LITIGATING UNDER THE VOTING RIGHTS ACT AFTER THE TEXAS REDISTRICTING CASES

BY FRANITA TOLSON

Two recent cases—*Perry v. Perez* and *Perry v. Davis,* commonly referred to as the *Texas Redistricting Cases*—represent the latest saga surrounding challenges to Texas' state legislative and congressional redistricting plans.[1] Texas is no stranger to controversy involving redistricting in the state. In 1993, Republicans challenged the state's redistricting plans as unconstitutional partisan gerrymanders in violation of the Equal Protection Clause.[2] In that litigation, the Republican Party of Texas also alleged that the plans violated the Voting Rights Act (VRA) of 1965. The VRA is a federal law designed to prevent electoral disenfranchisement on the basis of race, both by creating a cause of action in § 2 of the VRA to challenge state redistricting plans as discriminatory and requiring certain states, including Texas, to "pre-clear" any changes to their electoral mechanisms with the federal government pursuant to § 5 of the statute.[3] In 2003, the Democratic Party of Texas challenged the state's mid-decade redistricting plan on the same grounds that Republicans had used more than 10 years earlier, although the Democrats met with more success than their predecessors.[4]

Now, in this decade, the *Texas Redistricting Cases* are the latest chapter in this long-running drama, an ode to Texas' attempt to reconcile the booming growth of its left-leaning minority population with the ongoing shift to the right in the partisan composition of current residents. Although similar in many respects to the litigation that has occurred in prior decades, these cases raise new issues that will affect how Voting Rights Act claims are prosecuted going forward. In these cases, the U.S. Supreme Court adopted a new standard of review to determine how much deference a district court that is hearing a challenge under § 2 of the VRA must show to the state's redistricting maps when drawing interim maps to govern pending elections, even though the state's maps have not been pre-cleared with the federal government as required by § 5 of the act. The Court held that the district court has to defer to the state-drawn maps unless there is a "likelihood of success" that constitutional and statutory challenges to the map will succeed and there is a "reasonable probability" or "not insubstantial" chance that the plan will not be pre-cleared.[5]

This article argues that this new standard undermines the pre-clearance regime specified in § 5 of the Voting Rights Act—in particular by focusing primarily on the first part of the Court's new standard: "likelihood of success." In adopting this standard, the Court was trying to mirror the approach taken in its preliminary injunction cases, which look at the "likelihood of the success" of the merits of a claim when determining whether to grant an injunction.[6] This comparison to the preliminary injunction context gives the impression that the Court has set a low evidentiary bar for plaintiffs alleging that the state's plan violates the Voting Rights Act or the U.S. Constitution and therefore should not influence the district court's interim redistricting plan. Despite its familiar language, however, it is likely that the "likelihood of success" standard will be interpreted by reference not to the preliminary injunction cases but rather the "strong basis in evidence" standard that the Court currently employs in cases under the Equal Protection Clause of the 14th Amendment, Title VII of the Civil Rights Act of 1964, and its redistricting jurisprudence more generally.

The "strong basis in evidence standard" requires that the state establish what is essentially a prima facie case of discrimination—that it had to engage in race-based decision-making that would otherwise violate the Equal Protection Clause to avoid liability for discrimination of its own creation.[7] Similarly, if a plaintiff wants the state to engage in race-based decision-making in the redistricting context, normally he or she has to establish that the district is required by the Voting Rights Act because of this presumption against the official use of race. Thus, under the new approach outlined in the decision handed down in the *Texas Redistricting Cases*, for plaintiffs to show that the district court should disregard the state's plan because of a potential violation of the Voting Rights Act, their evidentiary burden is likely to be similar to the "strong basis in evidence" standard used in other contexts, including redistricting, when the state is required to engage in race-based decision-making.

