

Step Zero” question — to what cases *Chevron* applies at all — to the forefront of administrative law, holding that no agency deference is warranted when Congress has not delegated to agencies the power to interpret statutes by issuing rules with the force of law.<sup>95</sup> *Home Concrete* took *Mead*’s core principles — that ambiguity does not always imply congressional intent to delegate, and that this intent, not statutory ambiguity, is the key to deference — and applied them to *Brand X*, at least where the earlier case precedes *Chevron*.<sup>96</sup> This approach will require a messy inquiry into what Congress intended, but this inquiry may be more useful than examining whether the previous court found a statute ambiguous. *Home Concrete* thus carves out another exception to *Chevron*’s familiar two-step. But unlike *Mead*, which at least generally implied that rules issued through notice and comment would receive deference,<sup>97</sup> *Home Concrete* did not expressly define the scope of the exception it creates. If read expansively, *Home Concrete* could alter the *Brand X* analysis for post-*Chevron* cases as well.

For the reasons discussed above, *Home Concrete* will not likely be read so broadly. But *Home Concrete*’s plurality signals the growing force and reach of *Mead*’s approach to administrative law. While *Home Concrete* and its owners may rest easy, observers of administrative law have reason to be cautious.

#### D. Voting Rights Act of 1965

*Redistricting.* — Congress passed the Voting Rights Act of 1965<sup>1</sup> (VRA) to remedy the long history of racial discrimination in voting that had continued to plague the country even after the adoption of the Fifteenth Amendment.<sup>2</sup> Since the VRA’s passage, litigants have wielded the two cornerstone provisions of the VRA to ensure that state legislatures’ redistricting efforts do not obstruct political access for communities of color.<sup>3</sup> Section 2 allows private individuals to bring

<sup>95</sup> See *Mead*, 533 U.S. at 227–31.

<sup>96</sup> Compare *Home Concrete*, 132 S. Ct. at 1843 (plurality opinion), with *Mead*, 533 U.S. at 227–31. As Professor Merrill noted, “*Mead* eliminates any doubt that *Chevron* deference is grounded in congressional intent.” See Merrill, *supra* note 76, at 812. Justice Breyer has long advocated this approach. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372–82 (1986). Justice Scalia and some scholars fiercely object, however. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989) (“*Chevron* . . . replaced this statute-by-statute evaluation ( . . . assuredly a font of uncertainty and litigation) with an across-the-board presumption . . .”); see also Bressman, *supra* note 72.

<sup>97</sup> See *Mead*, 533 U.S. at 233.

<sup>1</sup> Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

<sup>2</sup> See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966).

<sup>3</sup> See generally, e.g., *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (examining litigants’ claims that changes to voting laws not directly related to voter qualifications fell within the purview of section 5).

lawsuits against states or political subdivisions for any “standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”<sup>4</sup> Section 5, the preclearance provision of the VRA, requires that covered jurisdictions<sup>5</sup> gain approval from the Department of Justice (DOJ) or a three-judge panel of the D.C. District Court before implementing changes to any “voting qualification or prerequisite to voting, or standard, practice, or procedure.”<sup>6</sup> Last Term, in *Perry v. Perez*,<sup>7</sup> the Supreme Court held that a three-judge district court faced with the task of evaluating a legislatively drawn map challenged under section 2 had to defer to the judgments of the legislature in creating an interim map unless the section 2 claims had a “likelihood of success on the merits”<sup>8</sup> or a court could find a “reasonable probability” that the plan would not receive section 5 preclearance.<sup>9</sup> By circumscribing the scope of the VRA yet again, *Perez* may signal the Court’s ultimate unwillingness to strike down the VRA in the impending decision about its constitutionality.

