
34. *Purcell*, 549 U.S. at 3.
35. *Milligan*, slip op. at 4.
36. *Id.*
37. *Milligan*, 142 S. Ct. at 882 (Kavanaugh, J., concurring).

Next, the question of what was required by the Voting Rights Act and not prohibited by the Equal Protection Clause was also summarily dismissed by Justice Kavanaugh as "notoriously unclear and confusing," which buttressed the conclusion that the underlying merits were not clearcut in favor of the plaintiffs.[38] This line of reasoning allowed Justice Kavanaugh to swiftly conclude that preventing an inconvenience to Alabama took precedence over preventing the irreparable harm that would occur if the action denied Black people of their full voting rights.

There is, however, a significant realm of practical considerations that Justice Kavanaugh did not mention. To make the implications of Justice Kavanaugh's reading of *Purcell* plain: it was decided that states can implement maneuvers to effectively rig elections against Black people, and, if done in close proximity to an election, the federal government has no authority to intervene.[39] The formulation is that, when the state actively dilutes Black political power to shore up white political power close to an election, it is a matter of state sovereignty to which the federal government must bow. But when the federal government intervenes close to an election to safeguard Black political power, it is an unfair disruption that cannot be tolerated. Thus, the current law of the land places the burden on Black people to show that restoring their rights will not cause too much of a disturbance to the operations of the political apparatus.[40] While purportedly not reaching the merits of voting rights law, Justices Kavanaugh and Alito pronounced that Black people failed to demonstrate that protecting their constitutional rights would not cause *the state* significant cost, confusion, or hardship.[41]

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38. *Id.* at 881.

39. Greg Varner, *At the U.S. Supreme Court, Race Is on the Docket*, G.W. TODAY (Sept. 26, 2022), https://gwtoday.gwu.edu/us-supreme-court-race-docket [https://perma.cc/G5QX-RZTW] (quoting panelist Andrew Chung, Supreme Court correspondent for Thomson Reuters).

40. *Milligan*, 142 S. Ct. at 879, 882 (Kavanaugh, J., concurring); *see* Ian Millhiser, *Alabama's High-Stakes Supreme Court Fight over Racial Gerrymandering, Explained*, VOX (Oct. 4, 2022, 4:50 PM), https://www.vox.com/policy-and-politics/2022/10/2/23377432/supreme-court-alabama-merrill-milligan-racial-gerrymandering-voting-rights-act [https://perma.cc/HKQ8-PP5C] (discussing how, should the Supreme Court adopt Alabama's proposed framework, it could become impossible for plaintiffs challenging partisan gerrymanders to win in court).

41. *Milligan*, 142 S. Ct. at 879, 882 (Kavanaugh, J., concurring).

C. The Real Principles of Purcell

Similarly, while the Court in *Purcell* insisted that it was not expressing an opinion on the correct disposition of the Court of Appeals' decision or the ultimate resolution of the cases, by resting its decision exclusively on procedural considerations, the Court did, in fact, express an opinion on what should be regarded as a legitimate compelling interest. Without much interrogation, it accepted Arizona's stated rationale of "preventing voter fraud" as a valid exercise of preserving election integrity while subordinating the plaintiffs' countervailing compelling interest in not having their votes suppressed.[42] The Court uncritically assumed the legitimacy of the state's claim that preventing voter fraud was a more serious threat to election integrity than eliminating people from the electoral process.[43] Rather than acknowledge the disenfranchisement of those who would be deprived of their constitutional right to vote as a result of being newly subject to a voter identification law, the Court turned the history of voting rights on its head by exclusively identifying "[v]oters who fear their legitimate votes will be outweighed by fraudulent ones" as the disenfranchised.[44] By assuming that the state's law was objectively rational and neutrally administered, the Court implemented the *Purcell* principle allowing Alabama's interest in election administration to easily bar the disenfranchisement claims of the historically disenfranchised seeking emergency relief by identifying their claims as unreasonable and causing unnecessary confusion.[45]

No matter how much the rule of law is foregrounded as the basis for the *Purcell* and *Milligan* stay opinions, there is no way to reconcile the decision to defer to the district court's discretion in the former and wholly disregard it in the latter other than ideology. The Court's ideological investment in a form of fundamentalism that does not believe the discriminatory effects of ostensibly colorblind election procedures, like voter identification laws and dilutive redistricting plans, are true violations of the fundamental right to vote harmonizes

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42. Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam). Pervasive voter fraud as a viable threat to election integrity has been widely and thoroughly discredited as a myth. *The Myth of Voter Fraud*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/myth-voter-fraud [https://perma.cc/7DUW-Q23T].

