

## Population Predominance in Racial Gerrymandering

By O. Andrew F. Wilson – May 11, 2015

The Supreme Court's [decision](#) in the related cases *Alabama Legislative Black Caucus v. Alabama* and *Alabama Democratic Conference v. Alabama* provides the high court's latest statement on racial gerrymandering and offers new insight into the role of equal-population objectives in redistricting analysis. The majority holds that, regardless of population fluctuations, race may only be used to draw districts where necessary to ensure minorities are able to elect candidates of their choice.

Addressing the complexity of racial gerrymandering has long been at the heart of the Supreme Court's voting-rights jurisprudence. The Fourteenth Amendment forbids use of racial classification in any "redistricting plan [unless it is] in pursuit of a compelling state interest . . . [and] narrowly tailored to achieve" that interest. [Shaw v. Hunt](#), 517 U.S. 899, 908 (1996) (*Shaw II*) (citation omitted). And the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." As the Supreme Court recognized more than 20 years ago, "[r]acial gerrymandering, even for remedial purposes . . . threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." [Shaw v. Reno](#), 509 U.S. 630, 657 (1993) (*Shaw I*). In March of this year, the Supreme Court analyzed whether a prioritization of equal district populations in Alabama's new redistricting plan furthers these constitutional goals.

### Alabama's 2012 Redistricting Plan

The Alabama cases arose from the state's 2012 redistricting plan for its state house and senate districts. In defense of its new plan, Alabama argued that it had prioritized equal population and compliance with the Voting Rights Act of 1965, among its other traditional districting objectives (such as core district preservation and county lines). The state sought to ensure that the deviation between the population in each district was less than one percent. In addition, "Alabama believed that to avoid retrogression [in contravention of §5 of the Voting Rights Act] . . . it was required to maintain roughly the same black population percentage in existing majority-minority districts." Given population variances, the combination of these two factors proved challenging. In Senate District 26, an example highlighted by the Supreme Court, the state proposed adding 16,000 individuals to the new district to meet its population variation objective, but "only 36 of those newly added individuals were white," to maintain the same minority percentage as the old district. After a three-judge Federal District Court rejected challenges to this plan, the petitioners—the Alabama Legislative Black Caucus and the Alabama Democratic Conference—appealed to the Supreme Court.

In a 5–4 decision, the Supreme Court reversed the district court and remanded for further proceedings. Justice Breyer—joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan—wrote the majority opinion that addressed the geography, standing, predominance, and tailoring of the petitioners' gerrymandering claims. Justice Scalia authored a dissent focused on standing and the construction of the petitioners' claims that Chief Justice Roberts and Justices Thomas and Alito joined. Justice Thomas also authored a separate dissent that criticized the Court's voting-rights precedents.

### Geography and Standing

At the outset, the majority emphasized the localized geographical nature of gerrymandering claims. The rationale of these claims, the court reasoned, "applies to the boundaries of individual districts" rather than the state "as an

## Civil Rights Litigation

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undifferentiated ‘whole’” because the harm caused by unconstitutional gerrymandering is experienced by voters in specific districts, rather than by voters in the state at large. While the dissent did not challenge this geographic distinction in principal, its application to these cases gave rise to a challenge to standing for the Alabama Democratic Conference.

Given the geographically localized nature of gerrymandering claims, to have standing to challenge a district's gerrymander, a plaintiff must be found in the specific district he or she is challenging. The district court below determined, *sua sponte*, that the Alabama Democratic Conference had failed to make this showing. The majority reversed on the basis that a reasonable inference could be drawn that the petitioners had members in the challenged districts given that the organization both existed as a statewide political caucus and had the purpose of endorsing candidates responsible to the needs of minorities and the poor. These factors, the majority reasoned, “support an inference that the organization has members in all of the State’s majority-minority districts” sufficient to require the lower court to give the petitioners an opportunity to provide evidence to establish member residence. While acknowledging the importance of the merits of their claims, Justice Scalia’s dissent argued that the burden of establishing standing should be borne by the petitioners, not Alabama.

### Racial Predominance and Tailoring

The core of the majority’s opinion focuses on the role that population plays in analyzing racial predominance in gerrymandering claims. As the Court previously explained in [Miller v. Johnson](#), a racial-gerrymandering plaintiff must 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.” To establish racial predominance, plaintiffs must show that the proposed redistricting plan subordinates “traditional race-neutral districting principles . . . to racial considerations.” These traditional factors include compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation. Population parity between districts, prioritized by Alabama, is not among these traditional factors. Instead, the majority reasoned, population should be considered a background factor for redistricting analysis.

Where, as here, a state must place additional voters in a district “to achieve an equal population goal,” the majority reasoned, “the ‘predominance’ question concerns which voters the legislature decides to choose, and specifically whether the legislature predominately uses race as opposed to other, ‘traditional’ factors when doing so.” Here, the majority reversed the district court on the grounds that it had improperly considered population as a districting principle whereas, if it had “treated equal population goals as background factors, it might have concluded that race was the predominant boundary-drawing consideration.”

The majority also challenged the district court’s alternative holding that, even if race was predominant, its use was sufficiently narrowly tailored to survive scrutiny. The Voting Rights Act does not command the maintenance of a particular minority percentage when redrawing majority-minority districts, the Court held. Rather, “it requires the jurisdiction to maintain a minority’s ability to elect a preferred candidate of choice.” In a call for a contextualized approach to population analysis, the Court cited to Justice Souter’s dissent in [Georgia v. Ashcroft](#) and admonished that “courts should not mechanically rely upon numerical percentages but should take account of all significant circumstances.” Alabama “asked the wrong question with respect to narrow tailoring,” the Court reasoned. Instead of asking how to maintain minority percentages in majority-minority districts, “they should have asked: ‘To what extent must we preserve existing minority percentages in order to maintain the minority’s present ability to elect the candidate of its choice?’” This approach—calibrating minority percentages by the pole star of the power of choice—is the majority’s core guidance for future redistricting efforts.

### Next Steps for Gerrymandering Claims

The Court’s three opinions in the Alabama cases sound disparate notes for the future of gerrymandering jurisprudence. Justice Scalia’s dissent warns that the consequences of the majority’s leniency concerning standing

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## Civil Rights Litigation

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and claim construction “will reverberate far beyond the narrow circumstances presented in this case.” Justice Thomas raises the opposite concern with regard to the merits, that the court’s opinion “does nothing to ease the conflict between our color-blind Constitution and the ‘consciously segregated districting system’ the Court has required in the name of equality.” The majority’s countervailing optimism is grounded in the potential for a contextualized analysis of race in drawing district lines as a means to reach the political future envisioned by *Shaw I* “in which race no longer matters.”

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