Between 2000 and 2010, Texas’s population grew by over four million people.<sup>10</sup> An overwhelming majority of the growth came from communities of color, particularly Latinos.<sup>11</sup> As a result of this growth, Texas received four additional congressional seats and had to undergo redistricting for its state legislative and congressional seats to comply with the “one person, one vote” requirement of the Fourteenth Amendment.<sup>12</sup> The Texas state legislature began the politically contentious redistricting process in the spring of 2011,<sup>13</sup> and the Governor signed the plans into law the following summer.<sup>14</sup> Texas, having been a “covered jurisdiction” under section 4(b) of the VRA since 1972,<sup>15</sup> chose to request preclearance from a three-judge panel of the D.C. Dis-

<sup>4</sup> 42 U.S.C. § 1973(a) (2006).

<sup>5</sup> Jurisdictions subject to preclearance under the VRA include those that maintained poll tests or had less than fifty percent of the population registered to vote or actually vote in the 1972 presidential election. *See id.* § 1973b(b) (2006 & Supp. II 2008).

<sup>6</sup> *Id.* § 1973c(a) (2006).

<sup>7</sup> 132 S. Ct. 934 (2012).

<sup>8</sup> *Id.* at 942.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 939.

<sup>11</sup> *Perez v. Perry*, 835 F. Supp. 2d 209, 214 (W.D. Tex. 2011).

<sup>12</sup> *Perez*, 132 S. Ct. at 939 (per curiam); *see Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) (establishing the one-person, one-vote requirement of the Fourteenth Amendment).

<sup>13</sup> *See* Justin Levitt, *Texas*, ALL ABOUT REDISTRICTING, <http://redistricting.ills.edu/states-TX.php> (last visited Sept. 29, 2012).

<sup>14</sup> *See Texas Redistricting News Archive*, TEX. LEGISLATIVE COUNCIL, [http://www.tlc.state.tx.us/redist/news\\_archive\\_2011.html](http://www.tlc.state.tx.us/redist/news_archive_2011.html) (last visited Sept. 29, 2012) (state legislative map); *82(1) History for SB 4*, TEX. LEGISLATURE ONLINE, <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=821&Bill=SB4> (last visited Sept. 29, 2012) (congressional map).

<sup>15</sup> *See* 28 C.F.R. pt. 51, app. (2011); *see also* 42 U.S.C. § 1973b(b) (2006 & Supp. II 2008).

trict Court.<sup>16</sup> The D.C. District Court denied Texas's summary judgment motion.<sup>17</sup>

An additional wave of litigation predicated upon section 2 claims and equal protection claims under the Fourteenth Amendment accompanied the preclearance request.<sup>18</sup> The plaintiffs alleged that compliance with the VRA required the creation of additional majority-minority districts and that the state's plan resulted in equal protection violations and illegal vote dilution under the VRA.<sup>19</sup>

The District Court for the Western District of Texas, in an opinion by Judges Garcia and Rodriguez, adopted a court-drawn interim map for the Texas House districts.<sup>20</sup> The court began by explaining the difficult procedural posture of the case: since the D.C. District Court had denied Texas's request for summary judgment on preclearance, the Western District was in the "unwelcome position" of creating an interim map so that primary elections could proceed in the state in time for the 2012 general election.<sup>21</sup> Relying on two cases in which states had failed to obtain preclearance in time for elections, the court determined that it had a duty to draw a map for the imminent elections.<sup>22</sup> The court acknowledged that "redistricting is generally a task for legislatures,"<sup>23</sup> but reasoned that since Texas had failed to obtain preclearance the new map could not be lawfully implemented.<sup>24</sup> The court further explained that an entirely court-drawn map was necessary to avoid interfering with the pending preclearance lawsuit.<sup>25</sup>

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<sup>16</sup> See Press Release, Att'y Gen. of Tex. Greg Abbott, Texas Seeks Preclearance for State's Redistricting Plans (July 19, 2011), available at <https://www.oag.state.tx.us/oagnews/release.php?id=3805>.