43. *Purcell*, 549 U.S. at 4–5.

44. *Id.* at 4.

45. *Milligan*, 142 S. Ct. at 880–81 (Kavanaugh, J., concurring).

seemingly arbitrary outcomes.[46] The reading of *Purcell* as solely about promoting orderly and effective voting through the prohibition of altering election rules on the eve of an election is not only a narrow reading, *it is a misreading*. It is inaccurate.

Such a misreading does, indeed, lead to arbitrary procedural outcomes—district courts are left without clear guidance as to whether their intensive fact-finding processes are worthy of considerable deference or relegated to just one factor in the appellate courts' decision-making—but it also leads to consistent substantive outcomes. In both cases, vulnerable voters lose. Attention to the fundamentalist interpretation of "election integrity"—whereby the integrity of electoral processes is jeopardized by voters who fear their "legitimate votes" will be outweighed by "fraudulent ones," but not by excluding Black and other historically disenfranchised populations from participating in the electoral process—clarifies what the reasoning of "practical considerations" obscures.[47] Underneath the legal formalism legitimizing *Purcell* is a fundamentalist fidelity to antiblackness.

In addition to bearing the burden of showing how supposedly race-neutral election practices result in the denial or abridgment of their right to vote based on race, Black people now also bear the burden of defending themselves against time. Time itself—"a period close to an election"—has been seized by the Court as a shield against enforcing Black voting rights and a sword to willfully and unpredictably undermine them. Violating Black political power is not cast as an undesirable outcome of following procedure, but a *necessary* outcome so obvious that it went unmentioned in Justice Kavanaugh's concurrence. If Blackness as a political presence disrupts the business of the states, the *Purcell* principle justifies privileging the interests of the states. Justices Kavanaugh and Alito's interpretation of *Purcell* in *Milligan* forecloses the possibility of Black people having any cognizable argument or claim that can rival the primacy of the state's agenda. Neither Black people nor their deprivation was even acknowledged in the concurring opinion. The law possesses the ability to create both Black rights and Black rightlessness, to both enable and disenable the civil lives of Black people. The Black citizen is one who

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46. "For fundamentalists, everything is simple. For fundamentalists everything boils down to one simple thing, one fundamental thing." Symposium, *Is There a Constitutional Right to Vote and Be Represented?: The Case of The District of Columbia*, 48 AM. U. L. REV. 589, 674 (1998) (quoting Professor Anthony P. Farley).

47. *Purcell*, 549 U.S. at 4; *Milligan*, 142 S. Ct. at 880–82 (Kavanaugh, J., concurring).

can be stripped of rights, made to exist in the body politic as an unrepresented subject, and then have its dispossession framed as a public good. This is not hyperbole. This is the real principle of *Purcell*.

II. THE CONSTITUTIONAL SIGNIFICANCE OF MAJORITY-BLACK DISTRICTS

Today's voting rights jurisprudence mandates that racial equality cannot be avoided in the name of federal-state comity because the redistricting process is a prolific realm of Black disenfranchisement.[48] During the post-Civil War years in the South, "malapportionment assured that rural counties controlled the all-white state legislatures" despite the fact that Black people made up the majority population in these districts.[49] Passage of the Voting Rights Act of 1965 ("VRA") was critical in establishing the validity of majority-Black districts governing themselves without subjection to white rule maintained by vote dilution.[50]

In *Milligan*, the State argued that a remedial map containing two majority-Black congressional districts constituted discrimination on account of race and that the map was unconstitutional despite Alabama's Black communities being sufficiently numerous and geographically compact enough to warrant representation in two districts instead of one.[51] It further argued that maps redrawn to remedy racial vote dilution should use race-neutral redistricting principles.[52] This is a consequential line of argument, as the current redistricting process is the product of Black political struggle and an unequivocal assertion of Black political association. Redistricting legislation is an agreement between the state's democratic constituents not merely another act of state government.[53] It is a rejection of the status of Black people as slaves of the states upon recognition of the fact that majoritarian rule results in the subjugation of Black people's ability to exercise private political rights. "Representatives of the many

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48. James U. Blacksher & Larry T. Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 34 (1982).

49. *Id.* at 39.

50. *Id.* at 1–2.

51. *See* Milligan v. Merrill, No. 2:21-cv-1530-AMM, slip op. at 136 (N.D. Ala. Jan. 24, 2022).

