
THE STANDARD OF PROOF IN RACIAL-GERRYMANDERING CASES: *ALEXANDER*'S MISTAKE AND ITS IMPLICATIONS

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In Alexander v. South Carolina State Conference of the NAACP, the United States Supreme Court reversed a district court ruling that a South Carolina congressional district was an unconstitutional racial gerrymander. From the perspectives of constitutional law, election law, and politics, the decision was notable for several important reasons and the decision will no doubt prompt scholarly discussion in these areas.

Alexander, however, was also a case about evidence, evidence law, and legal proof. The case turned on whether the district court's factual finding that the plaintiffs had met their burden of proof was "clearly erroneous." When viewed from the perspective of evidence law and legal proof, the decision is both surprising and problematic. It is surprising because the majority opinion mistakes the substantive legal standard for the evidentiary standard of proof (a mistake not called out by an otherwise detailed dissent). It is problematic because, in doing so, the majority opinion also appears to raise the standard of proof from "preponderance of the evidence" to something like "clear and convincing evidence," without explicitly justifying that policy choice.

If this reading of Alexander is correct, several implications follow. First, the analysis clarifies aspects of the doctrine that are otherwise confusing or obscure—most importantly, the presumption of good faith by the legislature and the evidentiary significance of alternative legislative maps. As will be illustrated, the standard of proof gives content to these aspects. Second, the analysis best explains the disagreements between the majority and the dissent about the evidence in the case and the application of the "clear error" standard. Third, and most importantly, the analysis makes explicit an issue on which future cases will depend. As a matter of

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procedural due process, heightened standards of proof require explicit justification—something missing in Alexander. Going forward, this justification must either be provided or Alexander’s mistake corrected. The viability of future racial-gerrymandering cases may turn on this choice.

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I. INTRODUCTION

Following the 2020 census, South Carolina adopted a reapportionment plan for its congressional districts.¹ Among other changes, the enacted plan moved over 30,000 Black residents from Charleston County out of District 1.² This number constituted 62% of the Black residents who had previously been located in the district.³ *Alexander v. South Carolina State Conference of the NAACP* concerned constitutional challenges to South Carolina’s enacted reapportionment plan, including District 1.⁴ Following a trial, a three-judge district court panel ruled that District 1 constituted an unconstitutional racial gerrymander.⁵ The United States Supreme Court, in a 6-3 opinion, reversed the district court’s ruling.⁶

Alexander is significant in several respects. The case raises important issues involving constitutional law, election law, and politics. Some of these include, for example, the relationship between racial gerrymandering and partisan

1. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 7 (2024).

2. *S.C. State Conf. of the NAACP v. Alexander*, 649 F. Supp. 3d 177, 189 (D.S.C. 2023).

3. *Id.*

4. 602 U.S. at 15.

5. *Alexander*, 649 F.Supp.3d at 183 (“The Court received the testimony of numerous witnesses over eight trial days and received into evidence hundreds of exhibits.”).

6. *Alexander*, 602 U.S. at 5.

gerrymandering after the Supreme Court's decision in *Rucho v. Common Cause* (holding that partisan-gerrymandering claims are nonjusticiable),⁷ and Justice Thomas's separate concurrence in *Alexander* (arguing that racial-gerrymandering claims should be nonjusticiable),⁸ among others. Commentary following the opinion's release has focused on how the decision fits into the larger picture of election law, and scholars will likely explore these and related issues in the coming years.⁹

But *Alexander* is also, fundamentally, a case about evidence, evidence law, and legal proof.¹⁰ At trial, the case turned on whether South Carolina used race as the "predominant motivating factor" in drawing District 1.¹¹ After hearing from witnesses and other proffered evidence, the district court found, as a matter of fact, that race was used as the predominant motivating factor.¹² Under the applicable substantive law, this finding meant that the burden shifted to the defendants to provide a compelling state interest for using race that would satisfy strict scrutiny.¹³ The defendants provided no such justification and, after its finding, the district court ruled that District 1 constituted an unconstitutional racial gerrymander as a matter of law.¹⁴

The Supreme Court reversed after applying the deferential "clear error" review standard to the district court's factual finding.¹⁵ In doing so, the majority opinion looked closely at details of the evidentiary proof process and the evidence in the case.¹⁶ With regard to the former, the Court discussed a "presumption of good faith" by the legislature in enacting the reapportionment map.¹⁷ With regard to the latter, the Court discussed circumstantial evidence about the design of District 1; credibility judgments about the testimony of state officials; and expert testimony providing statistical analyses of the district's design.¹⁸ Finally,

7. 588 U.S. 684, 687 (2019).

8. 602 U.S. at 39–66 (Thomas, J., concurring in part).

9. See, e.g., DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN, DANIEL P. TOKAJI & NICHOLAS STEPHANOPOULOS, *ELECTION LAW: CASES AND MATERIALS* 10 (7th ed. Supp. 2024); Note, *Fourteenth Amendment—Election Law—Alexander v. S.C. Conf. of the NAACP*, 138 HARV. L. REV. 385, 390 (2024); Michael J. Pitts, *Undermining Voting Rights*, 56 N.M. L. REV. (forthcoming 2026).

10. See 602 U.S. at 17–18.

11. *Id.* at 7.

12. S.C. State Conf. of the NAACP v. *Alexander*, 649 F. Supp. 3d 177, 193 (D.S.C. 2023) ("After carefully weighing the totality of evidence in the record and the credibility of witnesses, the Court finds that race was the predominant motivating factor in the General Assembly's design of Congressional District No. 1 . . .").

13. *Id.* at 197.

14. *Id.*

15. *Alexander*, 602 U.S. at 17–18. See *Anderson v. City of Bessemer City N.C.*, 470 U.S. 564, 573 (1985) ("[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948))); FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

16. *Alexander*, 602 U.S. at 24.

17. *Id.* at 6 ("[I]n assessing a legislature's work, we start with a presumption that the legislature acted in good faith.").

18. See *infra* Part II for an overview of the evidence.

the Court drew an “adverse inference” from the absence of an alternative map showing that the legislature could have achieved its partisan goal while retaining a higher percentage of Black residents in the district.¹⁹ The dissent disagreed with the majority on each and every one of the above aspects, arguing that the district court’s factual finding was reasonably supported by the evidence and thus was not clear error.²⁰

This Article argues, from the perspective of evidence law and legal proof, that *Alexander* has both a surprising gap and a critical mistake at its core. The gap and the mistake concern the evidentiary standard of proof. With regard to the *gap*, despite extensive discussion of the evidence and several aspects the proof process, the standard of proof was absent.²¹ This is surprising and unfortunate because a number of contested issues in the case—including the presumption of good faith, the sufficiency of the evidence, and the clear-error standard all depend on the evidentiary standard of proof.²²

More significant than this gap, however, is a *mistake*. This mistake has two related aspects.²³ First, the majority opinion mistakes the applicable *substantive* legal standard—the racial-predominance test—for the *evidentiary* standard of proof.²⁴ This doctrinal confusion is significant in its own right because of the uncertainty it may engender for parties and courts in future cases.²⁵ Second, however, the majority opinion also appears to compound the problem by implicitly *raising* the evidentiary standard of proof for racial-gerrymandering claims.²⁶ Specifically, the majority appears to raise the standard of proof from the “preponderance of the evidence” standard to something like the “clear and convincing evidence” standard, without explicitly providing the reasons that would justify such a doctrinal choice.²⁷ The aim of this Article will be to explain this mistake and its implications.

If *Alexander* implicitly raised the standard of proof, then several implications follow. First, this clarifies aspects of the opinion and underlying doctrine that are otherwise confusing or obscure.²⁸ For example, for reasons that will be explained, it gives content to the presumption of good faith by the legislature.²⁹ Second, this conclusion best explains various disagreements between the majority and the dissent about the evidence in the case (and the evidentiary significance

19. *Alexander*, 602 U.S. at 34–35.

20. See *infra* Part II for an overview of the dissent.

21. As Part III *infra* demonstrates, the majority twice purports to refer to the standard of proof—but mistakenly refers instead to the substantive legal standard.

22. Part IV *infra* demonstrates these connections.

23. See *infra* Parts III, IV.

24. See *infra* Part III.

25. See *infra* Part III.

26. See *infra* Part IV.

27. See *infra* Part IV.

28. See *infra* Part IV.

29. See *infra* Subsection IV.B.2.

of alternative maps).³⁰ Third, it gives content to the “clear error” review standard.³¹

Finally, and most importantly, it illuminates an issue that must be clarified in future racial-gerrymandering cases. When courts depart from the default preponderance-of-the-evidence standard in civil cases—and require clear and convincing evidence—they do so explicitly and for specific policy reasons.³² Thus, it is imperative that either (1) the policy justifications for this significant departure are provided, or (2) *Alexander*'s mistake is corrected. As this Article will demonstrate, without clarifying this issue, it is impossible for courts to know how to apply the presumption of good faith; how to assess expert testimony and other evidence; and the evidentiary significance of alternative legislative maps.³³ Correspondingly, it is impossible for parties to know their proof obligations.³⁴ Nor is it an issue that may be left to the discretion of courts to decide on a case-by-case basis.³⁵ As the Supreme Court has explained, Due Process requires that evidentiary standards of proof apply to general classes of cases and are known by the parties ahead of time:

Standards of proof, like other ‘procedural due process rules[,] are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases’ Since the litigants and the fact finder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance.³⁶

The viability of future racial-gerrymandering claims will depend on this issue.³⁷

Here is the roadmap. Part II provides an overview of *Alexander* and its evidentiary issues.³⁸ This Part first outlines the evidence in the case and the district court’s factual findings. It then discusses the differing analyses by the majority and the dissent regarding the evidence in the case and whether the district court’s finding was “clearly erroneous.” Part III demonstrates *Alexander*'s mistake in confusing the substantive legal standard for the evidentiary standard of proof. Part IV explains why and how *Alexander* raised the standard of proof. Drawing on the scholarly literature on evidence law and legal proof, this Part first discusses evidentiary standards of proof, how they operate in practice, and the important theoretical and policy issues underlying them. This discussion provides the necessary background for understanding the analytical implications of *Alexander*'s analysis. Then, this Part explains how *Alexander*, without explicitly

30. See *infra* Part IV.

31. See *infra* Subsection IV.B.4.

32. *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45, 47 (2025) (“The usual standard of proof in civil litigation is preponderance of the evidence. A more demanding standard, such as clear and convincing evidence, applies only when a statute or the Constitution requires a heightened standard or in certain other rare cases”).

33. See *infra* Subsections IV.B.2–4.

34. See *infra* Subsection IV.B.1.

35. *Santosky v. Kramer*, 455 U.S. 745, 757 (1982).

36. *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 344 (1974)).

37. See *id.* at 756.

38. Readers already familiar with the details of the opinion may skip Part II.

saying so, appears to raise the standard of proof from “preponderance of the evidence” to “clear and convincing evidence” (or something like it). Finally, this Part explains how this understanding of *Alexander* clarifies several other aspects of the opinion and the underlying doctrine. These include the presumption of good faith, alternative maps, expert testimony and other evidence in the case, and application of the clear-error standard. The Conclusion summarizes the underlying policy implications and their significance for future racial-gerrymandering claims.

II. WHAT *ALEXANDER* SAYS

Alexander involved a constitutional challenge to a South Carolina redistricting map that was adopted following the 2020 census.³⁹ The plaintiffs challenged several districts, but the *Alexander* opinion focuses on Congressional District 1—which includes Charleston County.⁴⁰ The redistricting plan adopted by the state legislature moved approximately 30,000 (of the approximately 48,000) Black residents formerly assigned to District 1 to another congressional district (District 6).⁴¹

The central issue in the case turned on a factual dispute between the parties.⁴² In order to understand the significance of this factual dispute, it is necessary to understand the doctrinal framework for racial-gerrymandering challenges.⁴³ In prior caselaw, the Supreme Court recognized race-based gerrymandering claims and the doctrinal contours for proving them. First, *Shaw v. Reno* recognized constitutional claims under the Equal Protection Clause based on racial gerrymandering and held that decisions to draw congressional districts based on race were subject to strict scrutiny.⁴⁴ Then, in *Miller v. Johnson*, the Court established the “racial predominance” test: “The plaintiff’s burden is to show . . . that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”⁴⁵ Although legislatures may engage in political gerrymandering,⁴⁶ the racial-predominance test may be met when race is used as a proxy for partisanship,⁴⁷ so long as race is “the predominant criterion” used to advance a partisan goal.⁴⁸ In cases such as *Alexander*, plaintiffs must “disentangle race from politics

39. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 7 (2024).

40. *See id.* at 14–15.

41. *S.C. State Conf. of the NAACP v. Alexander*, 649 F. Supp. 3d 177, 189 (D.S.C. 2023).

42. *Alexander*, 602 U.S. at 18.

43. *See id.* at 11 (describing the “daunting requirements” necessary to overcome strict scrutiny review).

44. *Shaw v. Reno*, 509 U.S. 630, 653 (1993).

45. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

46. *See Rucho v. Common Cause*, 588 U.S. 684, 685 (2019) (citing *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)).

47. *Miller*, 515 U.S. at 914.

48. *Cooper v. Harris*, 581 U.S. 285, 291 n.1 (2017). Post-*Rucho*, a legislature may choose to use race as a proxy when race is thought to provide a reliable (or efficient) indication of political affiliation. On the high correlation between race and political affiliation in the American South, and the difficulties this poses for

and prove that the former drove a district's lines."⁴⁹ If the plaintiff satisfies that burden, then the burden shifts to the defendants to show that their decision satisfies strict scrutiny.⁵⁰

In *Alexander*, the decision depended solely on the first step of the analysis.⁵¹ The defendants denied using race in designing District 1 (and did not offer any arguments on the second step).⁵² Rather, the defendants argued that partisan interests motivated the design of District 1 and race was not used to advance that goal.⁵³ Thus, when the district court found race was used at the first step, it concluded that the enacted district was unconstitutional as a matter of law.⁵⁴

This Part first discusses the district court's factual finding and the evidence on which it was based. It then discusses how the majority and the dissent in *Alexander* analyzed the evidence and this finding.

A. *The District Court*

In finding that the legislature used race as the predominant criterion, the district court based its conclusion on three categories of evidence.

First, uncontested background information in the record informed the Legislature's districting choices.⁵⁵ This category included the following details. After the 2020 census, two districts—1 and 6—had significant population variances.⁵⁶ District 1 had an excess and District 6 had a deficit.⁵⁷ Republican majorities in the South Carolina House and Senate “sought to create a stronger Republican tilt” in District 1.⁵⁸ The General Assembly was presented with several proposed maps by interested parties, each of which differed in the number of Black voters in District 1.⁵⁹ A district in the range of 17% of Black voters produced a Republican tilt; a range of 20% produced a “toss up”; and a range of 21–24% produced a Democratic tilt.⁶⁰ The plan ultimately adopted was 17.8%.⁶¹

Second, the court heard testimony from Will Roberts, the cartographer responsible for preparing the reapportionment plan.⁶² Robert admitted during his

election-law doctrine, see Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1839 (2018).

49. *Cooper*, 581 U.S. at 308 (quoting *Cromartie*, 526 U.S. at 546).

50. *Id.* at 292.

51. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 17–18 (2024).

52. *See S.C. State Conf. of the NAACP v. Alexander*, F. Supp. 3d 177, 198 (D.S.C. 2023).

53. *Id.* at 188.

54. *Id.* at 197.