<sup>17</sup> *Texas v. United States*, No. 11-1303, 2011 WL 5402888 (D.D.C. Nov. 8, 2011). The three-judge panel issued its final decision almost ten months later and concluded that Texas's plans could not be precleared under section 5 because Texas had failed to meet its burden of showing that the maps did not have a retrogressive effect and were not the product of intentional discrimination. *Texas v. United States*, No. 11-1303, 2012 WL 3671924, at \*37 (D.D.C. Aug. 28, 2012).

<sup>18</sup> By the time that Governor Rick Perry signed the State Senate and House plans into law, various minority rights groups had filed nine separate lawsuits challenging the plans. See *Texas Latino Redistricting Task Force, et al. v. Perry (Suit #9)*, TEX. REDISTRICTING (June 17, 2011, 6:54 PM), <http://txredistricting.org/post/6844686971/texas-latino-redistricting-task-force-et-al-v-perry>. Three of the lawsuits were consolidated in the Western District of Texas. *Perez v. Texas*, No. SA-11-CA-360-OLG-JES-XR (W.D. Tex. July 6, 2011).

<sup>19</sup> See, e.g., Complaint at 8–9, *Tex. Latino Redistricting Task Force v. Perry*, No. 5:11-cv-00490 (W.D. Tex. June 17, 2011).

<sup>20</sup> *Perez v. Perry*, 835 F. Supp. 2d 209, 211 (W.D. Tex. 2011).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 212 n.2 (citing *Branch v. Smith*, 538 U.S. 254, 266 (2003); *Lopez v. Monterey Cnty.*, 519 U.S. 9, 24 (1996)).

<sup>23</sup> *Id.* at 212.

<sup>24</sup> *Id.* at 211 & n.1.

<sup>25</sup> *Id.* at 212.

Thus, with its “hands . . . tied,” the court outlined the “neutral” principles that it had employed to draw the interim map.<sup>26</sup> Rejecting both the state- and the plaintiff-proposed maps, the court listed preservation of the status quo,<sup>27</sup> “compactness, contiguity, and respect for county and municipal boundaries” as the criteria that “place[d] the interests of the citizens of Texas first.”<sup>28</sup> Applying these principles, the court drew the map by first adopting the unchallenged districts<sup>29</sup> and then reinstating the fifty pre-2010 majority-minority districts.<sup>30</sup> In addition to these fifty districts, three more majority-minority districts “emerged naturally once neutral districting principles were used.”<sup>31</sup>

Judge Smith dissented.<sup>32</sup> He characterized the majority’s decision as implementing a “runaway plan . . . untethered to the applicable caselaw.”<sup>33</sup> Judge Smith argued that the interim map instead should be determined by deferring to the legislature’s judgments except in cases where the plaintiffs’ claims had a “substantial likelihood of success on the merits.”<sup>34</sup> Following this formula, Judge Smith proposed an alternative map, which would have reinstated only forty-nine of the fifty pre-2010 majority-minority districts.<sup>35</sup>

The Supreme Court vacated and remanded.<sup>36</sup> Having already granted Texas’s request for a stay of the interim plan,<sup>37</sup> the Court concluded in a per curiam decision that the district court’s interim map impermissibly departed from the legislature’s proposed map.<sup>38</sup> The Court began by “emphatic[ally]” reaffirming its dedication to the preclearance process and the notion that covered jurisdictions may not implement new maps until they are precleared.<sup>39</sup> While a previously enacted and precleared plan can normally remain in place, the Court explained that Texas’s immense population growth necessitated an “unwelcome obligation” — the court’s drawing of an interim map.<sup>40</sup> The Court then instructed that “neutral legal principles” were of little

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 213.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 214. The new legislatively drawn map included only forty-five majority-minority districts. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 218 (Smith, J., dissenting).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 221.

<sup>35</sup> *Id.* at 222 (explaining areas of agreement with the majority).

<sup>36</sup> *Perez*, 132 S. Ct. at 944 (per curiam).

<sup>37</sup> *See Perry v. Perez*, 132 S. Ct. 843 (2011).