After a brief introduction to the Voting Rights Act and the facts of the *Texas Redistricting Cases*, this article will discuss two cases involving the Equal Protection Clause and Title VII of the Civil Rights Act—*City of Richmond v. J.A. Croson Co.* and *Ricci v. DeStefano*—which involve the scope of the state's obligations to engage in race-based remedial measures that are normally prohibited under the Equal Protection Clause of the Constitution. These cases are, in essence, the other side of the *Texas Redistricting Cases* coin, which also deal with giving states room to enact their policy preferences in the face of the conflicting constitutional and statutory mandates that govern the redistricting process. In addition, the *Croson* and *Ricci* cases deal with many of the same power struggles between minority groups and the state as those that emerge in the redistricting context. The discussion in the section dealing with the "strong basis in evidence" standard bolsters this comparison by showing how that standard is already used in the redistricting context, making it even more likely to influence what "likelihood of success" will mean going forward.

Because of the similarities between these cases and the constitutional presumption against the governmental use of race, it is probable that "likelihood of success" will not be interpreted as the low level of proof akin to that required in the preliminary injunction context. This low level of proof would not account for the Court's attempt in the *Texas Redistricting Cases* to accommodate the conflicts that arise between minority groups seeking to maximize their electoral success at each other's expense on the one hand, and to defer to the state's authority over elections on the other. Given this tension, the standard will defer less to plaintiffs, as a "likelihood of success" approach might require, and will fall closer to the "strong basis in evidence" end of the spectrum in order to protect the state sovereignty interests that the Court believes are being impermissibly sacrificed by court-drawn plans that do not defer to a state's policy preferences.[8]

The last section of this article argues that the Court's concerns about judicial competency and protection of state sovereignty are inconsistent with a low standard like "likelihood of success," which would make it easier for plaintiffs to challenge a state's redistricting plan. A higher evidentiary threshold is the only way to protect the federalism interests that, according to the Court, are seriously threatened when state-drawn plans are ignored, even if these plans are ultimately deemed to violate minority rights. This article concludes by exploring the implications of the *Texas Redistricting Cases* and what "likelihood of success" will mean for litigants.

The Voting Rights Act, Pre-clearance, and a "New" Approach

Section 5 of the Voting Rights Act requires certain jurisdictions, mostly in the deep South, to pre-clear any change to their electoral mechanisms with the federal government before the change can go into effect in order to ensure that the changes do not "retrogress"—that is, reduce the ability of a minority group to elect its candidate of choice. The VRA, one of the most successful civil rights statutes in history, minimizes the discrimination in voting that had historically prevented minority groups from electing candidates who would protect their interests in local, state, and federal legislative bodies. In recent years, the Supreme Court has attacked § 5 of the VRA, ruling that it imposes significant federalism costs on the states because states often have trouble complying with the sometimes contradictory requirements of the Voting Rights Act, the Constitution's prohibition on racial discrimination, and requirements of their respective state laws.[9] One of the recent challenges raised by the regulatory regime established in § 5 is determining what constitutes "non-retrogression" when the interests of different minority groups conflict or, even more important, when there is a conflict between § 5 of the act and the other widely used provision of the act—§ 2, which prohibits any practice that abridges the right to vote on the basis of race or color. A minority group alleges a successful § 2 claim when their legislative district is dismantled, preventing them from electing their candidate of choice.[10] The combination of these factors frames the background of the current controversy over redistricting in Texas, which culminated in the recent Supreme Court decision in the *Texas Redistricting Cases*.

At issue in the Court's decision in these cases are Texas' state legislative and congressional redistricting maps, which were challenged by various minority activist groups and individual plaintiffs as violating § 2 of the Voting Rights Act. Simultaneous to the challenge under § 2, Texas had submitted the plans to the federal government for pre-clearance, as required by § 5 of the VRA. Because the plans had not been pre-cleared, the district court that was hearing the § 2 challenge drew interim maps that would govern the primary elections until both the § 2 and § 5 issues could be resolved. The state filed an emergency appeal to the U.S. Supreme Court, arguing that the district court was obligated to defer to the state-drawn maps that had not been pre-cleared in drawing its interim maps.