55. *Id.* at 185.

56. *Id.*

57. *Id.*

58. *Id.* at 187–88. There was also a desire to include two previously split counties (Beaumont and Berkeley) in District 1, along with portions of a third county (Dorchester). *Id.* at 188.

59. *Id.*

60. *Id.*

61. *Id.* at 191.

62. *Id.* at 188.

testimony that, for Charleston County, he abandoned the “least change” approach taken in other counties and made “dramatic changes.”⁶³ This included moving 62% of the Black residents (30,243 out of 48,708) from District 1 to District 6.⁶⁴ The court also found that Roberts possessed extensive knowledge of the State’s racial demographics—“down to the individual precinct level”—and was aware of how changes in the proposed map would affect the percentage of Black voters in District 1.⁶⁵ The court noted that Roberts “failed to provide the Court with any plausible explanation” for the “dramatic changes” made to Charleston County and found it to be “more than a coincidence” that the adopted plan matched the 17% target.⁶⁶ Given the absence of any plausible alternative explanation for the changes, the court concluded that Roberts’ testimony that he did not consider race in drawing the district “r[ang] hollow.”⁶⁷

Third, the court relied on expert testimony to further support its finding that race predominated over other factors in drawing the District 1 map.⁶⁸ The district court’s opinion discussed testimony from two plaintiffs’ experts and one defendant’s expert.⁶⁹ Dr. Kosuke Imai, a professor in the Department of Statistics at Harvard, testified regarding “race-blind simulation analysis” he conducted on District 1.⁷⁰ He produced 10,000 simulations and concluded that only 0.2% of the simulations produced fewer Black voters in District 1 than the plan that was adopted.⁷¹ Moreover, the percent of Black voters in District 1 was 6.5% lower than the Black voting-age population in simulations produced by Dr. Imai.⁷² A second plaintiffs’ expert, Dr. Jordan Ragusa (a professor of political science at the College of Charleston) testified about the analysis he conducted on the relationships concerning race, partisanship, and the District 1 map.⁷³ He examined the likelihood that a “voter tabulation district” (“VTD”)⁷⁴ would be moved based on race or partisanship (as measured by votes in the 2020 presidential election).⁷⁵ He testified that racial composition was a stronger factor than partisanship in predicting whether a VTD was moved out of District 1.⁷⁶ The district court also discussed testimony from Sean Trende, the defendants’ sole expert witness.⁷⁷ He testified that the adopted plan made only “modest changes” and that the map for

63. *Id.* at 189.

64. *Id.*

65. *Id.* at 191 n.12.

66. *Id.* at 191.

67. *Id.*

68. *Id.* at 191, 193.

69. *Id.* at 191–93.

70. *Id.* at 191.

71. *Id.* at 191–92.

72. *Id.*

73. *Id.*

74. A “voter tabulation district” is, basically, a precinct. *See id.* at 185–86 n.3.

75. *Id.* at 193.

76. *Id.* (“Dr. Ragusa’s findings were particularly probative regarding changes in the Charleston County portion of Congressional District No. 1 in the 2022 plan, where ten of the eleven VTDs with African American populations of 1,000 or more were moved to Congressional District No. 6.”).

77. *Id.* at 192–93.

District 1 conformed to natural geographic boundaries.⁷⁸ The court noted that Trende “ignored the movement of more than 30,000 African American residents out of Charleston County” and therefore found his testimony and reports “unpersuasive” as to District 1.⁷⁹

The district court thus concluded:

After carefully weighing the totality of evidence in the record and the credibility of witnesses, the Court finds that race was the predominant motivating factor in the General Assembly’s design of Congressional District No. 1.⁸⁰

And:

The Court finds that to achieve a target of 17% African American population in Congressional District No. 1, Charleston County was racially gerrymandered and over 30,000 African Americans were removed from their home district.⁸¹

Based on these findings, defendants then had the burden of providing a compelling state interest justifying the use of race in designing District 1 that survives strict scrutiny.⁸² Because the defendants made no such showing, the plaintiffs were entitled to judgment as a matter of law on their claim that the design of District 1 constituted an unlawful racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment.⁸³

B. *The Majority*

The U.S. Supreme Court reversed after concluding that the district court’s finding—that race was the predominant factor in designing District 1—was “clearly err[oneous].”⁸⁴ The majority opinion, written by Justice Alito, outlines the clear-error review standard and the substantive legal standards before turning to the evidence.⁸⁵ On one hand, the Court cites a common formulation of the clear-error standard, which states that the reviewing court should give deference to the trial court and reverse only when “left with the definite and firm conviction

78. *Id.* at 193.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 197 (citing *Cooper v. Harris*, 581 U.S. 285, 292 (2017)).

83. *Id.* The plaintiffs also challenged two other districts as unconstitutional racial gerrymanders. The district court found that the plaintiffs had not met their burden of proof with regard to those districts. *Id.* The plaintiffs also brought a separate vote-dilution claim, on which the Supreme Court reversed and remanded for failure to apply to the correct legal standard. *See Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 38–39 (2024). This issue is outside the scope of this Article.

84. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 17 (2024).

85. *See id.* at 6–7.

that a mistake has been committed.”⁸⁶ Under this standard, courts will affirm so long as the district court’s findings are “plausible.”⁸⁷

On the other hand, the Court explains that the plaintiffs’ “evidentiary burden” is “especially stringent.”⁸⁸ Plaintiffs may prove that race was the “predominant motivating factor” in the legislature’s decision to move voters into or out of a district with direct or circumstantial evidence.⁸⁹ Cases such as *Alexander* that proceed with circumstantial evidence are “much more difficult” and “especially difficult when the State raises a partisan-gerrymandering defense.”⁹⁰ In such a case, the plaintiffs must “rul[e] out the competing explanation that political considerations dominated the legislature’s redistricting efforts.”⁹¹ The plaintiff, however, may also succeed by proving that race was used as a proxy for partisanship and was the predominant criterion in redistricting efforts.⁹² Importantly, the Court explains that, “in assessing a legislature’s work, we start with a presumption that the legislature acted in good faith.”⁹³ The majority outlines several policy considerations that justify the presumption.⁹⁴ These policy considerations include—that court review is “a serious intrusion” into a function that is primarily the responsibility of the state legislators; respect for legislators (who are “bound by an oath to follow the Constitution”); caution in declaring that a legislator engaged in “offensive and demeaning” behavior; and a wariness to turn courts into “weapons of political warfare.”⁹⁵

In concluding that the district court’s finding was clear error, the majority focused on four aspects of the evidence: (1) circumstantial evidence, (2) Roberts’s testimony, (3) the expert testimony, and (4) the absence of an alternative map by the plaintiffs.

First, the majority dismissed the significance of the percentage of Black residents in the enacted map.⁹⁶ Because the Court reasoned race and partisan preferences are “closely tied,” the percentage of Black residents “prove[d] very little.”⁹⁷ Rather, the Court explained, the 17% result may have been a “side effect” of the legislature’s partisan goal rather than a target—and “certainly

86. *Id.* at 18 (quoting *Cooper*, 581 U.S. at 309); see also *Anderson v. Bessemer City*, 470 U.S. 564, 573–74 (1985) (“[A] finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948))).

87. *Anderson*, 470 U.S. at 574.

88. *Alexander*, 602 U.S. at 11.

89. *Id.* at 7–8 (“Direct evidence often comes in the form of a relevant state actor’s express acknowledgment that race played a role in the drawing of district lines. Such concessions are not uncommon because States often admit to considering race for the purpose of satisfying our precedent interpreting the Voting Rights Act of 1965. . . . Direct evidence can also be smoked out over the course of litigation.”).

90. *Id.* at 8–9.

91. *Id.* 9–10.

92. *Id.* at 7 n.1.

93. *Id.* at 6.

94. *Id.* at 11.

95. *Id.* at 7, 11.

96. *Id.* at 20.

97. *Id.*

nothing rule[d] out that possibility.”⁹⁸ Moreover, “[i]n light of the presumption of legislative good faith, that possibility [wa]s dispositive.”⁹⁹ Similarly, the Court argued that the legislature’s partisan goal “c[ould] easily explain” the dramatic changes to District 1, including the splitting of Charleston and other counties and moving many predominantly Black Charleston precincts out of District 1.¹⁰⁰ Because partisanship also explained these choices, “the District Court therefore erred in crediting the less charitable conclusion that the legislature’s real aim was racial.”¹⁰¹

Second, the majority dismissed the district court’s (1) rejection of Roberts’s testimony and (2) reliance on the fact that Roberts had knowledge of the specific racial demographics throughout the process.¹⁰² According to the Court, Roberts testified that he considered the racial data only after he drew the map (and that he did so only to check whether the map complied with Voting Rights Act precedent).¹⁰³ Although the district court “discredited this testimony,” the Court explained, the district court “cited no evidence that could not also support the inference that politics drove the mapmaking process.”¹⁰⁴

Third, the majority rejected the district court’s reliance on the plaintiffs’ expert testimony.¹⁰⁵ The Court took a close look at methodological choices made by the plaintiffs’ expert witnesses.¹⁰⁶ Focusing on the two experts relied on by the district court, the majority concluded that methodological choices rendered the evidence defective and insufficient to support the district court’s findings.¹⁰⁷ With regard to Dr. Imai’s testimony, the Court rejected the evidence because the simulation models “failed to consider partisanship.”¹⁰⁸ In particular, the models did not account for the legislature’s aim of creating a Republican tilt in the district.¹⁰⁹ With regard to Dr. Ragusa’s testimony, the Court rejected the evidence for failure to account for “contiguity and compactness” and for how it measured “partisan leanings.”¹¹⁰ On the former, the “flaw,” according to the majority, was that Ragusa’s analysis assumed a precinct could be moved into or out of a district

98. *Id.* (“[T]he Challengers cannot point to even one map in the record that would have satisfied the legislature’s political aim and had a BVAP above 17%.”).

99. *Id.*

100. *Id.* at 22.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 24.

106. Justice Thomas joined the majority opinion, except for the majority’s review of the expert testimony. *Id.* at 39 (Thomas, J., concurring) (“The Court’s searching review of the expert reports exceeds the proper scope of clear-error review.”).

107. *See id.* at 24–33.

108. *Id.* at 24.

109. *Id.* at 25. The majority also faulted the models for not accounting for “core district retention.” *Id.* at 26–27 (“The Enacted Plan retains 83% of District 1’s core, but the average map produced by Dr. Imai’s model scored 69% on the core-district-retention metric . . . we cannot rule out core retention as another plausible explanation for the difference between the Enacted Plan and the average Imai simulation.”).

110. *Id.* at 27.

without accounting for its geographic “distance from the line between” the two districts.¹¹¹ On the latter, the flaw, according to the majority, was that partisanship in a precinct was measured by total votes for President Biden, not the net votes for Biden.¹¹² The majority thus concluded that “none of the expert reports offered by the Challengers provides any significant support of their position.”¹¹³

Fourth, and finally, the majority argued that the district court “critically erred” by not drawing an adverse inference from the plaintiffs’ failure to offer an alternative map showing how the legislature could have achieved its partisan goal while “producing ‘significantly greater racial balance.’”¹¹⁴ The majority explained that such a map “can [help plaintiffs] go a long way toward . . . disentangling race and politics.”¹¹⁵ The “evidentiary force of such a map, coupled with its easy availability, means that trial courts should draw an adverse inference from a plaintiff’s failure to submit one.”¹¹⁶ According to the majority, this should be interpreted “as an implicit concession that the plaintiff cannot draw a map that undermines the legislature’s defense” that politics, not race, drove the redistricting decision.¹¹⁷ Thus, “[t]he District Court’s conclusions are clearly erroneous because it did not follow this basic logic.”¹¹⁸

C. *The Dissent*

Justice Kagan’s dissent argued that the district court’s factual finding did not constitute clear error.¹¹⁹ The dissent framed the factual dispute as a choice between two competing stories or explanations of what occurred: a politics-only account and a race-as-predominant-factor account.¹²⁰ Following a trial “featuring some two dozen witnesses and hundreds of exhibits,” the three judges on the district-court panel unanimously agreed that the plaintiffs’ account was more likely, and concluded that state officials gerrymandered District 1 by race.¹²¹ In arguing that this finding was not clearly erroneous, the dissent strongly contested the majority’s use of the presumption of legislative good faith and took issue with the majority’s analysis on each of the four aspects of the evidence discussed above.¹²²

111. *Id.* at 28.

112. *Id.* at 30.

113. *Id.* at 33. The majority also discussed and critiqued two other plaintiffs’ experts, who were not discussed by the district court. *Id.* at 31–33.

114. *Id.* at 34. (quoting *Easley v. Cromartie*, 532 U.S. 234, 258 (2001)).

115. *Id.*

116. *Id.* at 35.

117. *Id.* (“The adverse inference may be dispositive in many, if not most, cases where the plaintiff lacks direct evidence or some extraordinarily powerful circumstantial evidence.”).

118. *Id.*

119. *Id.* at 69 (Kagan, J., dissenting).

120. *Id.* at 67 (“In the end, the court had to decide between two starkly different stories, backed by opposing bodies of evidence.”).

121. *Id.* at 67–68 (“[A]ll three judges agreed: the [plaintiffs’] version of events was . . . more credible.”).

122. *Id.* at 70–80.

With regard to the presumption, the dissent argued that the majority “[went] seriously wrong” in how it applied the deferential clear-error review standard.¹²³ Rather than deferring to reasonable factual findings (as the clear-error standard requires), the majority invoked the presumption to interpret the evidence and to draw inferences whenever they could possibly be drawn in the defendants’ favor.¹²⁴ But, according to the dissent, the presumption simply meant that the plaintiffs bore the burden of proof at trial.¹²⁵ It does not, the dissent argued, transform the clear-error standard or otherwise remove the deference that should be given to trial court findings.¹²⁶ With this understanding, the dissent then turned to the evidence.

First, the dissent argued that it was reasonable for the district court to rely on circumstantial evidence in the case.¹²⁷ The primary factual dispute was whether “[t]he State had advanced its partisan objective primarily by racial means.”¹²⁸ The district court was faced with the fact that “[t]he part of the county that the legislature had moved out of District 1 was disproportionately Black, and by a lot.”¹²⁹ Moreover, the map enacted by the legislature “hit on the dot the Black voting percentage that state officials knew they needed to achieve their partisan goal.”¹³⁰ Furthermore, it was undisputed that the mapmakers were aware of the racial data throughout the process and how various changes would affect that data.¹³¹

Second, the dissent pointed out that the contrary evidence consisted of “self-serving denials.”¹³² Although Roberts testified that they did not consult the racial data until after the map had been drawn, the district court found this testimony not credible—the testimony “r[ang] hollow” and “did not hang together.”¹³³ Credibility judgments by district courts, in particular, are entitled to deference during clear error review and, thus, the dissent argued, the majority failed to give deference to these credibility judgments.¹³⁴

123. *Id.* at 68.

124. *Id.* at 68–69.

125. *Id.* at 73; see Ronald J. Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843, 849–55 (1981).

126. *Alexander*, 602 U.S. at 73.

127. *Id.* at 76.

128. *Id.* at 82.

129. *Id.* at 81.

130. *Id.* at 83.

131. *Id.* at 84–85 (“Why configure a computer to tell you, at every stage of the mapmaking process, how the slightest change in a district line would affect Black voting-age population if you weren’t tracking and manipulating Black voting-age population? Roberts had no answer.”).

132. *Id.* at 88.

133. *Id.* at 89–90.