<sup>38</sup> *Perez*, 132 S. Ct. at 941 (per curiam).

<sup>39</sup> *Id.* at 940 (citing *Clark v. Roemer*, 500 U.S. 646, 652 (1991)).

<sup>40</sup> *Id.* (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)) (internal quotation marks omitted).

use to courts implementing interim plans.<sup>41</sup> Because redistricting is fundamentally predicated on “political judgment,” for which courts are “ill suited,” the Court held that district courts must use newly drawn plans as benchmarks and flatly rejected the district court’s view that it need not defer to the legislature.<sup>42</sup> Thus, the Western District’s decision to substitute wholesale the legislature’s newly drawn maps with the previously enacted pre-2010 Census plan represented a “standard-less decision.”<sup>43</sup>

To further guide the lower court in crafting the interim plan, the Court established two new standards for assessing challenges brought under the Constitution and the VRA.<sup>44</sup> With respect to constitutional challenges and section 2 claims, the Court imported the standard for preliminary injunctions from *Winter v. Natural Resources Defense Council, Inc.*<sup>45</sup>: a court must determine that there is a “likelihood of success on the merits” in order to stray from the legislatively enacted plan for any particular district.<sup>46</sup> With respect to section 5 challenges, the Court held that a district court must find a “reasonable probability” of success on the claims in order to stray from the state’s proposed map.<sup>47</sup> Given the Court’s concerns with the constitutionality of section 5, the Court warned that a less stringent standard would “exacerbate[.]” the potential for “intrusion on state sovereignty.”<sup>48</sup> District courts could “avoid prejudging” the merits of section 5 claims by deferring to state legislatures under the guidance of the new standards.<sup>49</sup> The Court concluded that the district court’s opinion did not clearly employ these standards.<sup>50</sup>

Justice Thomas concurred in the judgment.<sup>51</sup> While he agreed that the court’s decision implementing the interim plan should be vacated and remanded, he reasserted his view that section 5 of the VRA is unconstitutional.<sup>52</sup> Justice Thomas referred readers to his separate opinion in *Northwest Austin Municipal Utility District No. One v. Holder*<sup>53</sup> (*NAMUDNO*), in which he explained that section 5’s extreme

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<sup>41</sup> *Id.* at 941.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Perez*’s facts involved only the drawing of an interim map, but the Court’s language in *Perez* suggests that the new standards likely apply to all section 2 or section 5 claims regardless of whether the map is an interim or a final one. *See id.* at 942.

<sup>45</sup> 129 S. Ct. 365 (2008).

<sup>46</sup> *Perez*, 132 S. Ct. at 942 (per curiam).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *See id.* at 943.

<sup>51</sup> *Id.* at 944 (Thomas, J., concurring in the judgment).

<sup>52</sup> *Id.* at 945.

<sup>53</sup> 129 S. Ct. 2504 (2009).

intrusion on state sovereignty violated the Constitution unless it was justified by an “extensive pattern of [intentional] discrimination.”<sup>54</sup> Because section 5 is unconstitutional, Justice Thomas argued, new standards for interim maps were unnecessary, and “Texas’ duly enacted redistricting plans should govern the upcoming elections.”<sup>55</sup>

As challenges to the constitutionality of the VRA creep closer to the Court,<sup>56</sup> *Perez* represents the most recent in a series of judicially imposed limitations on the VRA.<sup>57</sup> By circumscribing the scope of the VRA yet again, *Perez* and the restrictions that it places on judicial scrutiny of a state’s redistricting efforts may foreshadow the Court’s impending decision about the constitutionality of the VRA. Just as the Court has come to the brink but ultimately balked at other opportunities to strike down hallmark civil rights policies, *Perez* may indicate a similar course for the VRA — one in which the law survives, albeit transfigured by the Court’s successive limitations.