The Supreme Court agreed with the state and held that the district court was required to defer to the state-drawn maps that had not been pre-cleared unless legal challenges to the plan are shown to have "a likelihood of success" on the merits.[11] What this "likelihood of success" standard means in the redistricting context is uncertain because it is not clear how strong the likelihood must be that the plan violates the Voting Rights Act before the district court can depart from the state-drawn plan.[12] In particular, disputes between African-American and Latino plaintiffs about whether specific districts violate § 2 of the Voting Rights Act demonstrate the difficulty of implementing the standard articulated by the Supreme Court.[13] As the next section of this article shows, guidance will not come from cases in the preliminary injunction context, but rather from the contexts in which the Court has faced a conflict between multiple racial groups and different statutory and constitutional provisions—Title VII, the Equal Protection Clause, and the redistricting cases themselves. This analysis illustrates that "likelihood of success" probably will mean "strong basis in evidence" going forward, and as

such, is inappropriate to resolve redistricting disputes in this context, because it undervalues the interest that minority groups have in equality of representation, as embodied by the pre-clearance regime defined in § 5.

"Likelihood of Success" as a "Strong Basis in Evidence": The Case Law

This section traces the use of the "strong basis in evidence" standard in the Court's equal protection, employment discrimination, and redistricting cases, and explains why it is likely that, despite the Court's attempt to rely on the preliminary injunction standard, "likelihood of success" will be equated to "strong basis in evidence" in future redistricting cases.

"Strong Basis in Evidence" in the Employment Discrimination and Equal Protection Context

In *Ricci v. DeStefano*, the Supreme Court held that the city of New Haven violated Title VII, a statute that forbids discrimination in employment, after it administered an exam to determine promotions of fire department employees and later opted not to use the exam because the white candidates had scored higher on the exam than the minority candidates had.[14] The city threw out the test results because it believed that the minority candidates would sue under the disparate impact provisions of Title VII if the test were used.[15] Instead, after the city threw the test out, white and Hispanic candidates filed suit, alleging violations of both Title VII and the Equal Protection Clause. The Court held that the city's failure to certify the test constituted disparate treatment based on race in violation of Title VII.[16] According to the Court, the only time an employer can engage in such discrimination is if the employer has "a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."[17] The Court argued that the standard was not met in this case, because the examination was job-related and consistent with business necessity and because there were no equally valid testing alternatives that were less discriminatory—all of which are factors that constitute a full defense to a claim of disparate impact.[18]

Although the Court did not resolve the equal protection issue in *Ricci,* the "strong basis in evidence" standard is also used in this area of the Court's jurisprudence because states are allowed to remedy past discrimination with race-based measures when "there is a strong basis in evidence that the remedial actions" are necessary.[19] In *City of Richmond v. Croson*, where the Court invalidated a set-aside program for minority contractors in the construction industry, the Court described a "strong basis in evidence" as evidence "approaching a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry,"[20] as sufficient to withstand strict scrutiny.[21] In 1983, the Richmond City Council adopted a minority set-aside plan requiring its contractors to subcontract at least 30 percent of the dollar amount of the contract to businesses that were at least 51 percent minority-owned and operated.[22] The Richmond City Council adopted this program because only 0.67 percent of the city's prime construction contracts had been awarded to minority businesses in the five-year period from 1978 to 1983.[23] Because there was no evidence that specific companies within the industry had actually discriminated, the "strong basis in evidence" standard was not met.

Ricci and *Croson* illustrate that the "strong basis in evidence" standard means something more than "reasonable probability" or "not insubstantial" and is more akin to something approaching a prima facie case. By requiring this level of proof, one can eliminate the perception that one politically powerful minority is using the power of the state to benefit itself at the expense of a less powerful group, and it does so without undermining the state's regulatory authority to act, if appropriate.[24] In *Ricci*, there was significant evidence that the tests were not required by business necessity and that the potential disparate impact claim against the city of New Haven would have succeeded, but the Court concluded that the city had not established that it would have faced an essentially prima facie case of employment discrimination under Title VII's disparate impact provisions. Similarly, in *Croson,* the Court ignored the fact that minorities had been excluded from the construction industry and trade associations and that the city had deliberately avoided awarding contracts to minority contractors for decades.[25] This evidence was inadequate to establish the "strong basis in evidence" needed to justify the use of a race-based classification designed to aid minority groups in the construction industry.