134. *Id.* at 89 (“[W]e give singular deference to a trial court’s judgments about the credibility of witnesses.” (alteration in original) (quoting *Cooper v. Harris*, 581 U.S. 285, 309 (2017))). See also FED. R. CIV. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”).

Third, the dissent challenged the majority's dismissal of the plaintiffs' expert testimony in the case.¹³⁵ In doing so, the dissent again framed the issue as a comparative choice. Given the factual dispute about what best explained the data, "you might think that the trial would feature a war of statistical experts, each presenting their own multivariate regressions. But you would be wrong."¹³⁶ The plaintiffs presented studies "with significant probative force," concluding that Charleston County was split based on race.¹³⁷ The defendants, however, did not submit analyses of their own—rather they focused on "searching for holes" in the testimony and reports of the plaintiffs' experts.¹³⁸ The district court found the plaintiffs' expert testimony persuasive.¹³⁹ The dissent concluded that this finding was not clearly erroneous—particularly in the absence of any expert analysis by the defendants showing that "partisanship subsumed race" in designing District 1.¹⁴⁰

Fourth, and finally, the dissent vigorously challenged the majority's "adverse inference" analysis concerning alternative legislative maps.¹⁴¹ As the dissent explained, the Court had previously rejected an alternative map as a *necessary* requirement for plaintiffs in racial-gerrymandering cases.¹⁴² The presence or absence of such a map is one piece of relevant evidence—its presence may help a plaintiff carry the day in an otherwise weak case, and its absence may be decisive in an otherwise close case—but there is no need for parties to jump through "evidentiary hoops," if they can otherwise prove their case.¹⁴³ The dissent concluded that the district court, for the reasons discussed above, reasonably found that the plaintiffs had proven their case.¹⁴⁴

III. STANDARDS OF PROOF AND *ALEXANDER*'S MISTAKE

Despite detailed discussion of the evidence and various aspects of the proof process, the evidentiary standard of proof did not feature in the discussion.¹⁴⁵ Nor was it a source of explicit disagreement between the majority and the

135. *Alexander*, 602 U.S. at 91–98.

136. *Id.* at 91 ("The Challengers did their part, but the State failed to respond in kind.").

137. *Id.* at 92.

138. *Id.* at 91–92. The dissent explained that the defendants' expert "took a couple of shots" at the plaintiffs' evidence but did not offer the most relevant and probative type of counter-evidence: "a counter-analysis showing that partisanship subsumed race in the design of District 1." *Id.* at 98.

139. *Alexander*, 602 U.S. at 98.

140. *Id.* ("It was hardly clear error for the District Court to credit the Challengers' statistical evidence about race's predominant role when the State presented no similar evidence to support its partisanship theory.").

141. *Id.*

142. *Id.* at 76 ("*Cooper* expressly rejected a similar demand that a plaintiff alleging a gerrymander submit an alternative map.").

143. *Id.* (quoting *Cooper v. Harris*, 581 U.S. 285, 319 n.15 (2017)); see also *id.* at 77 ("Like all other submissions in a gerrymandering case—the 'testimony of government officials,' proof about the data available to mapmakers, and 'expert analysis'—'[a]n alternative map is merely an evidentiary tool.'" (quoting *Cooper*, 581 U.S. at 318–19)).

144. *Id.* at 98–99.

145. *Id.*

dissent.¹⁴⁶ In two places, the majority purports to refer to the standard of proof.¹⁴⁷ But, in fact, the discussion confuses the substantive legal standard for the evidentiary standard of proof. This Part demonstrates this confusion. Then, Part III will explain how, along with this confusion, the majority appears to raise the evidentiary standard of proof for racial-gerrymandering claims.

What is an evidentiary standard of proof? Evidentiary standards of proof are one component of *burdens of proof*.¹⁴⁸ Legal burdens of proof have two aspects: a burden of production and a burden of persuasion. First, a party with the burden of proof must produce evidence or they lose as a matter of law.¹⁴⁹ Second, the party with the burden of proof on an issue must persuade the fact finder (juries or, in bench trials, judges) to a particular standard of proof.¹⁵⁰ The standard of proof, in other words, provides the fact finder with a standard to use in deciding whether—given the admissible evidence—a disputed fact has been “proven” for legal purposes.¹⁵¹ The law typically uses one of three standards of proof: “preponderance of the evidence” (“POE”), “clear and convincing evidence” (“CCE”), and “beyond a reasonable doubt” (“BARD”).¹⁵² The prosecution in a criminal case must prove each element of the crime BARD (the most demanding of the three standards).¹⁵³ In most civil cases, the plaintiff must prove the elements of the causes of action by a POE (the least demanding of the three).¹⁵⁴ For some civil claims, however, plaintiffs must prove some issues by CCE (an

146. *Id.* at 72.

147. *See infra* notes 159, 174 and accompanying text.

148. For an overview of legal burdens of proof, see RONALD J. ALLEN, DAVID S. SCHWARTZ, MICHAEL S. PARDO & ALEX STEIN, *AN ANALYTICAL APPROACH TO EVIDENCE* 738–51 (7th ed. 2021).

149. *See* John T. McNaughton, *Burdens of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382, 1384 (1955) (citing JOHN HENRY WIGMORE, *EVIDENCE* § 2487, at 283 (3d ed. 1940)).

150. *See id.* at 1382–83.

151. *See* *Colorado v. New Mexico*, 467 U.S. 310, 315 (1984) (“The function of any standard of proof is to ‘instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.’” (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring))).

152. *See* *Concrete Pipe & Prods. of Cal, Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1983) (“[P]reponderance,’ is customarily used to prescribe one possible burden or standard of proof before a trier of fact in the first instance, as when the proponent of a proposition loses unless he proves a contested proposition by a preponderance of the evidence. The term thus belongs in the same category with ‘clear and convincing’ and ‘beyond a reasonable doubt,’ which are also used to prescribe standards of proof (but when greater degrees of certainty are thought necessary).”); *Addington v. Texas*, 441 U.S. 418, 423 (1979) (“[T]he evolution of this area of law has produced across a continuum three standards or levels of proof for different types of cases.”). Statutes will occasionally provide unique standard standards of proof. *See, e.g.*, *Bufkin v. Collins*, 604 U.S. 369, 372 (2025) (discussing the “unique standard of proof known as the ‘benefit-of-the-doubt’ rule” when evaluating a veteran’s claims under 38 U.S.C. § 5107(b)). Other standards may apply to other proceedings or litigation stages—*e.g.*, probable cause, reasonable suspicion, substantial evidence, some evidence, and so on.

153. *In re Winship*, 397 U.S. at 364.

154. *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45, 47 (2025) (“The usual standard of proof in civil litigation is preponderance of the evidence. A more demanding standard, such as clear and convincing evidence, applies only when a statute or the Constitution requires a heightened standard or in certain other rare cases . . .”). *See also id.* at 50 (“[T]he preponderance-of-the-evidence standard has remained the default standard of proof in American civil litigation.”).

intermediate standard, higher than POE but not as demanding as BARD).¹⁵⁵ Defendants in both criminal and civil cases bear the burden of proof (production and persuasion) on some affirmative defenses.¹⁵⁶ When this is the case, defendants must prove the affirmative defenses to a standard of proof—typically by a POE but sometimes by CCE.¹⁵⁷

In order to succeed on their racial-gerrymandering claim, the plaintiffs in *Alexander* had to prove that race was the “predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”¹⁵⁸ At this point, an observer focused on the evidentiary proof process might ask: which of the three standards of proof applies to the racial-predominance test? In one of two mentions of the “standard of proof,” however, the majority states:

Here, the standard of proof that the three-judge court was required to apply, *i.e.*, the racial-predominance test, has a very substantial legal component that must take account of our prior relevant decisions.¹⁵⁹

This is a mistake. The racial-predominance test is not the standard of proof.¹⁶⁰ The Court is correct that prior caselaw had provided doctrinal guidance and constraint in applying that *substantive* legal standard.¹⁶¹ For example, prior cases have discussed the presumption of good faith¹⁶² and the types of direct or circumstantial evidence that might or might not be sufficient to “disentangle race from politics.”¹⁶³ The Court had also previously explained that the predominance test may be met if race was used as a “proxy” for a political goal so long as “race was the predominant criterion” used to “advance the political goal.”¹⁶⁴ Doctrinal guidance of this sort on the substantive legal standard, however, is not the

155. *See id.* at 50–51 (explaining that a heightened standard of proof applies when required by statute or the Constitution or in other “uncommon” cases, typically involving coercive actions by the government); *see, e.g.*, *Addington v. Texas*, 441 U.S. 418, 424 (1979) (holding that the “clear, unequivocal and convincing” standard applies to civil commitment). Section IV.A provides additional examples. *See infra* notes 215–23 and accompanying text.

156. *See* *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45, 53 (2025); *see also* 18 U.S.C. § 17(b).

157. *See, e.g.*, 18 U.S.C. § 17(b) (“The defendant has the burden of proving the defense of insanity by clear and convincing evidence.”).

158. *Alexander v. S.C. Conf. of the NAACP*, 602 U.S. 1, 7 (2024) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

159. *Alexander*, 602 U.S. at 19.

160. *See infra* Part III.

161. *Alexander*, 602 U.S. at 19.

162. *Miller*, 515 U.S. at 915 (“[T]he good faith of a state legislature must be presumed.”).

163. *See* *Cooper v. Harris*, 581 U.S. 285, 308, 322 (2017) (rejecting an “alternative map” requirement when plaintiff’s evidence is otherwise sufficient); *Easley v. Cromartie (Cromartie II)*, 532 U.S. 234, 258 (2001) (suggesting an alternative map might be necessary in an otherwise weak case); *Miller*, 515 U.S. at 916 (instructing courts to exercise “extraordinary caution” when “adjudicating claims that a State has drawn district lines on the basis of race”). One way to understand some of this guidance, in addition to clarifying the doctrinal test, is as judicial comment on the evidence. *See* Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 330–32 (1980).

164. *Cooper*, 581 U.S. at 291 n.1.

standard of proof.¹⁶⁵ Four different types of considerations converge to demonstrate this point and the Court's confusion.¹⁶⁶

First, we can begin to notice the mistake by looking again at the substantive legal standard. The legal standard—the racial-predominance test—focuses on something in the world: the factors that motivated the legislature's decision to move voters in or out of a district.¹⁶⁷ In any given case, it may be true or false that race was the predominant motivating factor. The standard of proof, by contrast, picks out a state of mind corresponding to how *persuaded* or *convinced* or *certain* the fact finder must be that a disputed fact is true.¹⁶⁸ How persuaded must the fact finder be that race was the predominant factor motivating the legislature's decision? By a preponderance of the evidence? By clear and convincing evidence? Beyond a reasonable doubt? Notice that different standards of proof may be applied to the racial-predominance test.¹⁶⁹ A fact finder applying the test might be persuaded by a POE but not by CCE, or by CCE but not BARD.¹⁷⁰

Second, we can see the mistake more clearly by comparing the racial-predominance test with the substantive legal standards that apply to other types of discrimination claims. For example, in the employment discrimination context, plaintiffs bringing Title VII claims may succeed by proving (among other elements) that race was a “motivating factor” in a defendant's employment decision.¹⁷¹ Notice that “motivating factor” is not the standard of proof. Rather, plaintiffs must prove the “motivating factor” issue by a preponderance of the evidence.¹⁷² The majority in *Alexander* is correct that the racial-predominance test is a “demanding” one¹⁷³—for example, we can see that proving something was “the predominant motivating factor” is more demanding than proving that something was “a motivating factor”—but neither “predominance” nor “a factor” are the standard of proof.¹⁷⁴

165. See *infra* pp. 116–19.

166. See *infra* pp. 116–19.

167. See *Miller*, 515 U.S. at 916.

168. See *supra* note 148 and accompanying text.

169. See *supra* notes 152–57 and accompanying text.

170. See *supra* notes 153–55 and accompanying text.

171. See, e.g., *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993) (race-discrimination claim).

172. See *id.* at 506.

173. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 17–18 (2024).

174. Some confusion may arise from the fact that the racial-predominance test (and other motivation-focused tests), on one hand, and standards of proof, on the other hand, both have mental components to them. Nevertheless, they are distinct (the state of mind of the legislators (or other decision-makers) versus the state of mind of the fact finder). Similar issues arise with other types of legal doctrine. For example, courts evaluate evidence for purposes of the Confrontation Clause by asking whether the “primary purpose” of out-of-court statements was “testimonial” or “non-testimonial.” See *Davis v. Washington*, 547 U.S. 813, 822 (2006). But “primary purpose” is not a standard of proof. This analogy is particularly apt because in both contexts the doctrinal standards (“predominate motivating factor” or “primary purpose”) have been criticized for requiring courts to draw inferences about hard-to-discern facts (or fictions). Compare Hasen, *supra* note 48, at 1863 (describing the predominance test as “a quixotic quest for legislative motive”), and Richard. H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 *YALE L.J.* 2505, 2546 (1997) (“Any one decision can itself reflect a complex mix of racial, partisan, and candidate-specific considerations. As soon as the redistricting problem is confronted on its own terms, the intractability of trying to determine the predominant motive for the location of

Third, there is nothing special about “predominance” that transforms it into a special, one-of-a-kind standard of proof. Predominance or its variants feature in several different legal doctrinal standards. For example, class-action certification requires courts to determine, among other issues, whether “questions of law and fact common to class members predominate over any questions affecting only individual members.”¹⁷⁵ In some jurisdictions, causation in the tort context is phrased in terms of “predominant cause.”¹⁷⁶ And in the context of contract law, courts may apply a “predominant purpose test” to hybrid contracts.¹⁷⁷ In none of these contexts is predominance the standard of proof.¹⁷⁸ Rather, *predominance* must be proven to the applicable evidentiary standard of proof (*i.e.*, POE or CCE).¹⁷⁹ In other words, predominance picks out a fact in the world that is legally significant—the standard of proof specifies the state of mind that is necessary for a positive finding of predominance.¹⁸⁰

Finally, the majority’s second (and only other) reference to the “standard of proof” confirms the mistake of confusing the racial-predominance test for the evidentiary standard of proof.¹⁸¹ In a footnote, the majority states:

In assessing whether a finding is clearly erroneous, it is important to keep in mind the standard of proof that the district court was required to apply. It is hornbook law, after all, that we must ask on appeal whether the “fact finder in the first instance made a mistake in concluding that a fact had been proven *under the applicable standard of proof.*” *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 622–623 (1993) (emphasis added); see also H. Edwards & L. Elliott, *Federal Standards of Review* 26 (3d ed. 2018) (“[I]n applying the clearly erroneous standard, a reviewing court must take

a district becomes readily apparent.”), *with Davis*, 547 U.S. at 841–42 (Thomas, J., dissenting) (“In both of the cases before the Court, like many similar cases, pronouncement of the ‘primary’ motive behind the interrogation calls for nothing more than a guess by courts.”). The important point to recognize is that the facts picked out by the legal standards (predominant motive or primary purpose) are distinct from the evidentiary standard of proof and the facts may be proven (or not) to different proof standards.

175. FED. R. CIV. P. 23(b)(3).

176. *Carroll v. CUNA Mut. Ins. Soc.*, 894 P.2d 749, 755 (Colo. 1995).

