AMERICAN CONSTITUTIONALISM

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Supplementary Material

The Contemporary Era—Democratic Rights/Voting

**Harris v. Arizona Independent Redistricting Commission, \_\_ U.S. \_\_** (2016)

*The Arizona Independent Redistricting Commission is a bipartisan commission responsible for apportioning legislative districts in Arizona. Wesley Harris and other Arizona residents objected to the state legislative districts drawn after the 2010 census, claiming that the commission deviated from the principle of one person, one vote in order to benefit Democrats. The Commission responded that the deviations were necessary to comply with the Voting Rights Act, that drawing slightly smaller districts with many Hispanic voters was necessary to ensure that Hispanics did not lose political power in the state. The lower district court sided with the redistricting commission. Harris appealed to the Supreme Court of the United States.*

*The Supreme Court by a unanimous vote ruled that deviations from the principle of one person, one vote were constitutional. Justice Stephen Breyer’s unanimous opinion declared that states could deviate from the principle of one person, one vote under the Voting Rights Act to avoid retrocession (weakening the power of historically disadvantaged racial minorities) and that Arizona had done so in this case. Under what conditions does Breyer think states may deviate from the principle of one person, one vote. Why does he think that* Shelby County v. Holder*, which declared unconstitutional the Voting Rights Act’s provisions on preclearance was not relevant to determining the constitutionality of Arizona’s attempt to comply with those provisions? Given that the lower federal court reached the same decision as the Supreme Court, no conflict existed between circuits on this matter, and the judicial ruling was unanimous, why do you think the justices decided to resolve this appeal?*

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Idd1cf07306ca11e6b4bafa136b480ad2&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

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The Fourteenth Amendment's Equal Protection Clause requires States to “make an honest and good faith effort to construct [legislative] districts ... as nearly of equal population as is practicable.” *Reynolds v. Sims* (1964). The Constitution, however, does not demand mathematical perfection. In determining what is “practicable,” we have recognized that the Constitution permits deviation when it is justified by “legitimate considerations incident to the effectuation of a rational state policy.”  In related contexts, we have made clear that in addition to the “traditional districting principles such as compactness [and] contiguity,” those legitimate considerations can include a state interest in maintaining the integrity of political subdivisions, or the competitive balance among political parties. In cases decided before *Shelby County v. Holder* (2013), Members of the Court expressed the view that compliance with § 5 of the Voting Rights Act is also a legitimate state consideration that can justify some deviation from perfect equality of population. It was proper for the Commission to proceed on that basis here.

We have further made clear that “minor deviations from mathematical equality” do not, by themselves, “make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.”  We have defined as “minor deviations” those in “an apportionment plan with a maximum population deviation under 10%.”

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The Voting Rights Act, among other things, forbids the use of new reapportionment plans that “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”  A plan leads to impermissible retrogression when, compared to the plan currently in effect (typically called a “benchmark plan”), the new plan diminishes the number of districts in which minority groups can “elect their preferred candidates of choice” (often called “ability-to-elect” districts). A State can obtain legal assurance that it has satisfied the non-retrogression requirement if it submits its proposed plan to the Federal Department of Justice, and the Department does not object to the plan within 60 days. While Shelby County struck down the § 4(b) coverage formula, that decision came after the maps in this case were drawn.

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On the basis of the facts . . . , the District Court majority found that “the population deviations were primarily a result of good-faith efforts to comply with the Voting Rights Act ... even though partisanship played some role.”  This conclusion was well supported in the record. And as a result, appellants have not shown that it is more probable than not that illegitimate considerations were the predominant motivation behind the plan's deviations from mathematically equal district populations—deviations that were under 10%. Consequently, they have failed to show that the Commission's plan violates the Equal Protection Clause as interpreted in Reynolds and subsequent cases.

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The appellants make three additional arguments. First, they support their claim that the plan reflects unreasonable use of partisan considerations by pointing to the fact that almost all the Democratic-leaning districts are somewhat underpopulated and almost all the Republican-leaning districts are somewhat overpopulated. That is likely true. But that fact may well reflect the tendency of minority populations in Arizona in 2010 to vote disproportionately for Democrats. If so, the variations are explained by the Commission's efforts to maintain at least 10 ability-to-elect districts. The Commission may have relied on data from its statisticians and Voting Rights Act expert to create districts tailored to achieve preclearance in which minority voters were a larger percentage of the district population. That might have necessitated moving other voters out of those districts, thereby leaving them slightly underpopulated. The appellants point to nothing in the record to suggest the contrary.

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Third, appellants point to *Shelby County v. Holder*, in which this Court held unconstitutional sections of the Voting Rights Act that are relevant to this case. Appellants contend that, as a result of that holding, Arizona's attempt to comply with the Act could not have been a legitimate state interest. The Court decided *Shelby County*, however, in 2013. Arizona created the plan at issue here in 2010. At the time, Arizona was subject to the Voting Rights Act, and we have never suggested the contrary.