52. *Id.*

53. James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery*, 39 HOW. L.J. 633, 634 (1996).

political associations which constitute the state's body politic are supposed to agree on the new shape of their democratic compact, with the explicit understanding that the resulting district lines will have a powerful effect on the outcomes of elections for the next decade."[54] This is why the federal government oversees the political redistricting process.

A. The Statutory and Early Judicial Provisions

The original version of section 2 of the VRA tracked, in part, the text of the Fifteenth Amendment.[55] It prohibited practices "imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."[56] In *Mobile v. Bolden*,[57] the Court held that section 2, as it then read, "no more than elaborates upon . . . the Fifteenth Amendment" and was "intended to have an effect no different from that of the Fifteenth Amendment itself."[58] The Court interpreted the original VRA prohibition of those practices "imposed or applied . . . to deny or abridge" the right to vote as only employing an intent requirement.[59] However, in response to the *Mobile* ruling, Congress amended section 2 in 1982, giving the statute its current form.[60] The amended version of section 2 required consideration of effects, specifying that it prohibits practices "imposed or applied . . . in a manner which results in a denial or abridgment" of the right to vote.[61] The 1982 amendments also added subsection 2(b) providing a test for determining whether a section 2 violation has occurred:

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54. *Id.*

55. *Compare* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 ("No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.") *with* U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *see also* S. Rep. No. 162 pt. 3, at 19–20 (1965) (noting that the purpose of the Voting Rights Act of 1965 was to correct violations of the 15th Amendment).

56. 79 Stat. 437; *cf.* U.S. CONST. amend. XV.

57. 446 U.S. 55 (1980).

58. *Id.* at 60–61.

59. *Id.*; *see also* 79 Stat. 437.

60. Voting Rights Act Amendment of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).

61. 96 Stat. 134.

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[62]

The Court first construed the amended version of section 2 in *Thornburg v. Gingles*.[63] In *Gingles*, the plaintiffs were Black residents and registered voters of North Carolina who alleged that multimember districts diluted minority voting strength by submerging Black voters into the white majority, thereby denying them an opportunity to elect a candidate of their choice.[64] The Court identified three "necessary preconditions" for a claim that the use of multimember districts constituted actionable vote dilution under section 2: the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district . . . politically cohesive," and the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[65] In *Growe v. Emison*,[66] the Court held that the three *Gingles* requirements apply equally in section 2 cases involving single-member districts, such as a claim alleging vote dilution because a geographically compact minority group has been split between two or more single-member districts.[67] After a party has established the *Gingles* requirements, courts must then proceed to analyze whether a violation has occurred based on the totality of the circumstances—an assessment of the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the districting scheme to impair the ability of geographically insular and politically cohesive groups of Black voters to participate equally in the political process and to elect candidates of their choice.[68]

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62. *Id.*
63. 478 U.S. 30 (1986).
64. *Id.* at 35.
65. *Id.* at 50–51.
66. 507 U.S. 25 (1993).
67. *Id.* at 40–41.
68. *Gingles*, 478 U.S. at 32; *see also Johnson v. De Grandy*, 512 U.S. 997, 1013 (1994) (asserting that the *Gingles* factors were necessary but not sufficient to inquiries surrounding these cases).

B. The Numerical and Theoretical Bases

Concerns about the need for balance between judicial and legislative administrations manifested in the case of *Bartlett v. Strickland*.[69] Here, the Court found support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration, reasoning that the rule draws clear lines for courts and legislatures alike.[70] In the Court's estimation, the justification for the majority-minority rule was found in its efficacy as an objective, numerical test.[71] The Court ruled in that, in order for a majority-minority district to be constitutionally required, minorities must constitute at least fifty percent of a district's voting-age population.[72] Further, minorities must constitute at least fifty percent of the citizen voting-age population of a district.[73] The rule—do minorities make up more than fifty percent of the voting-age population in the relevant geographic area—provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with section 2.[74]

> Where an election district could be drawn in which minority voters form a majority but such a district is not drawn, or where a majority-minority district is cracked by assigning some voters elsewhere, then—assuming the other *Gingles* factors are also satisfied—denial of the opportunity to elect a candidate of choice is a present and discernible wrong that is not subject to the high degree of speculation and prediction attendant upon the analysis of crossover claims.[75]