177. See *Vermillion State Bank v. Tennis Sanitation, LLC*, 969 N.W.2d 610, 616 (Minn. 2022).

178. See *supra* notes 175–78.

179. *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008) (“Today, we dispel any remaining confusion and hold that the preponderance of the evidence standard applies to evidence proffered to establish Rule 23’s requirements.”); *Carroll*, 894 P.2d at 756 (“Mr. Carroll must prove by a preponderance of the evidence that the predominant cause of Mrs. Carroll’s death was accident.”); *Vermillion*, 969 N.W.2d at 617 (“[T]he jury, under a preponderance of the evidence standard, found that an oral contract existed, the predominant factor of the contract was the purchase of Troje’s customer routes . . .”). See also *id.* at 633 n.1 (“The parties disagree about the standard of proof that Vermillion must meet to establish that the predominant factor in this contract was something other than goods, and thus the contract was not subject to the statute of frauds. Tennis argues that clear and convincing evidence is required; Vermillion insists that the standard usually applicable in civil disputes, preponderance of the evidence, is sufficient.”).

180. See *supra* note 174 and accompanying text.

181. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 33 n.11 (2024).

account of the standard of proof informing the trial court's factual finding").¹⁸²

It will be illuminating to unpack this language. Notice first the irony in the majority adding the italicized emphasis to the quoted text (there is also some irony in the use of "hornbook law" and perhaps "after all" as well).¹⁸³ The Court is correct that "clear error" review must take account of the evidentiary standard of proof.¹⁸⁴ So, for example, a district court's finding might be "clear error" when the CCE standard applies but not "clear error" under the POE standard (based on the same evidence).¹⁸⁵ Although potentially confusing, this is a familiar feature of the evidentiary proof process. A similar phenomenon applies in the contexts of summary judgment and judgment as a matter of law in civil cases.¹⁸⁶ For example, courts must assess whether a "reasonable jury" could find for the non-moving party based on the evidence *and the applicable standard of proof*.¹⁸⁷ Thus, there will be cases in which a reasonable jury could find a disputed fact by a preponderance of the evidence—but not by clear and convincing evidence.¹⁸⁸ The footnote purports to refer to this familiar feature of the proof process (*i.e.*, that *review standards* depend on the underlying evidentiary standard of proof).¹⁸⁹ But it does so, for the second time in the opinion, mistakenly assuming that the racial-predominance standard is the standard of proof.¹⁹⁰ The "hornbook law" point the footnote attempts to make would be apt if the applicable standard of proof were something higher than the preponderance standard.¹⁹¹ But it makes no sense as a reference to the racial-predominance standard.

There is further irony in this footnote. The case the majority cites for the "hornbook law" point (*Concrete Pipe*) goes to great pains to distinguish evidentiary standards of proof from other legal standards—including the "clear error" appellate-review standard.¹⁹² Justice Souter explains in *Concrete Pipe*:

As our descriptions indicate, the first, "preponderance," is customarily used to prescribe one possible burden or standard of proof before a trier of fact in the first instance, as when the proponent of a proposition loses unless he

182. *Id.* The footnote follows the following text in the opinion: "The circumstantial evidence falls far short of showing that race, not partisan preferences, drove the districting process, and none of the expert reports offered by the Challengers provides any significant support for their position."

183. *Id.*

184. *Id.*

185. *Concrete Pipe & Prods. of Cal, Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622–23 (1993).

186. See *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 244 (1986); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 135 (2000). This feature also arises in criminal cases. Courts examine the constitutional sufficiency of evidence by asking whether a reasonable jury could convict "beyond a reasonable doubt." See *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

187. *Reeves*, 530 U.S. at 149.

188. *Anderson*, 477 U.S. at 252–53.

189. *Alexander*, 602 U.S. at 33 n.11.

190. *Id.*

191. *Id.*

192. *Id.*; see also *Concrete Pipe & Prods. of Cal, Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622–23 (1993).

proves a contested proposition by a preponderance of the evidence. *The term thus belongs in the same category with “clear and convincing” and “beyond a reasonable doubt,” which are also used to prescribe standards of proof (but when greater degrees of certainty are thought necessary).* Before any such burden can be satisfied in the first instance, the fact finder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty (emphasis added).¹⁹³

The other source quoted in the footnote also explains this clearly. After the text quoted in the footnote, Edwards and Elliott state:

The certainty with which a trial judge must reach a conclusion based on the evidence is prescribed by various standards of proof, *including, most commonly, preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt.* See *Concrete Pipe*, 508 U.S. at 622. Thus, if a district court is required to make findings under, for example, the clear and convincing evidence standard, an appellate court applying the clearly erroneous test would ask whether it is definitely and firmly convinced that the district court erred in finding that the fact was proven *by clear and convincing evidence*.¹⁹⁴

The mistake in confusing the racial-predominance test for the standard of proof should now be evident.

Prior caselaw and the district court’s opinion created some of the conditions for *Alexander*’s mistake to arise.¹⁹⁵ For example, in introducing the racial-predominance test, *Miller* stated that the test is the “plaintiff’s burden” and that the principles announced (such as the presumption of good faith) “inform the plaintiff’s burden of proof at trial.”¹⁹⁶ Similarly, in concurrence, Justice O’Connor described the racial-predominance test’s “threshold standard” as a “demanding one.”¹⁹⁷ At the same time, prior cases do not contain explicit discussion of the actual *evidentiary* standard of proof.¹⁹⁸ Picking up on this, the district court’s

193. *Concrete Pipe*, 508 U.S. at 623 (emphasis added).

194. HARRY T. EDWARDS & LINDA A. ELLIOTT, *FEDERAL STANDARDS OF REVIEW* 26 (3d ed., 2018), Westlaw (database updated Feb. 2018) (emphasis added).

195. See *supra* notes 162–65 and accompanying text; see also *supra* Section II.A.

196. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

197. *Id.* at 928 (O’Connor, J., concurring).

198. The best explanation for this silence may be that the default preponderance-of-the-evidence standard was assumed to apply. See *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45, 47 (2025). The only reference to an evidentiary standard of proof that I could find in the Supreme Court’s racial-gerrymandering opinions is an assumption—in a footnote in *Cooper*—that the preponderance standard applied. *Cooper v. Harris*, 581 U.S. 285, 319 n.15 (“[I]f the plaintiffs have already proved by a preponderance of the evidence that race predominated in drawing district lines, then we have no warrant to demand that they jump through additional evidentiary hoops . . .”). See also *Bethune-Hill v. Virginia State Bd. of Elections*, 326 F. Supp. 3d 128, 181 (E.D. Va. 2018) (Payne, J., dissenting) (“I do not believe that Plaintiffs’ District-specific evidence supports a finding of racial predominance by a preponderance of the evidence.”); see also *Milligan v. Allen*, No. 2:21-cv-01530-AMM, slip op. at 84 (N.D. Ala. Aug. 7, 2025). “The usual standard of proof in civil litigation is preponderance of the evidence,” *E.M.D. Sales.*, 604 U.S. at 47, and redistricting cases do not require a higher threshold, see, e.g., *Cooper*, 581 U.S. at 319 n.15.

opinion in *Alexander* states that “[t]he burden of proof for the plaintiffs to demonstrate discriminatory intent is a ‘demanding one.’”¹⁹⁹ Moreover, the district court’s forty-nine-page opinion never discusses or mentions the actual evidentiary standard of proof.²⁰⁰ Likewise, the parties’ briefs before the Court in *Alexander* also fail to mention the evidentiary standard of proof.²⁰¹ Nor was the issue discussed or mentioned at oral argument.²⁰² These references to the plaintiff’s burden of proof without explicit discussion of the actual evidentiary standard of proof create the conditions for *Alexander*’s mistake.²⁰³

Nor was *Alexander*’s mistake explicitly noticed or challenged by the dissent.²⁰⁴ In response to the above-quoted footnote about the standard of proof, the dissent states:

Of course clear-error review takes into account the standard of proof in the trial court. See ante, at 29–30, n. 11. But that standard is not transformed because of the good-faith presumption. In our precedents, that presumption tells a court not to assume a districting plan is flawed or to limit the State’s opportunities to defend it. See *Abbott v. Perez*, 585 U. S. 579, 603 (2018) (the presumption requires a plan’s challengers to bear the burden of proof).²⁰⁵

The dissent first acknowledges the familiar proof feature discussed above (*i.e.*, that clear error under one standard of proof may not be clear error under another standard of proof).²⁰⁶ But then the dissenting opinion fails to address what the evidentiary standard of proof *is* in the case.²⁰⁷ Rather, it shifts to the related issue of the good-faith presumption—noting that the presumption does not transform the standard of proof (which is never specified).²⁰⁸ Finally, the dissent explains that the presumption means that the plaintiffs bear the burden of proof on the racial-predominance issue.²⁰⁹ This is true. But the key point is this: what the burden of proof *entails* depends on the applicable standard of proof, on which the dissenting opinion is silent.²¹⁰

Alexander’s mistake would be significant even if the only consequence was the doctrinal confusion that it generates. This confusion includes not only a lack of clarity about the actual standard of proof in racial-gerrymandering cases, but

199. 649 F. Supp. 3d 177, 184 (D.S.C. 2023) (quoting *Easley v. Cromartie*, 532 U.S. 234, 241 (2001)).

200. *Id.*

201. *See generally* Appellees’ Brief, 602 U.S. 1 (2024) (No. 22-807); *see generally* Reply Brief for Appellants, 602 U.S. 1 (No. 22-807).

202. *See* Transcript of Oral Argument, *Alexander*, 602 U.S. 1 (No. 22-807).

203. *See supra* notes 198–202.

204. *See* 602 U.S. at 66–100 (Kagan, J., dissenting).

205. *Id.* at 73.

206. *See supra* notes 188–91 and accompanying text.

207. The above quotation is the only reference to the standard of proof in the dissent. *See Alexander*, 602 U.S. at 66–100.

208. *See infra* Subsection IV.B.2, discussing the relationship between the presumption and the standard of proof.

209. *Alexander*, 602 U.S. at 75.

210. *See supra* note 207 and accompanying text.

also the confusion it creates about the presumption of good faith and other aspects of the evidentiary proof process.²¹¹ But, as the next Part will demonstrate, the mistake is more significant and problematic because of how it raises the standard of proof without justifying that policy choice.

In turning to this analysis, it is important to understand the structure of the issue in *Alexander*. The issue is not simply whether the district court clearly erred in applying the racial-predominance test. The issue is whether the district court (1) clearly erred (*the standard of review*), in (2) finding by [either a “preponderance of the evidence” or “clear and convincing evidence”] (*the evidentiary standard of proof*), that (3) race was the predominant motivating factor in designing the district (*the substantive legal standard*).

IV. WHAT *ALEXANDER* DOES

This Part explains, from the perspective of evidence law, the analytical implications of *Alexander*. The analysis demonstrates why and how the majority implicitly raised the standard of proof.²¹² Understanding this consequence of the Court’s analysis clarifies several other aspects of the opinion, including the presumption of good faith, alternative maps, and the differing analyses of the evidence by the majority and the dissent.²¹³ First, this Part spells out the basic features of, and policy ideas underlying, legal standards of proof. It then draws on evidence scholarship to describe the *explanatory* structure of the evidentiary proof process, of which standards of proof are one component.²¹⁴ This overview provides the groundwork for understanding the analytical implications of the majority’s reasoning in *Alexander*. Next, this Part explains how *Alexander* raised the standard of proof. Finally, this Part clarifies the presumption of good faith, alternative maps, and the analyses of the evidence in the case.

A. *Standards of Proof: Policy and Theory*

To understand the analytical implications of *Alexander*, it is necessary to first understand some of the basic features of, and policy ideas underlying, standards of proof. Although there are theoretical, empirical, and practical disagreements regarding standards of proof, this discussion relies on common ground and explicates details generally accepted by both caselaw and legal doctrine, on one hand, and evidence scholars, on the other.²¹⁵

211. See *infra* Subsections IV.B.2–3.

212. See, e.g., *infra* Subsections IV.B.1–4.

213. See *infra* Subsections IV.B.2–4.

214. See Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 *LAW & PHIL.* 223, 224 (2008). As explained *infra* in Section IV.B, *Alexander* is a good illustration of this explanation-based proof process.

215. For an overview of these debates, see Ronald J. Allen & Michael S. Pardo, *Relative Plausibility and Its Critics*, 23 *INT’L J. EVID. & PROOF* 5, 8 (2019); Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 *VAND. L. REV.* 547, 557 (2013); Hock Lai Ho, *The Legal Concept of Evidence*, *STAN. ENCYCLOPEDIA*

Standards of proof specify the standard of *persuasion* for the party with the burden of proof on the elements of a civil cause of action, a crime, or an affirmative defense.²¹⁶ As discussed in Part II, there are three generally accepted legal standards of proof: “preponderance of the evidence” (“POE”), “clear and convincing evidence” (“CCE”), and “beyond a reasonable doubt” (“BARD”).²¹⁷ The standards increase in the strength of the evidence needed to meet them. Among the three, preponderance is the least demanding, beyond a reasonable doubt the most demanding, and “clear and convincing evidence” an “intermediate” standard between the two.²¹⁸ Although there is controversy within evidence scholarship in terms of how much weight to accord the following heuristic,²¹⁹ standards of proof are sometimes presented as thresholds of certainty on a probabilistic scale between 0 (certainly false) and 1 (certainly true).²²⁰ Under this conception, POE requires proof beyond 0.5 or 50%; BARD requires proof beyond 0.9 or 90%, or greater; and CCE requires something in between, perhaps 0.7 or 70%.²²¹ There are other ways of understanding the standards of proof and what they require,²²² and nothing in the discussion to follow depends on the standards being probability thresholds or, if so, having precise numbers. The important point to notice is that more persuasive evidence is necessary to prove something by CCE than by a POE, and even more persuasive evidence is necessary to prove something BARD.²²³

There is also common ground in the caselaw and the academic commentary on the policy ideas and justifications underlying standards of proof. These ideas and justifications concern goals regarding accuracy and allocating the risk of error between the parties (concerning different types of possible fact-finding

OF PHIL. (Oct. 8, 2021) (Section 3.2), available at <https://plato.stanford.edu/entries/evidence-legal/> [<https://perma.cc/L533-K74A>].

216. See *Colorado v. New Mexico*, 467 U.S. 310, 315 (1984) (“The function of any standard of proof is to ‘instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.’” (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring))).

217. See *supra* note 152 and accompanying text.

218. See *Addington v. Texas*, 441 U.S. 418, 425 (1979) (discussing the three standards of proof and explaining that “clear and convincing” is an “intermediate” standard).

219. See *Allen & Pardo*, *supra* note 215, at 6; see *Ho*, *supra* note 215.

220. For an overview, see Rafal Urbaniak & Marcello Di Bello, *Legal Probabilism*, STAN. ENCYCLOPEDIA OF PHIL. (June 8, 2021) (Section 5), available at <https://plato.stanford.edu/entries/legal-probabilism/> [<https://perma.cc/5EXD-4XRX>].

221. See, e.g., Dale A. Nance, *THE BURDENS OF PROOF: DISCRIMINATORY POWER, WEIGHT OF EVIDENCE, AND TENACITY OF BELIEF* 31–42 (Cambridge Univ. Press 2016); Dorothy K. Kagehiro & W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 L. & HUM. BEHAV. 159, 160–61 (1985); C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1328–29 (1982); *Brown v. Bowen*, 847 F.2d 342, 345–46 (7th Cir. 1998).

222. See *Pardo & Allen*, *supra* note 214, at 225; *Allen & Pardo*, *supra* note 215, at 5–6; Michael S. Pardo, *What Makes Evidence Sufficient?*, 65 ARIZ. L. REV. 431, 431 (2023).