*Perez* may have been a response to what the Court saw as a constitutionally problematic delegation of power to courts in the political arena, but judicial scrutiny of the political process lay at the heart of Congress’s vision for the VRA. Because state legislatures had consistently failed to represent communities of color,<sup>58</sup> Congress, through sections 2 and 5, gave the judiciary the power to deploy standards developed by Congress and to function as a “referee over the political process.”<sup>59</sup> Congress enacted the VRA precisely because the Fourteenth and Fifteenth Amendments had proven insufficient to guard the voting rights of communities of color.<sup>60</sup> Section 5 established consistent supervision of notorious voting rights offenders by establishing preclearance as the new default position.<sup>61</sup> Similarly, the expansion of

<sup>54</sup> *Id.* at 2525 (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>55</sup> *Perez*, 132 S. Ct. at 945 (Thomas, J., concurring in the judgment).

<sup>56</sup> See Steven D. Schwinn, *Shelby County, Nix Take Voting Rights Act Challenge to Supreme Court*, CONST. L. PROF. BLOG (July 24, 2012), <http://lawprofessors.typepad.com/conlaw/2012/07/shelby-county-nix-take-voting-rights-act-challenge-to-supreme-court.html>.

<sup>57</sup> See, e.g., *NAMUDNO*, 129 S. Ct. at 2511–13 (allowing political units that do not register voters to avoid section 5 preclearance requirements); *Thornburg v. Gingles*, 478 U.S. 30, 55–58 (1986) (establishing the racial polarization requirement for section 2 claims).

<sup>58</sup> Attorney General Nicholas Katzenbach testified before the House of Representatives: “Our experience in the areas that would be covered by this bill . . . indicate[s] frequently on the part of State legislatures a desire . . . to outguess the courts of the United States or even to outguess the Congress of the United States.” *Voting Rights: Hearings on H.R. 6400 and Other Proposals to Enforce the 15th Amendment to the Constitution of the United States Before the Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 60 (1965) (statement of Att’y Gen. Katzenbach).

<sup>59</sup> James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 495 (1999).

<sup>60</sup> See *NAMUDNO*, 129 S. Ct. at 2508–09.

<sup>61</sup> See J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 680–81 (2008).

section 2 to include liability for laws that “result[] in a denial or abridgement” of the right to vote<sup>62</sup> expressed Congress’s doubt that intentional discrimination would sufficiently account for the myriad machineries of disenfranchisement. Judicial authority to override the preferences of state legislatures is an important means through which the VRA achieves its goal of representation reinforcement.<sup>63</sup>

Furthermore, a broad reading of the VRA may still be warranted today. First, if voting is “preservative of all rights,”<sup>64</sup> then Congress may be justified in erring on the side of protecting communities of color from the loss of representative power. Electoral disenfranchisement could have a significant multiplier effect on access to other government services: unequal representation could result in worse schools and fewer public resources for communities of color.<sup>65</sup> Second, voting, especially in jurisdictions covered under section 4(b) of the VRA, may not be significantly less racially polarized than at previous times in the nation’s history. Despite the election of the first black President in 2008, racially polarized voting patterns persist.<sup>66</sup>

Notwithstanding the normative gravity of the VRA, the Court has persistently restricted the breadth of the statute. For example, in *Thornburg v. Gingles*,<sup>67</sup> the Court instituted a requirement that plaintiffs making section 2 claims prove racial polarization to establish the need for a majority-minority district.<sup>68</sup> This judicially imposed requirement functions as a self-executing sunset provision: if racially polarized voting is a measure of the lack of political integration of communities of color, then section 2 claims will no longer be actionable once political integration has been achieved.<sup>69</sup> The Court has also circumscribed section 2 by imposing “a restrictive common law of statutory standing” on plaintiffs.<sup>70</sup> If plaintiffs cannot show that a minority opportunity district can be drawn from a compact, single-member district, they will be denied standing.<sup>71</sup> In practice these requirements

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<sup>62</sup> 42 U.S.C. § 1973(a) (2006); see also *Thornburg*, 478 U.S. at 43–44 (describing the legislative history of the 1982 amendments to the VRA).