"Strong Basis in Evidence" as a Redistricting Principle

The "strong basis in evidence" standard has also played a role in the redistricting context to determine the scope of the state's obligations to minority plaintiffs during the redistricting process. In *Miller v. Johnson*, the Court invalidated Georgia's Eleventh congressional district on the grounds that race was the predominant factor in the drawing of the district, which violated the Equal Protection Clause. In finding the constitutional violation, the Court assumed, without deciding, that compliance with § 5 of the Voting Rights Act could provide a compelling state interest that justifies the state's reliance on race in constructing the districts.[26] The Court determined, however, that, because minority political power had not "retrogressed" under the new plan, the Eleventh District was not required under § 5. Similarly, in *Bush v. Vera*, the Court assumed, without deciding, that compliance with § 2 of the Voting Rights Act is a compelling state interest that justifies the use of race in constructing legislative districts. Notably, Justice Sandra Day O'Connor, who wrote both for the majority and separately, argued that the state must have a "strong basis in evidence" to conclude that remedial action, or the creation of majority-minority districts to remedy alleged vote dilution, is necessary.[27] Here, the "strong basis in evidence" standard was essentially a prima facie case of vote dilution under § 2 of the Voting Rights Act. *Miller* and *Bush* thus make it unlikely that "likelihood of success"—which is also used to determine whether there is a cognizable § 2 or § 5 claim that permits the district court to depart from

the state's redistricting plan that was not pre-cleared—will mean anything other than "strong basis in evidence."

The *Texas Redistricting Cases* have opened the door for the "strong basis in evidence" standard to be further ingrained in the redistricting context without appropriately considering how deferring to plans that have not been pre-cleared based on *any* level of proof would undermine the regime set forth in § 5 of the VRA. The Court suggested that the need to avoid judging the merits of the pre-clearance process requires the lower courts to take guidance from the state plan unless the plan stands a "reasonable probability of failing to gain section 5 preclearance," which the Court defines as the § 5 challenge not being "insubstantial."[28] Yet the Court's approach ignores the fact that redistricting plans for covered states do not have any legal validity until pre-clearance is granted.

In *Branch v. Smith,* for example, the Supreme Court described a plan drawn by a state court that the state itself was "seeking to administer" within the meaning of § 5 of the Voting Rights Act as not "enforceable by operation of law" because it was not approved by the U.S. attorney general within 60 days of its submission, as required by the statute.[29] This is the reason for the pre-clearance requirement—it prevents a plan that might be legally deficient from having the force of law until the U.S. attorney general can determine whether the redistricting plan comports with the VRA. By ignoring the importance of pre-clearance, the "likelihood of success" standard represents a trade-off in rights that is not justified by the Voting Rights Act or the U.S. Constitution by allowing a potentially retrogressive plan that has not been pre-cleared and has no legal force to dictate electoral outcomes unless the plaintiff can establish what is essentially a prima facie case of discrimination under § 2 of the Voting Rights Act. However, this determination is not appropriate at this stage because it defeats the pre-clearance inquiry by allowing elections to take place under a plan that a district court or the Department of Justice may later determine violates § 5, and it can result in potentially inconsistent dispositions with regard to the legality of the proposed plan under § 2.[30]

Indeed, under a "likelihood of success" standard, a lower court could conceivably craft a redistricting plan that is made up of valid court-drawn districts and invalid state-drawn districts, or districts that could later be found to violate the Voting Rights Act. The Supreme Court suggests that lower courts should not draw new minority districts to increase the influence of minority groups, unless the court determines that the plaintiffs have established "a likelihood of success" on their claim that the district is required by § 2.[31] The Court made this compromise in order to balance the deference that it believes states deserve in the drawing of district lines with the Voting Rights Act's protection of minority power; yet, for this reason, it is likely that the balance would require that "likelihood of success" fall much closer to the "strong basis in evidence" standard in order to accommodate the Court's emphasis on the importance of state sovereignty.[32]