223. See *Cruzan v. Missouri Dep’t of Health*, 497 U.S. 261, 283 (1990) (“The more stringent the burden of proof a party must bear, the more party bears the risk of an erroneous decision.”).

errors).²²⁴ The preponderance standard is typically justified based on the assumptions that it treats the parties roughly equally with regard to the risk of fact-finding error and that it will foster overall accuracy in decision-making.²²⁵ The preponderance standard typically requires proof that a disputed fact is “more likely than not” true or that a “greater weight of the evidence” supports the fact being true.²²⁶ The parties are treated “in roughly equal fashion” with regard to the risk of error, so the thinking goes, because the decision is made in favor of whichever party the evidence better supports (which might be either side).²²⁷ The standard will also promote overall accuracy, so the thinking goes, by endorsing the decision that is most likely true based on the evidence, or, in more comparative terms, better supported by the evidence.²²⁸ This connection to accuracy assumes that the evidence will be a good indicator of what is true and that the fact finder will properly assess its probative value, among other assumptions.²²⁹ Whether the standard achieves either of these goals in practice is uncertain and contested.²³⁰ But these assumptions underlie the policy choice of the POE standard as the standard of proof. This is *why* the preponderance standard applies in the vast majority of civil cases.²³¹

224. *See id.*; *Colorado v. New Mexico*, 467 U.S. 310, 315–21 (1984) (“[T]he standard of proof allocates the risk of erroneous judgment between the litigants and indicates the relative importance society attaches to the ultimate decision[s].”). In a concurring opinion in *In re Winship*, Justice Harlan explained:

The standard of proof influences the relative frequency of . . . two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

397 U.S. 358, 371 (1970) (Harlan, J., concurring); *see also* Nance, *supra* note 221, at 243; ALLEN ET AL., *supra* note 148.

225. *See Grogan v. Garner*, 498 U.S. 279, 286 (1991) (“[T]he preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between [the parties]”); *Herman & Maclean v. Hudleston*, 459 U.S. 375, 390 (1983); *United States v. Fatico*, 458 F.3d 388, 403 (E.D.N.Y. 1978) (“As a general rule, a ‘preponderance of the evidence’ more probable than not standard is relied upon in civil suits where the law . . . seeks to minimize the probability of error.”). *See also* Edward K. Cheng & Michael S. Pardo, *Accuracy, Optimality, and the Preponderance Standard*, 14 L. PROB. & RISK 193, 193 (2015).

226. *See* John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 61 FLA. L. REV. 1569, 1572–73 (2015) (surveying jury instructions).

227. *Herman & Maclean*, 459 U.S. at 390 (explaining that any other standard of proof “expresses a preference for one side’s interest”).

228. Cheng & Pardo, *supra* note 225, at 195; ALLEN ET AL., *supra* note 148, at 738; David Hamer, *Probabilistic Standards of Proof, Their Complements, and the Errors that Are Expected to Flow from Them*, 1 U. NEW ENG. L.J. 71, 90 (2004).

229. Another important consideration is the distribution of true and false claims. *See* ALLEN ET AL., *supra* note 148, at 745, for further discussion.

230. As a practical matter, a multitude of factors might affect the actual number and distribution of errors, including for example, (1) the availability, admissibility, and quality of evidence, (2) how that evidence is interpreted by fact finders, and (3) the distribution of true and false claims that go to trial. *Id.*

231. *See* E.M.D. Sales, Inc. v. Carrera, 604 U.S. 45, 50 (2025) (explaining that the preponderance standard “makes sense” as the “default standard of proof” for civil litigation because it allows parties to “share the risk of error in roughly equal fashion” (quoting *Herman & Maclean*, 459 U.S. at 390)).

Higher standards of proof aim to allocate the risk of error in a particular direction.²³² This *asymmetric* allocation is justified based on the assumption that one type of factfinding error (a false positive) is more costly or worse than the opposite type of fact-finding error (a false negative).²³³ Thus, the BARD standard applies to the elements of crimes based on the assumption that false convictions are worse than false acquittals.²³⁴ Similarly, the CCE standard is justified based on the assumption that in some types of civil cases there are asymmetric costs or wrongs associated with fact-finding errors in a particular direction.²³⁵ This is why the CCE standard applies in cases involving civil commitment,²³⁶ deportation,²³⁷ denaturalization,²³⁸ decisions to terminate life,²³⁹ and the termination of parental rights.²⁴⁰ The CCE standard also sometimes applies when important constitutional rights are at stake. For example, the Supreme Court has held that the CCE standard applies to disputes about “actual malice” in defamation claims involving public figures because of the First Amendment interests at stake.²⁴¹ With both the BARD standard and the CCE standard, the policy choice is to treat the parties asymmetrically with regard to the risk of error in order to *minimize* one particular type of error (*e.g.*, false convictions or false findings of liability).²⁴² When the BARD or CCE standards apply, a disputed fact could be proven by a POE—*i.e.*, it could be “more likely true than not,” or “supported by a greater weight of the evidence”²⁴³—and not be proven in the eyes of the law.²⁴⁴

232. See *supra* note 224 and accompanying text.

233. See *supra* note 224 and accompanying text.

234. *United States v. Fatico*, 458 F.3d 388, 406 (E.D.N.Y. 1978).

235. See *Addington v. Texas*, 441 U.S. 418, 427 (1979) (“The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual’s interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.”).

236. *Id.*

237. *Woodley v. INS*, 385 U.S. 276, 285–86 (1966).

238. *Schneiderman v. United States*, 320 U.S. 118, 158–59 (1943).

239. *Cruzan v. Missouri Dep’t of Health*, 497 U.S. 261, 265 (1990).

240. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

241. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285–86 (1964) (“Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands . . .”).

242. See *Colorado v. New Mexico*, 467 U.S. 310, 316 (“Requiring Colorado to present clear and convincing evidence in support of its proposed diversion is necessary to appropriately balance the unique interests involved in water rights disputes between sovereigns. The standard reflects this Court’s long-held view that a proposed diverter should bear most, though not all, of the risks of erroneous decision . . .”). A further implication of higher standards of proof is to preference minimizing one type of error over total accuracy. See Michael S. Pardo, *Second-Order Proof Rules*, 61 FLA. L. REV. 1083, 1083 (2009) (“Proof rules in law dictate when facts have been proven. . . . The goals of the rules are to minimize errors (accuracy) and to allocate the risk of error fairly.”). The preponderance standard is thought to maximize total accuracy (by siding with whatever version of the facts is most likely true, given the evidence). See *United States v. Fatico*, 458 F.3d 388, 403 (E.D.N.Y. 1978). Thus, higher standards may decrease total accuracy by creating errors even when disputed facts are most likely to be true (but not proven to the higher standard). See Cheng & Pardo, *supra* note 225.

243. See ALLEN ET AL., *supra* note 148, at 739.

244. See *supra* note 242 and accompanying text.

Theoretical accounts of the standards of proof have been an ongoing source of scholarly debate.²⁴⁵ The analysis to follow will remain agnostic regarding these debates, as nothing in the analysis will turn on them.²⁴⁶ Some further ideas within evidence scholarship, however, will help to inform the analysis of *Alexander* to follow. These ideas concern the *explanatory* structure of the evidentiary proof process.²⁴⁷ From beginning to end, the evidentiary proof process is structured around competing *explanations* of the evidence and the disputed events.²⁴⁸ Standards of proof form one component of this larger explanatory structure.²⁴⁹ Parties present a possible version of events to explain the evidence and the disputed facts.²⁵⁰ And fact finders evaluate and select among these possible explanations (or formulate their own), in light of the evidence and the standards of

245. See *supra* note 215.

246. For reasons explained below, the different theoretical conceptions of the standards of proof all point in the same direction for purposes of the analysis. See *supra* note 223. The primary theoretical debate regarding standards of proof concerns whether the various standards are best explained as (1) explicit probability thresholds, see *supra* note 220, or as (2) explanatory thresholds based on the criteria described below, see *supra* note 222. The analysis of *Alexander* discussed below follows under either theoretical conception.

247. See Allen & Pardo, *supra* note 215, at 6. There is some academic debate about how this explanatory structure relates to probability theory in general and to probabilistic accounts of standards of proof in particular. See *id.* But, again, nothing in this discussion will turn on these theoretical issues. See *infra* note 254 and accompanying text. Importantly, even those who defend probabilistic accounts of the proof standards still largely accept this overall explanatory structure of the proof process. See, e.g., Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254, 1278–79 (2013); Sean P. Sullivan, *A Likelihood Story: The Theory of Legal Fact-Finding*, 90 U. COLO. L. REV. 1 (2019); Jonah B. Gelbach, *Estimation Evidence*, 168 U. PA. L. REV. 549, 569 (2020); Alex Biedermann, David Caruso & Kyriakos N. Klotsoglou, *Decision Theory, Relative Plausibility and the Criminal Standard of Proof*, 15 CRIM. L. & PHIL. 131, 131 (2021). The academic debates concern what best explains evidentiary rules and other discrete aspects of the evidentiary proof process.

248. The explanatory structure of the evidentiary proof process includes a wide scope of issues, including: (1) the form, securing, and presentation of evidence, (2) the forms of argumentation employed at trial, (3) the manner in which humans process and deliberate on evidence, (4) the trial structure created by the rules of evidence and procedure, (5) the structure of litigation before and after trial, (6) the manner in which judges and juries, on the one hand, and trial and appellate judges, on the other hand, interact, and (7) to some extent, the meaning and nature of rationality [in this context].

Ronald J. Allen & Michael S. Pardo, *Clarifying Relative Plausibility: A Rejoinder*, 23 INT'L J. EVID. & PROOF 205, 207–08 (2019).

249. See *id.*

250. These explanations may or may not take a narrative or “story” form. For a discussion of the ways in which explanations may diverge from narratives or stories, see Pardo, *supra* note 215, at 598–99 (distinguishing explanatory accounts of legal proof from the psychological “story model” of jury decision-making).

proof.²⁵¹ Reviewing courts also rely on this explanatory structure to assess the sufficiency of evidence in light of the standard of proof.²⁵²

For purposes of this discussion, it is important to notice that with higher standards of proof, parties with the burden of proof have a higher *explanatory burden*.²⁵³ In civil cases under the preponderance standard, fact finders select the best, or most plausible, or most likely explanation in light of the evidence.²⁵⁴ But with higher standards, parties must do more than persuade the fact finder that their account or explanation of the facts is best, or most plausible, or most likely.²⁵⁵ This is why, for example, the prosecution has not necessarily proven

251. Parties with the burden of proof must offer an explanation that includes or entails the formal legal elements (or they will lose as a matter of law). See Allen & Pardo, *supra* note 215, at 208. Jury instructions attempt to convey to juries when to accept an explanation. For the POE standard, jurors are most commonly instructed to accept a civil plaintiff's explanation when it is supported by "a greater weight of the evidence" or is "more likely true than not." See Leubsdorf, *supra* note 226 (surveying differences in modern POE instructions). A common instruction for CCE informs jurors to accept a plaintiff's explanation when it is "highly probable." See, e.g., FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 1.28, at 35, https://juryinstruction.ca7.uscourts.gov/jury-instructions/instructions/civil/7th_cir_civil_instructions.pdf [<https://perma.cc/SYG4-5PW2>] [hereinafter FEDERAL INSTRUCTIONS] ("[Y]ou [are convinced that it is highly probable that it is true.]"); see Colorado v. New Mexico, 467 U.S. 310, 316 (1984) (characterizing CCE as "an abiding conviction that the truth of [plaintiff's] factual contentions are 'highly probable'"). Due Process does not require any particular BARD instruction. See Victor v. Nebraska, 511 U.S. 1, 5 (1994) (discussing common instructions).

252. See Pardo, *supra* note 222, at 453–54 (collecting cases). See, e.g., United States v. Beard, 354 F.3d 691, 693 (7th Cir. 2005) ("Confidence in a proposition, such as Beard's guilt, is . . . undermined by presenting plausible alternatives."); Spitz v. Comm'r, 954 F.2d 1383, 1385 (7th Cir. 1992) ("The Spitzes' explanation, strained and self-serving as it may be, is the most plausible one on the table. There is not clear and convincing evidence against it.").

253. See Allen & Pardo, *supra* note 215, at 9; Pardo & Allen, *supra* note 214, at 234–35. The increasing explanatory burden tracks the policy assumptions underlying the standards of proof, given the assumption a better explanation is more likely to be true than a worse one. See Allen & Pardo, *supra* note 215, at 17. There is academic debate about whether the standards are best explained by the explanatory criteria themselves, on one hand, or whether the explanatory criteria are a proxy for additional probability judgments, on the other. See Allen & Pardo, *supra* note 215, at 20. But even those who opt for the latter still accept the increased explanatory burden. See sources cited in *supra* note 221. For a discussion of the criteria that make explanations better or worse in the legal context, see Pardo, *supra* note 222, at 453–54 (identifying patterns in the caselaw that include: inconsistency between explanations and evidence; gaps in evidence; counterfactual considerations; fit with background knowledge; and the absence of plausible alternative explanations). The reasoning process by legal fact finders is similar to what is termed "inference to the best explanation" in epistemology and the philosophy of science—see PETER LIPTON, INFERENCE TO THE BEST EXPLANATION 1 (José Luis Bermúdez et al. eds., 2nd ed. 2004) ("According to the model of Inference to the Best Explanation, our explanatory considerations guide our inferences. Beginning with the evidence available to us, we infer what we would, if true, provide the best explanation of that evidence."); see GILBERT HARMAN, CHANGE IN VIEW: PRINCIPLES OF REASONING 65–75 (Mass. Inst. Tech. Press, 1986); see ULRIKE HAHN & MIKE OAKSFORD, *Rational Argument*, in THE OXFORD HANDBOOK OF THINKING AND REASONING 277, 279 (Keith J. Holyoak & Robert G. Morrison eds., 2012)—with some notable differences, see Pardo & Allen, *supra* note 214, at 242 (explaining differences between the philosophical and legal contexts); Allen & Pardo, *supra* note 215, at 13 (same).

254. See Pardo & Allen, *supra* note 214, at 234–35. The language above is meant to encompass the different ways of characterizing the preponderance threshold and is meant to be agnostic concerning possible differences among them (for purposes of the analysis to follow). See *supra* note 246.

255. Factfinders evaluate was it the best, most plausible, or most likely explanation or account of the facts by considering the plausible alternatives. See Allen & Pardo, *supra* note 215, at 16. This a feature of explanations generally. See LIPTON, *supra* note 253, at 1; ALAN GARFINKEL, FORMS OF EXPLANATIONS 30 (1981) ("Lacking such a determinate sense of alternatives, one has difficulty seeing how we could give explanations at all; they

the elements of a crime even when they present enough evidence to prove that their account of the disputed facts is the best, or most plausible, or most likely account of what happened.²⁵⁶ Any plausible defense explanation is sufficient to raise a reasonable doubt—even when the prosecution’s explanation is more likely.²⁵⁷ A similar phenomenon arises with the CCE standard. Parties with the burden of proof must do more than merely present the best, the most plausible, or the most likely explanation.²⁵⁸ A disputed fact could be proven by a POE but not by CCE.²⁵⁹ When would this be the case? Although the CCE standard is vague,²⁶⁰ this would occur when the case is a close one or when the decisionmaker has considerable second-order doubts about which of the competing explanations is better, more plausible, or the most likely.²⁶¹ This explanatory burden arises not only at trial but also when courts are reviewing the sufficiency of evidence.²⁶²

B. *Back to Alexander*

In order to succeed, the plaintiffs had to prove “that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”²⁶³ In this case, that involved the choice to move a significant number of Black residents out of District 1.²⁶⁴ The legal standard has not been met when the choice was made for partisan reasons²⁶⁵—unless race was “used as a proxy” for political partisanship and was used as the “predominant criterion” for a partisan gerrymander.²⁶⁶ The defendants defended the legislative choice as one based on partisan considerations, without consideration of race, and thus the parties and the district court had the difficult task of trying to “disentangle race from politics.”²⁶⁷

would have to be so all encompassing as to be impossible.”) *Alexander* provides a specific example of the general phenomenon. *See infra* Section IV.B.