<sup>63</sup> See Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1306–07 (2012).

<sup>64</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>65</sup> See Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 729 (1998).

<sup>66</sup> See Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1435 (2010) (noting that in states with high black populations, President Obama garnered a lower percentage of the white vote than white Democratic candidates had).

<sup>67</sup> 478 U.S. 30.

<sup>68</sup> See *id.* at 55–63.

<sup>69</sup> Karlan, *supra* note 65, at 741.

<sup>70</sup> Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 169 U. PA. L. REV. 377, 380 (2012).

<sup>71</sup> See *id.*

have been nearly impossible to meet,<sup>72</sup> and section 2 has provided little relief to plaintiffs seeking its aegis in recent years.<sup>73</sup>

Beyond superimposing extrastatutory requirements on the VRA, the Court has increasingly focused on federalism-based concerns about the VRA's overall constitutionality. The Court has articulated its particular concerns with section 5 by questioning whether Congress has the power to require states to preclear changes to voting laws.<sup>74</sup> Under *City of Boerne v. Flores*,<sup>75</sup> Congress has the power to enact remedial legislation under the Fourteenth Amendment only insofar as there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>76</sup> Scholars have suggested that the *Boerne* test may be both the standard by which the Court will assess whether the VRA's federalism costs are justified and the harbinger of the VRA's eventual demise.<sup>77</sup>

The *Perez* plaintiffs' claims implicated yet another set of constitutional issues — separation of powers.<sup>78</sup> By asking a federal court to draw a new map despite the existence of a legislatively enacted map, the plaintiffs requested judicial involvement in an area constitutionally reserved to state legislatures.<sup>79</sup> Since the Warren Court waded into the thicket of election law,<sup>80</sup> the Court has grown increasingly wary of judicial involvement in elections.<sup>81</sup> Indeed, the *Perez* Court looked askance at the lower court's profession of "neutral principles."<sup>82</sup>

<sup>72</sup> See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1244–46 (2009) (plurality opinion) (rejecting a section 2 challenge on compactness grounds); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 445–47 (2006) (plurality opinion) (rejecting the notion that a section 2 challenge can be predicated on the mere "influence" of a racial minority group).

<sup>73</sup> See, e.g., Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1140–41 (2007).

<sup>74</sup> See *NAMUDNO*, 129 S. Ct. 2504, 2511–13 (2009).

<sup>75</sup> 521 U.S. 507 (1997).

<sup>76</sup> *Id.* at 520.

<sup>77</sup> See Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL'Y 125, 136–38 (2010) (arguing that *Boerne* "should have civil rights advocates on edge," *id.* at 136); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1736–37 (2001) (discussing the constitutionality of section 2 of the VRA after *Boerne*).

<sup>78</sup> See Fuentes-Rohwer, *supra* note 77, at 138. Of course, *Perez* involved a federal court's power over a state's redistricting decisions, and thus also implicated federalism concerns. Still, the Court's analysis and eventual solution primarily addressed the separation of powers concerns. See *Perez*, 132 S. Ct. at 941 (per curiam).

<sup>79</sup> See *Perez*, 132 S. Ct. at 940 (per curiam) ("Redistricting is 'primarily the duty and responsibility of the State.'" (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975))).

<sup>80</sup> See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) (holding that poll taxes violate the Equal Protection Clause); *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) (establishing the one-person, one-vote standard).

<sup>81</sup> See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion).