The Court's deference to state policy choices in the redistricting context defies a reading of "likelihood of success" (or even, arguably, "reasonable probability" or "not insubstantial") that could result in a lower evidentiary threshold for plaintiffs, even though the state interests have no independent legal force and potentially undermine minority power. A similar situation arises in the context of employment discrimination and equal protection when, as here, there is a conflict between a constitutional or statutory provision (in this case, § 5 of the VRA) and the state's interests (in this case, its sovereignty over elections). Usually, the Court will find against the state actor only when it has, in the Court's view, misinterpreted the scope of its relevant statutory and constitutional obligations. Otherwise, the Court is extremely deferential to the state and yields to legitimate state interests. For example, in *Ricci,* the Court acknowledged that the disparate impact and disparate treatment provisions of Title VII inherently conflict with each other because a potential disparate impact claim by African-American and Latino firefighters who did poorly on the exam "would violate the disparate-treatment prohibition of Title VII absent some valid defense." In this scenario, avoiding disparate treatment liability could be a defense that justifies using race-conscious measures that would otherwise discriminate against the white firefighters who did well on the exam.[33] But in *Ricci,* the city did not have a legitimate interest in avoiding Title VII liability because the disparate impact claim would not have succeeded. Similarly, in *Croson*, race-based decision-making that would otherwise violate the Equal Protection Clause could be justified by remedial action designed to address specific acts of past discrimination. Yet the Court determined that the city of Richmond did not have a legitimate interest in eradicating discrimination against minorities in the construction industry because there was no evidence that the city was directly responsible for the racial disparities in the industry.

In contrast, there is no legitimate state interest that emerges from a non-pre-cleared redistricting plan because § 5 "suspends" any change to state law pending approval by the Department of Justice or the district court. Even though there is some precedent for judicial deference to state policies when constructing court-drawn redistricting plans, the plans at issue in the earlier cases, unlike the Texas plans, were *legally valid*.[34] In *Upham v. Seamon*, for example, the Supreme Court held that a district court erred when it redrew the boundaries of districts to which the Department of Justice had not objected, instead of redrawing just the districts against which the attorney general had lodged objections.[35] *Upham* held that the district court should defer to the state plan when the Department of Justice has not objected to remaining districts in the plan because the rest of the plan is legally valid.[36] In contrast, in the *Texas Redistricting Cases*, the pre-clearance proceedings were still in progress, suggesting that no deference was required. Deferring when there has been some official determination of whether the plan comports with § 5, which is what occurred in earlier cases, is very different from deferring in cases in which no such determination has been made.

A state cannot have a legitimate interest in something that is not in effect and therefore has no force of law.[37] Allowing a plan that has not been pre-cleared to influence the draw-

ing of interim districts circumvents the purposes of § 5, which is to prevent any changes until such changes can be approved. Moreover, if "likelihood of success" is interpreted to mean "strong basis in evidence," then the plaintiffs will have even more difficulty vindicating their rights.

"Strong Basis in Evidence": Undermining the Judicial Role in the Name of State Sovereignty

In addition to the serious evidentiary issues raised by the Court's ruling in the *Texas Redistricting Cases,* the "likelihood of success" standard calls into question the propriety of judicial involvement in the crafting of temporary redistricting plans, even though federal law explicitly assigns this role to courts when the legislature has failed to draft a legal plan.[38] This is an unusual outcome, as district courts are governed by the same constitutional and statutory requirements as the legislature.[39] Moreover, court-drawn plans are most often remedial in nature, which inherently limits the court's authority.[40] Requiring courts to defer to plans that are not legal and have not been pre-cleared undermines the ability of courts to protect voters' rights until the legislature can comply with its constitutional and statutory obligations.