256. *See* Pardo & Allen, *supra* note 214, at 238–39.

257. *Id.*; *see also* Jennifer Lackey, *Norms of Criminal Conviction*, 31 PHIL. ISSUES 188, 199 (2021).

258. *See supra* note 255.

259. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1983).

260. *See supra* note 251.

261. *See McNair v. Coffey*, 234 F.3d 352, 355 (7th Cir. 2000) (distinguishing POE and CCE by explaining that under the POE standard “the plaintiff can win a close case” but under the CCE standard “all close cases go to the defendant”). To be clear: “close” here means close in terms of which explanation is best or most likely (not “close” in meeting the CCE standard).

262. *See supra* note 253 and accompanying text.

263. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 7 (2024) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

264. *See supra* note 64 and accompanying text.

265. *Alexander*, 602 U.S. at 9.

266. *Id.* at 7 n.1; *see also supra* note 48.

267. *Alexander*, 602 U.S. at 9.

1. Framing the Proof Issue

With the groundwork now in place about evidentiary standards of proof, we can frame the central proof issue in the following manner. The plaintiffs ought to win if they prove that race was the “predominant factor” behind the choice to move residents out of District 1—either as a goal in and of itself or for partisan reasons.²⁶⁸ The defendants ought to win if either (1) they did not use race in making their decision, or (2) they did use race but it was not the predominant criterion.²⁶⁹ The defendants argued that race was not considered at all, but the State was also entitled to win if they did consider race but it was not the predominant factor.²⁷⁰ This framing follows from the substantive legal standard.

When framed in this way, we can see that the “demanding” *substantive* legal standard requires the plaintiff to prove their account of the facts is more likely (or better or more plausible) than the above disjunction.²⁷¹ But how much more likely (or better or more plausible)? Crucially, we have no idea until we know the *evidentiary* standard of proof. Let us suppose it is the preponderance standard. In this situation, the plaintiff would succeed if they persuade the fact finder (the district court panel) that their explanation—*i.e.*, that the legislature used race as the predominant criterion to move residents out of District 1—is a better or more plausible or more likely explanation than the alternative(s).²⁷² Here, the alternatives are those mentioned above: they did not consider race, or they did but it was not the predominant criterion.²⁷³ Under this framing, the choice for the fact finder is complicated because the defendants advanced one particular explanation (*i.e.*, they did not consider race at all), but the fact finder could also consider the other possibility.²⁷⁴ If the POE standard applies, the decision is essentially a choice of the best or most plausible or most likely explanation.²⁷⁵ Thus, the “clear error” appellate-review standard would be applied to *that* decision—*i.e.*, was the district court reasonable in deciding that the

268. *Id.* at 7.

269. *Id.* at 5.

270. The majority is correct to note that the defendants ought to win under this second possibility, even though it was not argued by the defendants. *Id.* at 19 n.6. But the majority, confusingly, frames this as “[the parties] cannot by stipulation amend the law.” *Id.* This is not an attempt by the parties to amend the law by stipulation. Rather, this is another familiar feature of legal proof—namely, that fact finders will tend to focus on a comparative assessment of the explanations advanced by the parties and ignore those not advanced (although they may consider alternative explanations if they find them plausible). See Allen & Pardo, *supra* note 215, at 18 (explaining this feature). For example, in a criminal case, a jury may ignore a mistaken-identity explanation when the defendant is arguing “lack of mens rea” at trial, but the parties have not “amended the law” by stipulation. See *id.*

271. Again, the language is meant to be agnostic regarding different ways of describing the preponderance standard. See *supra* note 255 and accompanying text. On disjunctive explanations and legal proof, see Michael S. Pardo, *Group Agency and Legal Proof: Or, Why the Jury Is an It*, 56 WM. & MARY L. REV. 1793, 1839–42 (2015).

272. See *supra* note 255 and accompanying text.

273. *Alexander*, 602 U.S. at 17.

274. See *supra* note 270.

275. See *supra* note 255 and accompanying text.

plaintiff's explanation was more likely (or better or more plausible) than the alternative(s)?²⁷⁶ The dissent assumed the proof issue was framed in this way: "In the end, the court had to decide between two starkly different stories, backed by opposing bodies of evidence."²⁷⁷ And: "Faced with those competing stories, the District Court had to decide which to credit."²⁷⁸

But if the CCE standard applies, then the framing is different and the burden on the plaintiffs is higher.²⁷⁹ If the CCE standard applies, then the plaintiffs must do more than provide the more likely (better or more plausible) explanation.²⁸⁰ Why? Because that would be the proof burden under the POE standard.²⁸¹ The disputed fact might be proven by a POE but not by the higher CCE standard.²⁸² Thus, even if the plaintiffs' version of the events is found to be the best or most likely, it still might not be sufficient to cross the higher CCE threshold.²⁸³ And, if the CCE standard applies, then the "clear error" appellate-review standard applies to a district-court decision under *that* standard.²⁸⁴ Thus, there is now analytical space for the possibility that a district court's factual finding is not "clear error" when the POE standard applies but is "clear error" when the CCE applies.²⁸⁵ This is the familiar feature that the majority was referring to in the footnote quoted and discussed above.²⁸⁶ The analytical point quoted in the footnote—when applied to the *actual* standard of proof and not mistakenly applied to the substantive legal standard—is that *standards of proof higher than the preponderance standard require more persuasive evidence to support a finding by the district court.*²⁸⁷ In other words, a finding by the district court that the evidence satisfied the POE standard might *not* be clear error, but that same finding under the CCE standard *might* be clear error.

In addition to the footnote quoted above, the majority's framing of the proof issue also suggests a higher evidentiary standard of proof.²⁸⁸ The Court begins by acknowledging the general point discussed earlier in this Part concerning how the process of legal proof typically works in practice—*i.e.*, that fact finders draw inferences based on competing possible explanations of the evidence and disputed facts.²⁸⁹ The plaintiffs might establish that race was the predominant

276. *Alexander*, 602 U.S. at 23.

277. *Alexander*, 602 U.S. at 67 (Kagan, J., dissenting).

278. *Id.* at 82.

279. *See* Allen & Pardo, *supra* note 215, at 16.

280. *Id.*

281. *Id.* at 15.

282. *Id.* at 16.

283. *Id.* at 11.

284. *See* Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 623 (1993).

285. *See supra* note 194 and accompanying text.

286. *See supra* note 182 and accompanying text.

287. *See supra* note 194 and accompanying text.

288. *See* *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 19 (2024).

289. *See id.* at 8–10. *See supra* notes 247–52 and accompanying text. The Court focuses on the circumstantial nature of the plaintiffs' evidence, but the comparison of possible explanations would also arise in "direct evidence" cases. *See* Allen & Pardo, *supra* note 215.

criterion with either direct evidence or circumstantial evidence.²⁹⁰ When proceeding based on circumstantial evidence, as the plaintiffs did in this case, the majority explained:

we have, at least in theory, kept the door open for those rare instances in which a district's shape is so bizarre on its face that it discloses a racial design *absent any alternative explanation*.²⁹¹

And

To prevail, a plaintiff must "disentangle race from politics" by proving "that the former drove a district's lines." *Ibid.* That means, among other things, *ruling out the competing explanation* that political considerations dominated the legislature's redistricting efforts. If either politics or race *could explain* a district's contours, the plaintiff has not cleared its bar.²⁹²

Consider this framing. The presence of an alternative explanation that is both (1) plausible and (2) not "ruled out" means that the plaintiffs have failed.²⁹³ The alternative explanation in this context is that politics drove the decision (and that race was not used as the predominant criterion to achieve the partisan gerrymander).²⁹⁴ If the preponderance standard applies, then analytically this should *not* be the framing.²⁹⁵ Rather, the question would be whether race is the better, more plausible, or more likely explanation than the alternative explanation (regardless of whether the latter is plausible or ruled out).²⁹⁶ But if the CCE standard applies, then race might be the better, more plausible, and more likely explanation than the alternative—in other words, proven by a POE—but still not good enough to be established by CCE.²⁹⁷ Thus, concluding that race was the best explanation might not be sufficient to reasonably cross the CCE threshold and, accordingly, might be "clear error" under the appellate-review standard.²⁹⁸

290. *Alexander*, 602 U.S. at 7–8.

291. *Id.* at 8 (emphasis added).

292. *Id.* at 9–10 (emphasis added).

293. *Id.*

294. *Id.*; *see also supra* notes 256–66 and accompanying text.

295. *See supra* note 255.

296. *See supra* note 191. The analytical point—*i.e.*, that is *not* the correct framing—holds regardless of how the preponderance standard is conceptualized.

297. *See McNair v. Coffey*, 234 F.3d 352, 355 (7th Cir. 2000), vacated on other grounds by 533 U.S. 925 (2001):

Officer Coffey's argument for immunity in factually (as opposed to legally) close cases is fundamentally a request to increase the plaintiff's burden of proof—to insist that the plaintiff show a violation not by a preponderance of the evidence (where the plaintiff can win a close case) but by clear and convincing evidence (where all close cases go to the defendant), perhaps even proof beyond a reasonable doubt. Only then, the argument goes, can we be *sure* that the public official should have recognized the culpability of his conduct. Yet a § 1983 case is not a criminal prosecution, and the preponderance standard applies to civil claims of all sorts. (citation omitted). It should not be changed covertly, through an immunity defense that imposes a heightened standard of proof.

Id. at 355 (citing *Grogan v. Garner*, 498 U.S. 279, 286 (1991); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983)).

298. *See supra* note 194 and accompanying text.

Several additional aspects of the Court's opinion confirm this reading.²⁹⁹ Moreover, these aspects are clarified and make sense when viewed through the assumption that the CCE standard (or something higher than the POE standard) is being applied by the majority. The most significant of these aspects is the presumption of good faith. Other aspects include the evidentiary significance of alternative maps and the majority's analysis of the other evidence in the case. These are discussed in turn.

2. *The Presumption of Good Faith*

How should we understand the presumption of legislative good faith?

Evidentiary presumptions in law come in several varieties and thus the term is ambiguous.³⁰⁰ This is one source of confusion. Some possibilities may be eliminated quickly when applied to the presumption invoked in *Alexander*.

First, some presumptions are *irrebuttable* but most are *rebuttable*.³⁰¹ *Alexander*'s is rebuttable.³⁰² If the presumption were irrebuttable, then it would not be possible to overcome the presumption no matter what the evidence on the other side.³⁰³

Second, some presumptions are *permissive* and some are *mandatory*.³⁰⁴ *Alexander*'s is mandatory.³⁰⁵ If the presumption were permissive, then the district court would be free to disregard it.³⁰⁶ That is plainly not the case.³⁰⁷ Thus, the presumption is *mandatory* and *rebuttable*.

Third, mandatory rebuttable presumptions allocate or shift aspects of the burden of proof.³⁰⁸ Namely, they shift or allocate a burden of *production* or a

299. In addition to the aspects discussed below, Justice Alito's dissent in *Cooper* also suggests an implicitly assumed standard of proof higher than the preponderance standard. *Cooper v. Harris*, 581 U.S. 285, 330 (Alito, J., concurring in part and dissenting in part). In arguing in favor of an alternative-map requirement, Justice Alito argued that it was justified on policy grounds as an "evidentiary rule to prevent false positives." *Id.* at 335. As discussed above, the higher standards of proof are justified by trying to minimize false positives (the preponderance standard, by contrast, treats the risk of false negatives and false positives as equally problematic). See *supra* notes 232–42 and accompanying text. See also Pitts, *supra* note 9 (arguing that *Alexander* implicitly overruled *Cooper*). Implicitly raising the standard of proof provides a way to reach a different result from *Cooper* without explicitly overruling *Cooper*.

300. See ALLEN ET AL., *supra* note 148, at 755–63, for an overview of presumptions and how they relate to the evidentiary proof process.

301. *Id.* at 756.

302. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 9 (2024).

303. See ALLEN ET AL., *supra* note 148, at 757 ("A conclusive presumption is nothing more than a somewhat awkwardly worded substantive rule of law."). See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 13 (1976).

304. ALLEN ET AL., *supra*, note 148, at 756.

305. *Alexander*, 602 U.S. at 10.

306. A common permissive presumption is *res ipsa loquitur* in tort cases. See ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 84–100 (2001).

307. *Alexander*, 602 U.S. at 10.

308. ALLEN ET AL., *supra* note 148, at 758.

burden of *persuasion*.³⁰⁹ *Alexander* allocates a burden of persuasion.³¹⁰ The majority and the dissent agree on this.³¹¹

Knowing that the presumption of legislative “good faith” is a mandatory, rebuttable presumption that allocates a burden of persuasion provides some clarity.³¹² But there remains a missing piece in the puzzle. In order to know how much evidence is necessary to overcome or rebut the presumption, we have to know—yes, you guessed it—the *evidentiary* standard of proof.³¹³ The strength of the evidence necessary to overcome or rebut the presumption is whatever is necessary to satisfy the evidentiary standard of proof.³¹⁴

The Supreme Court has been relatively clear on this in other contexts. Consider, for example, *Clark v. Arizona*, which expounded on both the “presumption of innocence” and the “presumption of sanity” in criminal cases.³¹⁵ The “presumption of innocence” allocates the burden of proof to the prosecution on the elements of a crime and requires that the prosecution proves each element BARD (the standard of proof).³¹⁶ By contrast, the “presumption of sanity” assumes that criminal defendants possess “the capacity to form the *mens rea*” required for crimes.³¹⁷ As *Clark* explains, States and the federal government decide what is necessary to overcome this presumption by (1) allocating burdens of proof and (2) *setting a standard of proof*.³¹⁸ In the federal system, the presumption operates as a *mandatory rebuttable presumption that allocates the burden of persuasion*.³¹⁹ The applicable evidentiary standard of proof in *Clark* was CCE.³²⁰ This means that the defendant bears the burden of persuasion for the insanity defense (not just a burden of production) and that the defendant must overcome the presumption of sanity by proving the insanity defense by CCE.³²¹ Different jurisdictions may choose to allocate the burden differently and to set different standards of proof.³²² These legislative choices are decisions about what is necessary

309. *Id.* at 758–60.

310. *Alexander*, 602 U.S. at 10.

311. *Alexander*, 602 U.S. at 7, 73. By contrast, in the employment-discrimination context, the burden-shifting presumption established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), shifts a burden of production, not persuasion. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 507, 507 (1993).

312. *Alexander*, 602 U.S. at 14–15.

313. See, e.g., *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 95 (2011) (presumption of validity requires defendant to prove invalidity of patent by clear and convincing evidence); *Clark v. Arizona*, 548 U.S. 735, 771 (2006).