It is not only the presence of a concentrated Black population, but the manufactured denial of Black governance that evidences vote dilution. The Court maintained that the majority-minority rule is not an arbitrary invention and has its foundation in principles of democratic governance.[76] When a minority group can demonstrate the factors highlighted in Gingles, and that group is still not put into their

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69. Bartlett v. Strickland, 556 U.S. 1, 17 (2009)
70. *Id.* at 17.
71. *Id.* at 18; *see* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 485–86 (2006) (recognizing need for "clear-edged rule").
72. *Bartlett*, 556 U.S. at 19–20.
73. *Id.* at 19.
74. *Id.*
75. *Id.* at 18–19.
76. *Id.* at 19.

own district despite a history of racial polarization, it is a special wrong with special significance.[77]

The Court addressed doubts as to whether section 2 calls for the majority-minority rule by emphasizing that majority-minority districts follow logical, numerical conclusions rather than arbitrary racial objectives.[78] The unstated logic here is that the schemes of racial classification designed to entrench white supremacy are meaningfully distinct from rules designed to restore voting rights based on race that have been deprived because of race. Even if the moral imperative of the Equal Protection Clause is racial neutrality, a rule designed to neutralize the use of race implemented to advance the dominance of antiblackness in the body politic is, for all honest intents and purposes, the true meaning of a race neutral rule. Regardless of the false equivalences that abound, allowing Black people who already constitute a numerical majority to have some measure of self-determination over the conditions of their lives is not comparable to the irrational malapportionment that establishes white dominance in the electorate. In *Voinovich v. Quilter*,[79] the Court clarified that the creation of majority-minority districts does not necessarily increase or decrease overall minority voting power—it can have either effect, or neither.[80] The creation of majority-Black districts "necessarily leaves fewer Black voters and therefore diminishes the influence of Black voters in predominantly white districts."[81] In turn, the creation of majority-Black increases Black voters influence.[82] However, placing Black voters in a district where they constitute a "sizeable" and "safe" majority ensures that they will be able to elect the candidate of their choice.[83] Arbitrarily determining how many Black districts can exist, despite numerical realities, is an objective, mathematical deprivation.

There is not only a numerical basis for majority-Black districts, but also a theoretical basis—"where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters."[84] The essence of a section 2 claim is that electoral laws,

77. *Id.*
78. *Id.* at 18–19.
79. 507 U.S. 146 (1993).
80. *Id.* at 154.
81. *Id.*
82. *Id.*
83. *Id.*
84. Thornburg v. Gingles, 478 U.S. 30, 48 (1986).

practices, and structures interact with social and historical conditions to cause inequalities in the opportunities enjoyed by Black and white voters to elect their preferred representatives.[85] The constitutional rules for protecting Black people in the apportionment process cannot be written as if equality is the status quo. The foundational uses of antiblackness to structure governing in the United States, historically acknowledged by the adoption of the Reconstruction Amendments to the Constitution and the Supreme Court's adoption of the *Gingles* framework, must constrain judicial inclinations to develop theories of Black representation that are fundamentalist and ahistorical. "In particular, the Court ought not countenance use of the fourteenth and fifteenth amendments to assure electoral majorities a constitutional advantage over a racial minority."[86]

CONCLUSION

Black voting rights is a constitutional demand on par with majority rule. Prior to passage of the VRA, Black people's right of judicial protection was subordinated to white people's right to rule elections. It contended that Black political power is a compelling interest rivaling the states' freedom to administer elections according to a racist winner-take-all system. Even under this new ostensibly equitable regime, Black people are required to carry a heavy burden of proof to safeguard an equally effective voice in legislative apportionments. Under the *Milligan* concurrence's reading of the *Purcell* principle, it is possible that that burden of proof now includes establishing that respecting Black voting rights is not too much of a burden on the states. The cost, confusion, and hardship to Black people is rendered illegible. The focus on doctrine and practicality conceals that what is really being facilitated is violence.

> If slavery persists as an issue in the political life of [B]lack America, it is not because of an antiquarian obsession with bygone days or the burden of a too-long memory, but because [B]lack lives are still imperiled and devalued by a racial calculus and a political arithmetic that were entrenched centuries ago. This is the afterlife of slavery–skewed life chances, limited access to health and education, premature death, incarceration, and impoverishment.[87]

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85. *Id.* at 47.

86. Blacksher & Menefee, *supra* note 48, at 32–33.

87. *See generally* Saidiya Hartman, LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE 6 (2007).

When we are talking about the right to be self-determined and politically empowered, we are talking about the possibility for Black people to be represented by something other than suffering, neglect, and premature death.