<sup>82</sup> *Perez*, 132 S. Ct. at 943 (per curiam) (quoting 1 Joint Appendix at 170, *Perez*, 132 S. Ct. 934 (No. 11-713), 2011 WL 6469738, at \*170) (internal quotation mark omitted). *Vieth v. Jubelirer*,



The Court's introduction of the "likelihood of success" standard for section 2 claims and the "reasonable probability" standard for section 5 claims appears to further cabin the authority of federal judges under the VRA and continues the Court's trend of narrowing the VRA's substantive protections. These new standards ensure that plaintiffs seeking to invalidate a state's redistricting decisions must meet a high threshold at a very specific level of generality before a court will incorporate their challenges into an interim map. Taking Texas as an example, the *Perez* plaintiffs challenged thirty-one of the state House districts drawn by the legislature.<sup>83</sup> Under the Court's new standard, a lower court is required to examine the section 2 claims with respect to each of these districts and evaluate whether the "likelihood of success" standard is met.<sup>84</sup> If it is not, then the court must accept the legislature's proposal. Given the new standards, *Perez* will likely result in a dwindling role for federal courts in drawing redistricting maps.<sup>85</sup>

Just as the Court has slowly circumscribed the protections of the VRA, other civil rights measures have suffered a similar fate. Title VII offers one powerful example of the Court's reshaping of civil rights legislation in the image of its conservative constitutional principles. As with the VRA's requirements for political jurisdictions, Title VII had long been understood to require employers to address racial inequality.<sup>86</sup> But the Court has established higher burdens of proof for institutions seeking to implement racial remedies in the Title VII context. In *Ricci v. DeStefano*,<sup>87</sup> the Court dealt with the warring impulses of Congress's desire to create disparate impact liability under Title VII and the Court's increasing preference for viewing all race-based classifications as a form of disparate treatment.<sup>88</sup> As in *Perez*, the Court's solution was to impose a new standard: government employers had to have a "strong basis in evidence" that the disparate impact prong of Title VII was being violated in order to engage in remedial action based on racial classifications.<sup>89</sup> Thus, both *Perez* and *Ricci* gave voice to the increasingly conservative constitutional juri-

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541 U.S. 267, and *Perez* are of the same ilk: the Court's concern with the federal district court's drawing of new maps in *Perez* emanates from a deep skepticism toward the federal judiciary's ability to play a role in essentially political functions. See Elmendorf, *supra* note 70, at 414–15.

<sup>83</sup> See *Perez v. Perry*, 835 F. Supp. 2d 209, 213 (W.D. Tex. 2011).

<sup>84</sup> See *Perez*, 132 S. Ct. at 944 (per curiam) (detailing the district court's failure to examine the viability of individual districts under section 2 and section 5).

<sup>85</sup> See *Perez v. Perry*, No. SA-11-CV-360, 2012 U.S. Dist. LEXIS 92479, at \*55–94 (W.D. Tex. Mar. 19, 2012) (applying the new standards on remand).

<sup>86</sup> See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (explaining that even facially neutral employment practices cannot be utilized if they have a discriminatory effect).

<sup>87</sup> 129 S. Ct. 2658 (2009).

<sup>88</sup> See *id.* at 2673.

<sup>89</sup> *Id.* at 2675–76.

sprudence of the Court. In *Ricci*, the standard limited an employer's discretion to rectify a disparate impact, thereby solidifying the notion that even benign attempts at addressing racial inequality are impermissible racial classifications. Similarly, *Perez* limited the authority of judges to rectify unequal political access, thereby repudiating the notion that courts could neutrally engage in representation reinforcement.

The Court's decisions regarding affirmative action programs at public universities have followed a similar trajectory. Like the VRA and the Civil Rights Act, affirmative action in higher education was born out of the civil rights era,<sup>90</sup> and these policies have helped to desegregate universities throughout the South.<sup>91</sup> And, as with the VRA, the Court has slowly placed more and more restrictions on its use. The Court began by striking down the use of quotas.<sup>92</sup> Later, the Court held that giving university applicants additional points on the basis of their race was impermissible<sup>93</sup> but that an individualized assessment that took race into account was permissible.<sup>94</sup> And, following *Thornburg's* example, the Court hinted that the need for affirmative action would sunset in a generation.<sup>95</sup>