314. *Clark*, 548 U.S. at 769 (“The burden that must be carried by a defendant who raises the insanity issue, again, defines the strength of the sanity presumption.”).

315. *Id.*

316. *Id.* at 766 (“[T]he force of the presumption of innocence is measured by the force of the showing needed to overcome it, which is proof beyond a reasonable doubt.”).

317. *Id.*

318. *Id.* at 768–69.

319. 18 U.S.C. § 17(b) (“The defendant has the burden of proving the defense of insanity by clear and convincing evidence.”).

320. *Clark*, 548 U.S. at 769.

321. *Id.*

322. *Id.*

to overcome the presumption of sanity. To put it another way, the presumption of sanity is *defined* by these choices.³²³

Alexander implicitly assumed something like CCE as the evidentiary standard of proof (while mistakenly referring to the racial-predominance test as the standard of proof).³²⁴ This understanding both explains and clarifies how the presumption of legislative “good faith” functions in the opinion’s analysis. In other words, the presumption of good faith, as with other evidentiary presumptions, is defined by what is necessary to overcome the presumption.³²⁵ Moreover, understanding how the presumption functions in the opinion further illustrates how the majority raised the standard of proof.³²⁶

Alexander’s descriptions of the presumption support the idea that something like the CCE standard is being applied.³²⁷ Here are four ways in which the majority describes the presumption and its implications (with my emphasis added):

(1) “None of the facts on which the District Court relied to infer a racial motive is sufficient to support an inference that can overcome the presumption of legislative good faith.”³²⁸

(2) “This presumption of legislative good faith directs district courts to draw the inference that cuts in the legislature’s favor when confronted with evidence that *could plausibly support multiple conclusions*.”³²⁹

(3) “The presumption of good faith furthers each of these constitutional interests.³³⁰ It also explains why we have held that the plaintiff’s *evidentiary burden in these cases is especially stringent*.”³³¹

(4) “[T]here is strong evidence that the district’s BVAP of 17% was simply a side effect of the legislature’s partisan goal. And certainly *nothing rules out that possibility*. In light of the presumption of legislative good faith, that possibility is dispositive.”³³²

With regard to (1), we simply do not know how much evidence is necessary to overcome the presumption until we know the evidentiary standard of proof.³³³ But (2)-(3) give some indication that it is something higher than the preponderance standard. As explained above, if the preponderance standard applied, then plaintiffs would have to prove only that their explanation was more likely or better or more plausible than the alternative explanations.³³⁴ The fact that the

323. *Id.*

324. *See supra* Subsection IV.B.1.

325. *See supra* notes 314, 316 and accompanying text.

326. In other words, recognizing how the presumption is functioning in the opinion provides further evidence that CCE is the implicit standard of proof. *See supra* notes 314, 316 and accompanying text.

327. *See Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 14–15 (2024).

328. *Id.* at 19–20.

329. *Id.* at 10 (emphasis added).

330. *See supra* note 95 and accompanying text.

331. *Alexander*, 602 U.S. at 11 (emphasis added).

332. *Id.* at 20 (emphasis added).

333. *Id.*

334. *See supra* note 254 and accompanying text.

evidence could also plausibly support the alternatives (quotation (2) above) would be beside the point—the question is the *relative* strength or plausibility of the explanations.³³⁵ Quotation (3) ties the presumption directly to the evidentiary burden of proof.³³⁶ The fact that the evidentiary burden is “especially stringent” implies that it is something more than the usual burden of proof in civil cases, *i.e.*, the preponderance standard.³³⁷ A “stringent” *evidentiary burden* implies a higher standard of proof—such as CCE or BARD.³³⁸ Finally, with regard to (4), if the preponderance standard applied, then the plaintiffs would not have to “rule out” an alternative possibility to overcome the presumption.³³⁹ But if a higher standard of proof applied, then the presence of a plausible alternative that has not been ruled out might be sufficient to conclude the presumption has not been overcome.³⁴⁰

In sum, these descriptions of the presumption at work in the opinion imply that the Court was operating with a higher standard of proof than the preponderance standard.³⁴¹ The most likely explanation is that this standard of proof is something like the CCE standard that operates, as a matter of policy, in a small subset of civil cases.³⁴² That the majority was operating implicitly with this higher standard of proof also explains the disagreements between the majority and the dissent regarding alternative maps and the evidence in the case.³⁴³

3. *Alternative Maps*

As with the presumption of legislative good faith, a raised evidentiary standard of proof also clarifies and explains the majority’s analysis on alternative maps. Such a map would show how the legislature could have achieved its partisan goal while retaining a higher number of Black residents in District 1.³⁴⁴ This evidence would support the plaintiffs’ explanation that race was the predominant factor in the districting decision by discrediting the defendants’ alternative explanation that partisanship was the primary goal.³⁴⁵ Such a map may

335. *See supra* note 254 and accompanying text.

336. *Alexander*, 602 U.S. at 11.

337. *See supra* note 154 and accompanying text.

338. *See supra* notes 231–44 and accompanying text.

339. In this respect, the implied standard is similar to the BARD standard in criminal cases, in which any plausible defense explanation is sufficient to raise a reasonable doubt. *See Pardo & Allen, supra* note 214, at 239.

340. *See supra* notes 258–62 and accompanying text.

341. *See supra* note 326.

342. *See supra* notes 235–41 and accompanying text. Between the higher standards (CCE and BARD), CCE appears to be the most charitable (and plausible) reading of the opinion’s analytical implications because this is a civil rather than a criminal case. Some of the Court’s language, however, fits with the BARD standard. *See supra* notes 297, 339 and accompanying text.

343. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 35 (2024); *see also Alexander*, 602 U.S. at 77 (Kagan, J., dissenting).

344. *See Alexander*, 602 U.S. at 34.

345. Notice, however, neither the presence nor the absence of an alternative map necessarily “rules out” the explanation that the State used race as the predominant factor in achieving a partisan goal. *See id.* at 10. On one hand, the presence of such a map would show that there were additional ways to achieve a partisan goal other

“go a long way toward helping plaintiffs disentangle race and politics.”³⁴⁶ The Court in *Alexander* concluded that it was clear error for the district court to fail to draw an adverse inference from the absence of such a map.³⁴⁷

Prior cases had discussed the possibility and significance of such a map. First, in *Cromartie II*, the Court had stated:

where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.³⁴⁸

In *Cooper*, the defendants had argued that this language established a necessary requirement for plaintiffs in all racial-gerrymandering claims (or at least all cases proceeding with circumstantial evidence).³⁴⁹ *Cooper* rejected a necessary requirement.³⁵⁰ Rather, the Court explained that such a map is merely one piece of relevant and potentially probative evidence, which, for practical purposes, may make the difference in close cases.³⁵¹ But, in general, parties do not have to jump through additional “evidentiary hoops” if they can otherwise prove their cases with other admissible evidence.³⁵²

Turning back to *Alexander*, how does a raised standard of proof clarify and explain the majority’s reasoning? First, notice that the majority connects the alternative map directly to the presumption of good faith:

Without an alternative map, it is difficult for plaintiffs to defeat our starting presumption that the legislature acted in good faith. This presumption of legislative good faith directs district courts to draw the inference that cuts in the legislature’s favor when confronted with evidence that could plausibly support multiple conclusions.³⁵³

than using race as a proxy. *See id.* at 34. On the other hand, the absence of such of map does not disprove that race was the predominant criterion used to achieve the partisan goal (rather, its evidentiary value is in suggesting that the demographic results could have come about even when race was not the predominant criterion). *See generally* Richard. L. Hasen, *Resurrection: Cooper v. Harris and the Transformation of Racial Gerrymandering into a Voting Rights Tool*, ACS SUP. CT. REV. 105 (2016–17) (arguing that the predominance test may be met in situations in which an alternative map is not possible). In either case, the disputed fact of the matter (*i.e.*, that race was used as the predominant criterion) may be true or false.

346. *Alexander*, 602 U.S. at 34.

347. *Id.* at 35.

348. *Easley v. Cromartie*, 532 U.S. 234, 258 (2001).

349. *Cooper v. Harris*, 581 U.S. 285, 320 (2017).

350. *Id.* at 319 (“An alternative map is merely an evidentiary tool to show that such a substantive violation has occurred; neither its presence nor its absence can itself resolve a racial gerrymandering claim.”).

351. *Id.* *Cooper* distinguished *Cromartie II* by explaining that the latter was an otherwise weak case and, thus, for practical purposes such a map was necessary, given the particular arguments advanced by the plaintiffs. *Id.* at 321–22.

352. *Id.* at 319 n.15. On Justice Alito’s dissent on this point, *see infra* notes 370–77 and accompanying text.

353. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 10 (2024).

As discussed above, the presumption of good faith itself is best explained as a mandatory, rebuttable presumption with a heightened standard of proof.³⁵⁴ If this is true, then this explains why it would be “difficult” to defeat the presumption in the absence of such evidence. If the preponderance standard applied, however, then it would be no more difficult than in any other civil case: the plaintiff would need to establish the more likely (or better or more plausible) explanation, with whatever admissible evidence proves their case.³⁵⁵ Indeed, this seems to be exactly how the dissent views the matter.³⁵⁶

Second, notice the framing at the end of the block quotation above. As with the general framing discussed earlier, the analysis assumes that the plaintiffs ought to lose so long as the defendants’ explanation (politics-not-race) “could plausibly” explain the evidence. This framing implicitly assumes a higher standard of proof.³⁵⁷ If the preponderance standard applied, then the question would be *which* explanation is more likely (better, or more plausible) given the evidence.³⁵⁸ But with a higher standard of proof, the plaintiffs have to do something more to prove their case—such as establish their case by CCE.³⁵⁹ For the majority, it would be rare for plaintiffs to be able to cross that heightened threshold without such a map.³⁶⁰

Third, and relatedly, alternative maps are significant for the majority because the plaintiffs’ burden of proof includes “ruling out” or eliminating the defendants’ alternative explanations.³⁶¹ The Court explained:

To prevail, a plaintiff must “disentangle race from politics” by proving “that the former drove a district’s lines.” *Ibid.* (emphasis added). That means, among other things, *ruling out the competing explanation* that political considerations dominated the legislature’s redistricting efforts. If either politics or race *could explain* a district’s contours, the plaintiff has not cleared its bar.³⁶²

Again, if the preponderance standard applied, then the question would be the relative likelihood or plausibility of the explanations.³⁶³ There would be no requirement to “rule out” a plausible alternative.³⁶⁴ But with a higher standard of proof, the plaintiffs may need to do more in order to establish their cases by CCE.³⁶⁵ Consistent with this idea, the majority concluded that the district court should have drawn an adverse inference from the failure to undermine the

354. *See supra* Subsection IV.B.2.

355. *See supra* note 254 and accompanying text.

356. *See supra* notes 277–78 and accompanying text. *See also Alexander*, 602 U.S. at 76 (“[W]e could not have been more adamant in rebuffing the State’s proposed requirement [in *Cooper*].”).

357. *See supra* Subsection IV.B.1.

358. *See supra* note 254 and accompanying text.

359. *See supra* notes 255–62 and accompanying text.

360. *See Alexander*, 602 U.S. at 34–35.

361. *See supra* notes 256–57 and accompanying text.

362. *Alexander*, 602 U.S. at 9–10 (emphasis added).

363. *See supra* note 254 and accompanying text.

364. *See supra* notes 256–57 and accompanying text.

365. *See supra* note 297.

defendants' explanation with such a map.³⁶⁶ If the preponderance standard applied, then such an inference may or may not make a difference, even in otherwise close cases.³⁶⁷ It will depend on the strength of the evidence in support of the competing explanations.³⁶⁸ But if the standard of proof was implicitly raised to CCE, then more persuasive evidence is required—and that may mean the need for an alternative map, absent extraordinary cases.³⁶⁹ If CCE requires that close cases go to the defendant,³⁷⁰ then an alternative map may be necessary to show that it is not a close case.³⁷¹

Fourth, and finally, an implicit connection between alternative maps and the standard of proof can also be seen in Justice Alito's dissent in *Cooper*.³⁷² In *Cooper*, the Court held that such an alternative map was not a necessary requirement for plaintiffs.³⁷³ Justice Alito, however, argued in favor of an alternative-map requirement.³⁷⁴ He claimed that such a requirement made good sense as a matter of policy—thus concluding that *Cromartie II* was “justified in crafting an evidentiary rule to prevent false positives.”³⁷⁵ The focus on “false positives” is telling as a matter of evidence policy. As explained above, the concern for false positives (or one type of factfinding error) is precisely the justification for higher standards of proof.³⁷⁶ The preponderance standard, by contrast, is equally concerned with both false positives and false negatives (and a concern for overall accuracy).³⁷⁷ Although *Cooper* rejected alternative-maps as a necessary requirement, *Alexander*'s “adverse inference” resurrects the policy focus on preventing false positives.³⁷⁸ In other words, it is further evidence of a higher standard of proof implicitly at work in *Alexander*.³⁷⁹

4. *The Evidence*

Finally, a heightened evidentiary standard of proof also explains the Court's assessment of the plaintiffs' evidence in the case and its application of

366. *Alexander*, 602 U.S. at 35. One way to reconstruct the majority's “adverse inference” is as a judicial comment on the evidence, which also functions to raise the plaintiffs' burden of persuasion. See Allen, *supra* note 163 (demonstrating how comments on the evidence may raise, lower, or shift a burden of persuasion). In other words, evidence that might be sufficient in the absence of the adverse inference may become insufficient because of it.

367. See *supra* note 226 and accompanying text.

368. See *supra* notes 226–27 and accompanying text.

369. See *Alexander*, 602 U.S. at 34.

370. See *supra* notes 261, 297.

371. *Alexander*, 602 U.S. at 34–35.

372. See *Cooper v. Harris*, 581 U.S. 285, 335 (2017) (Alito, J., concurring in part and dissenting in part).

373. See *id.* at 317–22.

374. *Id.* at 335 (Alito, J., concurring in part and dissenting in part).

375. *Id.*

376. See *supra* note 224 and accompanying text.

377. See *supra* note 225.

378. The policy considerations justifying the presumption of good faith, see *supra* note 95 and accompanying text, were also cited in the *Cooper* dissent as justifying an alternative-map requirement as an “evidentiary rule” to “prevent false positives.” *Cooper*, 581 U.S. at 334–35.

379. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 10 (2024).

the “clear error” review standard. The evidence presented by the plaintiffs, and relied on by the district court in its discrimination finding, consisted of three categories: circumstantial evidence about the design of the district; credibility judgments concerning witnesses; and expert testimony.³⁸⁰

If the preponderance standard applied, then the proof question would be whether the plaintiffs’ explanation was the most likely, best, or most plausible possibility, given the evidence.³⁸¹ Thus, the district court would examine whether the plaintiffs or the defendants presented a stronger case in support of their competing explanations.³⁸² As such, the Court would then apply the “clear error” review standard by examining whether it was reasonable for the district court to conclude that the strength of the evidence tipped toward the plaintiffs and thus that their explanation was the most likely (best or most plausible).³⁸³ And, indeed, that appears to be how the dissent viewed the case.³⁸⁴ For each category of evidence, the dissent noted the reasons why it was reasonable for the district court to view the evidence as favoring the plaintiffs over the defendants.³⁸⁵

The majority, however, analyzes the evidence with a heightened threshold in mind.³⁸⁶ Recall the general framing on what the majority terms an “especially stringent” “evidentiary burden”³⁸⁷:

To prevail, a plaintiff must “disentangle race from politics” by proving “that the former drove a district’s lines.” *Ibid.* (emphasis added). That means, among other things, ruling out the competing explanation that political considerations dominated the legislature’s redistricting efforts. If either politics or race could explain a district’s contours, the plaintiff has not cleared its bar.³⁸⁸

This heightened burden also seemed to be what the majority was referring to in the footnote quoted above, noting that clear-error review must take into account the standard of proof.³⁸⁹ With this framing, the majority concluded that the district court’s finding was clear error, even if the plaintiffs presented a stronger evidentiary case than the defendants.³⁹⁰ In other words, a preponderance of the evidence might support the plaintiffs, but it still might not be sufficient because the evidence has not crossed the majority’s heightened proof standard.³⁹¹

380. *See supra* Section II.A for a summary.

