Preview Analysis of *Harris v. Arizona Independent Redistricting Commission*, courtesy of SCOTUS Blog, December 6, 2015

Argument preview: Does "one person, one vote" yield to partisan politics or the Voting Rights Act?

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In 2000, Arizona voters amended the state's constitution to give authority over redistricting to a five-member independent commission. Taking that authority away from the state legislature was supposed to take the politics out of redistricting – a key factor in a case before the Supreme Court last Term, in which the Justices rejected a challenge to the commission's power to draw federal congressional districts. But a lawsuit now before the Court brought by a group of Arizona voters alleges that the commission, while supposedly non-partisan, is actually anything but.

During the redistricting that followed the 2010 census, Wesley Harris and his fellow challengers contend, the commission deliberately put too many voters in sixteen Republican districts while putting too few in eleven Democratic districts. This means, Harris argues, that the votes of residents in the overpopulated districts effectively count less than the votes of their counterparts in the underpopulated districts – a violation of the constitutional principle of "one person, one vote." The Supreme Court will hear oral arguments in Harris's challenge on Tuesday, in a case that – depending on how broadly the Justices rule – could affect legislative maps far beyond Arizona.

Arizona's constitution requires legislative districts to be redrawn every ten years. It also directs the commission to consider several specific criteria when drawing redistricting maps for the state legislature: the federal Constitution and the Voting Rights Act; creating districts with equal populations; creating districts that are geographically compact and contiguous; preserving groups of people with common bonds or interests, which are often racial or ethnic; adhering to geographic features such as municipal or city boundaries; and maintaining political competitiveness, as long as it will not undermine the other criteria.

The first issue before the Court on Tuesday arises from Harris's accusation that the commission over-populated some of the districts that it drew in the post-2010 legislative maps to favor the Democratic Party. Harris (who has the support of Michele Reagan, Arizona's chief elections official) is adamant that he and his fellow voters are not challenging the role of party politics in redistricting, standing alone: he colorfully tells the Justices that "partisanship in redistricting is like gambling in a casino. Of course partisanship is present" in redistricting. Nor, Harris emphasizes, is he arguing that the commission was required to achieve "precise mathematical equality" in drawing the state legislative maps. But what the commission cannot do, he maintains, is draw legislative maps that apportion the state's population unequally because it wants to favor one political party.

The commission and the federal government, which filed a "friend of the Court" brief supporting the commission, are reluctant even to concede that partisanship might have played a role in the Arizona redistricting. The United States, for example, points out that "Arizona's plan gave Republicans slightly more than their proportionate share of seats in the state legislature," while the commission adds that "[e]lections under the map have mirrored the state's party registration and, if anything, Republicans have modestly overachieved." Moreover, they note, the Supreme Court's cases create a presumption that redistricting plans do not violate the principle of "one person, one vote" as long as the deviation between the largest and smallest districts from the ideal equal population does not exceed ten percent, and here the maximum deviation is only slightly under nine percent, with the average deviation only 2.2%. Such a rule, the commission emphasizes, is intended to preserve the states' sovereignty in governing its own electoral affairs and to protect them from "endless superintendence by federal courts."

Harris counters that it is irrelevant that none of the districts deviate more than ten percent from the ideal equal population for legislative districts. The Supreme Court, he argues, "never held that there is any safe harbor for" the breach of the "one person, one vote" principle. Rather, he continues, a redistricting scheme can deviate from the ideal equal population only when it does so to advance "legitimate justifications" such as "compactness, contiguity, and preserving political subdivisions and communities of interest." Partisan considerations do not fall into that category, particularly when the maps are being drawn by "an unelected and politically unaccountable body such as the commission."

The commission and the United States respond that what the challengers describe as partisanship was actually a "good faith" effort to comply with the Voting Rights Act. Until 2013, when the Supreme Court issued its decision in a case called *Shelby County v. Holder*, Arizona could not put a redistricting plan into effect unless it received approval – known as "preclearance" – from either the U.S. Department of Justice or a panel of three federal judges located in Washington, D.C. The Voting Rights Act would allow preclearance only if Arizona could show that the proposed redistricting scheme would not make it more difficult for racial minorities to elect their preferred candidates.

The commission tells the Justices that, in earlier redistricting efforts, "Arizona had never obtained preclearance on its first attempt." Because of what the commissioners viewed as the "significant" consequences if its maps did not receive preclearance – including the costs to taxpayers and the prospect that elections would have to use maps drawn by a federal court instead – the commissioners' top priority was to obtain preclearance for their maps on the first attempt. And the desire to obtain preclearance, the commission and the United States contend, is exactly the kind of factor that states can legitimately consider in redistricting, and which justifies minor deviations from the ideal population.

This effort to justify the reapportionment is at the heart of the second issue before the Court – whether the commission's desire to comply with the Voting Rights Act and obtain preclearance justifies a departure from the general "one person, one vote" principle. Harris and Reagan argue that nothing in the Voting Rights Act requires states to distribute their population unequally to receive preclearance. But if it did, Reagan continues, the constitutional principle of "one person, one vote" would trump that requirement.

Even if the Voting Rights Act might have once served as a valid reason for the commission to draw a legislative map that does not distribute the population evenly, Harris and Reagan add, that changed with the Court's 2013 decision in *Shelby County*. Because the Court invalidated the part of the Voting Rights Act that was used to determine which state and local governments needed to obtain preclearance, and Arizona is no longer required to seek preclearance, they contend, a desire to obtain preclearance can no longer justify an unequally apportioned map. Even if the commission drew up the map *before* the *Shelby County* decision, Harris argues, the district court ruled on his challenge *after* that decision: "A court must decide a case consistent with current law. Decisions invalidating unconstitutional laws apply to prior government acts, even when those acts were legal under then-existing law."

The commission counters that the Court's *Shelby County* ruling should not change the result in this case. It argues that Arizona, rather than Harris or the courts, gets to "decide whether and how the state should redraw its legislative maps in light of" the Court's ruling. And the United States cautions that Harris's argument "would place states in an impossible position by requiring them to 'attempt to predict future legal developments and selectively comply with voting rights law in accordance with their predictions or 'risk invalidation of their redistricting plans years later.'"

The impact of this case of course hinges on how the Court rules. A ruling for the commission would leave the current maps in effect and reinforce that states have some leeway in redistricting as long as they don't deviate too far from equally populated districts. On the other hand, a ruling for Harris could have much broader ripple effects. In a "friend of the Court" brief filed in support of the commission, a group of former Justice Department officials note that, as of 2010, "all or parts" of sixteen states were required to obtain preclearance for their redistricting maps. If the Court were to rule that a desire to obtain preclearance did not justify deviations from equally populated districts, the officials warn, "over a thousand redistricting plans would be open to legal challenges, creating massive instability in the political process in States throughout the nation."

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