Of course the Court has taken this approach before with the VRA itself. Most recently, the Court discussed the constitutionality of section 5 when a small utility district in Texas sought to "bail out" of section 5's coverage.<sup>96</sup> Section 4 of the VRA contains a set of requirements that a "State or political subdivision" must meet in order to bail out of section 5 preclearance.<sup>97</sup> The bail-out procedures had been generally considered to be available to "counties, parishes, and voter-registering subunits," in addition to states.<sup>98</sup> *NAMUDNO's* strained reading of section 4(b)<sup>99</sup> allowed even political jurisdictions that do not register voters to bail out, effectively decreasing the breadth of section 5's coverage in the name of federalism.<sup>100</sup>

<sup>90</sup> See Corinne E. Anderson, Comment, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 190-91 (1999).

<sup>91</sup> See Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1767 (2004).

<sup>92</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978) (opinion of Powell, J.).

<sup>93</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

<sup>94</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

<sup>95</sup> *Id.* at 343.

<sup>96</sup> *NAMUDNO*, 129 S. Ct. 2504, 2508, 2512 (2009). "Bail out" refers to the procedure whereby covered jurisdictions can seek to be removed from section 5's preclearance requirements.

<sup>97</sup> 42 U.S.C. § 1973b(a)(1)(A) (2006 & Supp. II 2008).

<sup>98</sup> *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 232 (D.D.C. 2008), *rev'd*, 129 S. Ct. 2504.

<sup>99</sup> See Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 204-05.

<sup>100</sup> See *NAMUDNO*, 129 S. Ct. at 2511-13; *see also Perez*, 132 S. Ct. at 942 (per curiam).

Yet in none of these cases has a majority of the Court been willing to strike down the most important achievements of the civil rights era. In *Ricci*'s wake, the Court recently declined another opportunity to rule on the constitutionality of Title VII's disparate impact provision.<sup>101</sup> In the case of affirmative action in higher education, the Court tinkered with the policy in a long series of cases before it seriously considered striking down the practice altogether.<sup>102</sup> Finally, *NAMUDNO* circumvented the precise issue of section 5's constitutionality by supplying a tortured, extratextual definition of the phrase "political subdivision" and applying constitutional avoidance.<sup>103</sup>

*Ricci*, the affirmative action cases, *NAMUDNO*, and now *Perez* illuminate a trend in the Court's handling of statutes and policies that seek progress on race relations: the Court has created an ever-growing list of restrictions on racially remedial policies but ultimately blinks when the opportunity arises to strike the policies down.<sup>104</sup> *Perez* and its restrictions on judicial authority may be the most recent indication that the VRA will survive the looming battle over its constitutionality,<sup>105</sup> but it may no longer be the VRA that its drafters envisioned. The sum of the Court's limitations on the VRA has substantially diminished the VRA's protections. *Perez* may be the latest in the VRA's death by a thousand cuts.

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<sup>101</sup> See *City of New Haven v. Briscoe*, 132 S. Ct. 2741 (2012) (denying petition for writ of certiorari). Moreover, *Ricci* itself was likely an exercise in constitutional avoidance. See Hasen, *supra* note 99, at 194–95.

<sup>102</sup> Compare *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003), *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003), and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978) (opinion of Powell, J.), with *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 217 (5th Cir. 2011) (upholding the University of Texas's affirmative action program), *cert. granted*, 132 S. Ct. 1536 (2012).

<sup>103</sup> See *NAMUDNO*, 129 S. Ct. at 2513; Hasen, *supra* note 99, at 218–19.

<sup>104</sup> See Hasen, *supra* note 99, at 219 (positing that the Court's desire to avoid harming its own legitimacy by striking down racially remedial policies may animate the Court's use of constitutional avoidance). The D.C. District Court's recent suspicion that Texas had engaged in intentional discrimination, *Texas v. United States*, No. 11-1303, 2012 WL 3671924, at \*37 (D.D.C. Aug. 28, 2012), may also help to convince the Court of the continued necessity of the VRA.

<sup>105</sup> See Schwinn, *supra* note 56.