381. *See supra* note 254 and accompanying text.

382. *See supra* note 253.

383. *See supra* note 194 and accompanying text.

384. *See Alexander*, 602 U.S. at 68.

385. *See supra* Section II.C.

386. *See supra* Subsection IV.B.1.

387. *Alexander*, 602 U.S. at 11.

388. *Id.* at 9–10.

389. *See supra* note 182 and accompanying text.

390. *Alexander*, 602 U.S. at 17–24.

391. *Id.* at 20.

This conclusion is manifest in the majority's rejection of each category of evidence.

First, even if race is the best explanation of the decision to move residents out of District 1, "the legislature's stated partisan goal can easily explain this decision, and the District Court therefore erred in crediting the less charitable conclusion that the legislature's real aim was racial."³⁹² Such evidence is inadequate because it does not "rule[] . . . out th[e] *possibility*" that this "was simply a side effect of the partisan goal."³⁹³ Moreover, the district court's reasoning was "flatly inconsistent" with the presumption of good faith.³⁹⁴ Thus,

the District Court clearly erred in finding that the legislature deliberately sought to maintain a particular BVAP [Black voting-age population] just because the maps that produced the sought-after partisan goal all had roughly the same BVAP.³⁹⁵

Second, the majority gave little weight to the district court's credibility judgments.³⁹⁶ The majority acknowledged the credibility judgments but argued that the evidence is likewise inadequate: "The District Court discredited [the mapmaker's] testimony, but it cited no evidence that could not also support the inference that politics drove the mapmaking process."³⁹⁷ Thus, it was not enough that the district court found the defendants' witnesses not credible in their denials.³⁹⁸ The district court was required to cite evidence that "rules out" the alternative explanation that politics drove the mapmaking process, even if the district court concluded that this was a less credible explanation than the plaintiffs' explanation, given the other evidence.³⁹⁹

Third, the majority's dismissal of the plaintiffs' expert testimony—even in the absence of similar defendant expert testimony—expresses a similar idea.⁴⁰⁰ Because of what the Court viewed as methodological problems with regard to measuring partisanship or controlling for partisanship,⁴⁰¹ "none of the expert reports offered by the [plaintiffs] provide any significant support for their

392. *Id.* at 22.

393. *Id.* at 20 (emphasis added).

394. *Id.* at 20–21. As explained above, the presumption is itself best explained as imposing a heightened standard of proof. *See supra* Subsection IV.B.2. In other words, the presumption is most likely *defined* in terms of a heightened proof standard. *See supra* note 314; *see also Alexander*, 602 U.S. at 24 ("[T]he District Court's heavy reliance" on evidence about the BVAP "was seriously misguided in light of the appropriate legal standard and our repeated instructions that a court in a case such as this must rule out the *possibility* that politics drove the districting process.") (emphasis added).

395. *Alexander*, 602 U.S. at 21.

396. *Id.* at 22.

397. *Id.* Similarly, the majority faulted the district court for not providing an alternative explanation in support of its own credibility judgment in not believing the mapmaker's testimony. *Id.* ("[T]he court provided no explanation why a mapmaker who wanted to produce a version of District 1 that would be safely Republican would use data about voters' race rather than their political preferences.")

398. *Id.* at 22.

399. *Id.* at 20, 22.

400. *Id.* at 23.

401. *See supra* notes 107–13 and accompanying text.

position.”⁴⁰² In sum, these items individually and collectively are, for the majority, insufficient because they do not “rule out” the possibility that partisanship rather than race was the predominant factor.⁴⁰³ Thus, it was not enough for the district court to find the plaintiffs’ experts more probative and more credible than the defense expert.⁴⁰⁴ And, for the majority, it was clear error for the district court to find otherwise.⁴⁰⁵

Stepping back from this conclusion, we can see *Alexander*’s mistake and its implications. Having confused the racial-predominance test for a “stringent” evidentiary standard of proof,⁴⁰⁶ the majority then viewed the plaintiffs’ evidence through the lens of a heightened standard of proof—resembling the CCE standard applicable in atypical civil cases.⁴⁰⁷ Then, the majority used this heightened standard of proof when reviewing the district court’s factual finding for clear error.⁴⁰⁸ In the absence of this mistake, the central issue—from the perspective of evidence law and legal proof—should have been an application of the preponderance standard to the racial-predominance test. In other words, what was the most likely, best, or most plausible explanation, given the evidence? Accordingly, the clear-error issue should have been reduced to whether the district court was reasonable in finding that race-as-a-predominant-factor was the best or more likely or most plausible explanation, given the evidence provided by the parties.⁴⁰⁹ If that were the framing, then it is hard to see how the district court’s analysis was clearly mistaken, given the evidence on each side.⁴¹⁰

V. CONCLUSION

Alexander confused the substantive legal standard for the evidentiary standard of proof and then, through its analysis, implicitly raised the standard of

402. *Alexander*, 602 U.S. at 33.

403. *Id.* at 24

404. The dissent, by contrast, viewed the experts from this comparative perspective. *See supra* notes 136–40 and accompanying text. Justice Thomas did not join this portion of the majority’s opinion, arguing that the majority’s analysis was inconsistent with “clear error” review. *See supra* note 106 and accompanying text.

405. *Alexander*, 602 U.S. at 33. The clear-error standard required the Court to conclude that it had a “definite and firm conviction” that the district-court’s factual finding was mistaken. *See supra* note 86. Phrased another way, they concluded that the district’s court’s finding was not plausible. *See supra* note 87.

406. *See supra* Part III; *Alexander*, 602 U.S. at 11.

407. *See supra* notes 234–41 and accompanying text.

408. *See supra* note 182 and accompanying text.

409. In other words, the issue would reduce to whether there was a “definite and firm conviction” that the district court was mistaken in that conclusion (or whether that conclusion by the district was itself implausible). *See supra* notes 86–87.

410. Some readers may disagree with this point (*i.e.*, on how the clear-error standard should have applied under the preponderance standard). To be clear, nothing in the above analysis turns on this conclusion. The main point of the analysis was to establish that a heightened standard of proof was implicitly utilized. That conclusion is analytically independent of how the case should have been decided under the preponderance standard. The analytical implication to notice, however, is that if the preponderance applied, then it should have been more difficult to conclude that the district court’s finding was clearly erroneous. *See supra* notes 86–88 and accompanying text.

proof.⁴¹¹ This raises an obvious question: how did this happen? What explains *Alexander's* mistake? Was it the result of inadvertence, given the complex set of interacting—and often confused—evidence-law concepts (burdens, standards, presumptions, and inferences)?⁴¹² These questions are important, to be sure, but they are outside the scope of this Article.⁴¹³ The questions, ultimately, are irrelevant to the thesis defended in this Article. Regardless of what exactly caused *Alexander's* mistake, the critical point is what the opinion *does*—it raises the evidentiary standard of proof.⁴¹⁴ And it does so without providing the policy reasons that would justify this doctrinal choice as a matter of procedural due process.⁴¹⁵ This Article concludes by making explicit the underlying policy choices and the potential consequences in future cases.

In adjudicating racial-gerrymandering claims, courts may make factual errors *when applying the racial-predominance test*. Standards of proof express policy choices about factual accuracy and how to allocate the risk of fact-finding error.⁴¹⁶ On one hand, there may be cases in which the legislature used race as the predominant criterion in designing a district, but a court finds that the plaintiff has not met its burden in proving this fact (*i.e.*, a false negative).⁴¹⁷ On the other hand, there may be cases in which the legislature did not use race as the predominant criterion, but a court finds, based on the evidence, that they did (*i.e.*, a false positive).⁴¹⁸ From the perspective of evidence law and policy, a legal system aiming to minimize the total number of these two types of fact-finding errors—treating the parties roughly equally with regard to the risk of fact-finding errors—would adopt the preponderance standard.⁴¹⁹ A heightened standard of proof, by

411. See *supra* Part III.

412. See *Allen*, *supra* note 125, at 844 (demonstrating confusion among courts); *Allen*, *supra* note 163, at 330–32 (same).

413. And any answers would be speculative at best. The standard-of-proof issue was not discussed in the district court's opinion and was not briefed and argued before the Supreme Court. See generally S.C. State Conf. of the NAACP v. *Alexander*, 649 F. Supp. 3d 177 (2023) (no discussion of standard of proof). Nor had prior Supreme Court opinions clearly spelled out the evidentiary standard of proof. See *supra* note 198 and accompanying text. Richard Hasen has argued that even “inadvertent” misstatements of law are unlikely to be random but rather are more likely to align with a Justice's values. See Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 794 (2012) (“The causal mechanism for such a bias is straightforward: an error in stating existing law (or inadvertent change of law) in a draft opinion is less likely to capture the attention of a Justice reviewing a draft opinion if the error is in line with what the Justice expects the law to be.”). See also notes 299 and 372–79 and accompanying text (discussing similarities between *Alexander* and Justice Alito's dissent in *Cooper*). Notably, Justice Kagan's dissent in *Alexander* also failed to discuss the standard-of-proof issue. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 69 (2024) (Kagan, J. dissenting).

414. See *supra* Part IV.

415. See *supra* notes 36–37 and accompanying text.

416. See *supra* Section IV.A.

417. See *supra* notes 224, 232–33 and accompanying text.

418. See *supra* notes 224, 232–33 and accompanying text.

419. See *supra* note 225. Treating the parties equally with regard to the risk of error (in applying the racial-predominance test) serves a procedural value distinct from overall accuracy. See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 286–89 (2004) (discussing the role of equality in procedural justice); Mike Redmayne, *Standards of Proof in Civil Litigation*, 62 MOD. L. REV. 167, 171–74 (1999) (discussing an equality principle in civil litigation).

contrast, “expresses a preference for one side’s interests” with regard to factual errors.⁴²⁰ The decision to adopt such a standard aims to minimize one type of error (at the expense of the other), and may also reduce overall factual accuracy.⁴²¹ If *Alexander* tried to do *explicitly* what it did implicitly, it would have needed to provide reasons to prefer fact-finding errors that favor the defendants (*i.e.*, mistakenly finding the legislature did *not* use race as the predominant criterion when the legislature in fact did so) over fact-finding errors that favor the plaintiffs (*i.e.*, mistakenly finding race *was* used as the predominant criterion when in fact it was not).⁴²² It failed to do so.⁴²³

By contrast, a policy choice to treat the factual errors as equally problematic—and to aim to reduce overall errors—would correct *Alexander*’s mistake and adopt the preponderance standard. To be clear, in practice, such a policy choice would also jettison the language in *Alexander* that implies a higher standard of proof.⁴²⁴ For example, plaintiffs would not have to “rule out” the alternative (politics-only) explanation in order to win.⁴²⁵ Nor would plaintiffs necessarily lose if the alternative (politics-only) explanation “could plausibly explain” the evidence.⁴²⁶ The correct framing under the preponderance standard would be whether the plaintiff’s explanation was more likely, better, or more plausible than the alternative explanation(s).⁴²⁷ And a district court’s finding would be reviewed for “clear error” under that framing.⁴²⁸

There are important interests on both sides in racial-gerrymandering cases. The residents have a constitutional right not to be moved into or out of a district based on race, unless that choice can survive strict scrutiny.⁴²⁹ In other constitutional contexts, the Court has used standards of proof in order to protect constitutional rights from fact-finding errors.⁴³⁰ On the other hand, the Court has also emphasized the interests of the legislators in carrying out their constitutional functions in redistricting and in the harms that may attend to “false positive”

420. *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983) (citing *Addington v. Texas*, 441 U.S. 418, 423 (1979)). To be clear: these would be errors in *applying the racial-predominance test* (which is itself a “stringent” and “demanding” substantive legal test). *See supra* Part II. For critiques of the racial-predominance test itself, *see supra* note 174.

421. *See supra* notes 224, 232–44 and accompanying text.

422. Such a policy choice would also potentially result in more total errors. *See supra* note 242.

423. *See generally* *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1 (2024) (failing to prefer fact-finding errors that favor the defendant).

424. *See supra* Subsection IV.B.1.

425. *See supra* note 265 and accompanying text.

426. *Alexander*, 602 U.S. at 10.

427. *See supra* note 254 and accompanying text.

428. *See supra* Section IV.B.

429. *See* *Miller v. Johnson*, 515 U.S. 910–15 (1995) (“[T]he essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts. Just as the State may not, absent extraordinary justification, segregate its citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools, so did we recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race.” (internal citations omitted)).

430. *See supra* note 241 and accompanying text.

factual findings.⁴³¹ Notice, however, that the latter interests were the reasons for adopting the “demanding” racial-predominance test in the first place.⁴³² Coupling that demanding substantive doctrinal test with a heightened evidentiary standard of proof may, therefore, be a kind of policy “double counting” in expressing a “preference for one’s sides interests.”⁴³³ This would mean, in effect, that even when a plaintiff proves that it is more likely than not that the “demanding” racial-predominance test is satisfied, the plaintiff still may lose as a matter of law.⁴³⁴ This policy choice would skew the risk of error even further in favor of defendants. It would also potentially reduce overall accuracy with regard to the racial-predominance test.⁴³⁵

Alexander implicitly raised the standard of proof without justifying that choice.⁴³⁶ Such a justification, if one were forthcoming, would need to provide reasons why the default preponderance rule should be discarded, why the State’s interests should be given this extra weight (above and beyond the “demanding” predominance test), and as a consequence why additional fact-finding errors going against plaintiffs should be tolerated.⁴³⁷ Going forward, procedural due process requires that this justification be provided—or *Alexander*’s mistake must be corrected.⁴³⁸ Future racial-gerrymandering cases may depend on this choice.

431. See *Miller*, 515 U.S. at 915 (“Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.”); *Alexander*, 602 U.S. at 11. These possible harms, according to the Court, include lack of respect for legislators; falsely accusing legislators of offensive and demeaning behavior; and turning courts into weapons of political warfare. *Id.*

432. See *Miller*, 515 U.S. at 915–16 (adopting the racial-predominance test because of the “sensitive nature of redistricting and the presumption of good faith that must be accorded legislative actions”).

433. See *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983). Cf. *Allen*, *supra* note 163, at 365 (explaining a similar implicit “double effect” with the presumption upheld in *Ulster County v. Allen*, 442 U.S. 140 (1979)).

434. See *supra* Part III.

435. See *supra* note 242 and accompanying text.

436. See *supra* Section IV.B.

437. See *supra* note 32 and accompanying text.

438. See *Addington v. Texas*, 441 U.S. 418, 423 (1979) (“The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to ‘instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.’” (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring))); *Santosky v. Kramer*, 455 U.S. 745, 755, 757 (1982):

Addington teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants . . . Since the litigants and the fact finder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.

See also *supra* note 36 and accompanying text.