A significant amount of precedent supports the judiciary's ability to draw redistricting plans independent of those drawn by the legislature. Indeed, the early cases mandating judicial involvement in the process of crafting redistricting plans concerned state-drawn plans that were not legal because of their failure to comport with the principle of "one person, one vote," which requires equal population in districts.[41] This justification for judicial involvement applies with equal force in the context of a redistricting plan that does not comply with § 5 of the Voting Rights Act, given that the Supreme Court has accepted the premise that courts can, like the legislature, draw districts in order to comport with constitutional and statutory mandates.[42] In its ruling in the *Texas Redistricting Cases,* the Court opted to take an approach that would give legal force to plans that have not been pre-cleared, not only because of concerns regarding judicial competency, but also because of concerns about the potential federalism costs of § 5. This concern about state sovereignty led the Supreme Court to task the district court with the impossible job of drawing a redistricting plan that defers to the state's policies, without using those aspects of the plan that violate the VRA or the Constitution, but also without wading into the merits of whether the plan should be pre-cleared, which, oddly, is a determination that is made on whether the plan violates the VRA or the Constitution.[43]

This confusing approach is unnecessary and unwarranted. Congress, in passing the Voting Rights Act initially in 1965, made the appropriate federalism calculation in its decision to require pre-clearance before states could implement any changes to their electoral scheme. Congress reinforced this calculation when it decided to renew § 5 in 2007 and also when it opted not to disturb the judiciary's ability to draw districts when legislatures failed to do so. Yet these federalism concerns continue to drive the Supreme Court to undermine this regulatory regime in the interest of protecting the states.[44] Any cognizable constitutional concerns should be entertained in a direct challenge to the constitutionality of § 5, rather than narrowing its reach in a way that undermines the purposes of the statute as the Court did in the *Texas Redistricting Cases*.[45] We do not need the judicial gamesmanship that is the *Texas Redistricting Cases* to avoid confronting the constitutional questions presented by the Voting Rights Act.[46]

Conclusion

If the "likelihood of success" standard is interpreted to require plaintiffs to come forward with prima facie evidence—similar to the "strong basis in evidence" standard used in the equal protection/employment discrimination/redistricting context—the outcome will be an affront to a statute that is responsible for most of the minority gains that have been achieved in the political arena. Despite its familiarity, the standard poses unique problems because the conflicts between groups and the conflicting statutory and constitutional mandates do not easily lend themselves to a standard that, by its terms, is deferential toward plaintiffs. This is particularly true here because the decision in the *Texas Redistricting Cases* is one in which the Court obviously deferred to the state. Thus, one cannot ignore the likelihood that lower courts will draw on other contexts that pose many of the same problems as redistricting—equal protection and employment discrimination—in determining what the standard means. In the end, "likelihood of success" will be a high standard of proof that will probably result in wholesale deference to the state's non-pre-cleared redistricting plan, undermining both the mandates of § 5 and the overall purposes of the Voting Rights Act.

Attorneys litigating in this area will need to structure their cases in a way that accounts for the presumption of legality accorded to state redistricting plans, a presumption that the Supreme Court has created by trying to incorporate the "likelihood of success" standard into the redistricting context. In other words, for purposes of § 2, attorneys will have to assume that the state redistricting plans that have not been pre-cleared are presumptively valid and that any challenges require plaintiffs to meet a standard similar to the "strong basis in evidence" standard currently employed in the Court's equal protection/Title VII/redistricting cases. The "strong basis in evidence" standard used in those cases is designed to address situations in which groups have disparate interests and can challenge state action based on legal theories that are in tension with each other. Hence, minority plaintiffs, in particular, should not assume that their interests are aligned. As the Texas redistricting illustrates, African-American and Latino plaintiffs may have very different ideas of what constitutes a prima facie violation of the Voting Rights Act—a conflict that could lead a reviewing court to defer even more to the original plans drawn by the state, even if the plans are ultimately deemed to be retrogressive in violation of the act. **TFL**

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