

Litigation and Defenses: A Practical Perspective

Local government entities often find themselves in the eye of a storm--a litigation storm.

Litigation over County jails and responsibility for providing a defense and indemnification for such litigation,⁵⁶ discrimination in employment, acts or omissions on the part of law enforcement agencies, Voting Rights Act litigation,⁵⁷ sexual harassment and sex discrimination litigation, and litigation under the Americans with Disabilities Act (ADA)⁵⁸ and Age Discrimination in Employment Act (ADEA)⁵⁹ have required and will continue to require the expenditure of much time, money and effort at the County level. State courts are competent to hear and decide civil actions for damages brought under Section 1983, and our Mississippi Supreme Court has recently demonstrated a willingness to address some of the more complex issues of policymaker liability, failure to train, and excessive force. See *Elkins v. McKenzie*, 2003 Miss. LEXIS 585 (Miss. 2003) (1983 action for wrongful death damages based on alleged excessive force by officers in shooting decedent).

⁵⁶See, e. g., *Love v. Sunflower County Sheriff's Dept.*, 2003 Miss. LEXIS 756 (Miss. 2003); *Alexander v. Tippah County*, No. 02-61033 (5th Cir. 2003)(affirming dismissal of excessive force claim for failure to exhaust administrative remedies under Prison Litigation Reform Act, which was held applicable to a county jail, and affirming summary judgment on 8th Amendment conditions of confinement claims brought by two inmates, Court noting "we decline to decide whether 24 hours in the conditions present in the isolation cell violated their 8th Amendment rights.") ; *Phillips v. Monroe County*, 311 F.3d 369 (5th Cir. 2002); *Continental Casualty v. Coregis Ins. Co.*, 313 F. Supp. 2d 673 (S. D. Miss. 2003)(Law enforcement liability insurer of county and sheriff sued by inmate alleging permanent psychological injuries as result of sexual assault in county jail and county's general liability insurer held required to prorate coverage, with each insurer sharing equally the cost of defending and indemnifying the county and sheriff up the policy limits); *State v. Hinds County Board of Supervisors*, 635 So. 2d 839 (Miss. 1994)("This case emphasizes the overcrowding problem faced by jails and prisons throughout the state. Although the cost of housing a state inmate in a County jail apparently exceeds Ten Dollars (\$10.00) per day per prisoner, there is nothing unconstitutional in limiting the amount the State will pay to County jails housing state inmates.")

⁵⁷See, e. g., *Lopez v. Monterey County*, 525 U.S. 266 (1999); *United States v. Board of Supervisors of Warren County*, 429 U.S. 833 (1977); *Prejean v. Foster*, 2003 U.S. App. LEXIS 23939 (5th Cir. 2003); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Foreman v. Dallas County*, 193 F.3d 314 (5th Cir. 1999); *Houston v. Lafayette County*, 56 F.3d 606 (5th Cir. 1995); *Teague v. Attala County*, 17 F.3d 796 (5th Cir. 1994); *Clark v. Calhoun County*, 21 F.3d 92 (5th Cir. 1994); *Lucas v. Bolivar County*, 756 F.2d 1230 (5th Cir. 1985); *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir. 1977); *Cook v. Lockett*, 735 F.2d 912 (5th Cir. 1985); *Dilworth v. Clark*, 129 F. Supp. 2d 966 (S. D. Miss. 2000); *Gunn v. Chickasaw County*, 705 F. Supp. 315 (N.D. Miss. 1989); *Theriot v. Parish of Jefferson*, 185 F.3d 477 (5th Cir. 1999).

⁵⁸J. Vandetta, 'Typhoid Mary' Meets the ADA: A Case Study of the 'Direct Threat' Standard Under the Americans With Disabilities Act, 22 Harv. J. L. & Pub. Pol'y 849 (1999).

⁵⁹See generally *Smith v. City of Jackson*, No. 02-06850 (5th Cir. Dec. 4, 2003); *Sandstad v. CB Richard Ellis, Inc.*, 309 F. 3d 893, 897 (5th Cir. 2002); *Shanks v. Tunica County*, No. 1:95cv214-S-D (N.D. Miss. 1996).

An Overview of Civil Rights Litigation under §1983

One of the principal vehicles for such litigation has been the federal statute initially enacted to curb the abuses of the Ku Klux Klan following the Civil War. This statute, codified as 42 U.S.C. §1983, provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), the United States Supreme Court held that local government units may be sued for damages, as well as declaratory and injunctive relief, whenever

the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. Moreover...local governments...may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's decision making channels. *Id.* at 690-91.⁶⁰

Monell rejects local government liability based on the doctrine of *respondeat superior*. In other words, a County cannot be held liable under §1983 merely because it employs a tortfeasor. 436 U.S. at 691-92.

Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. It encompasses claims based upon rights secured by federal statutes as well as by the United States Constitution. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).⁶¹

Local government liability may be imposed under *Monell* where an unconstitutional policy statement, ordinance, regulation or decision is formally adopted and promulgated by the governing body of the County or

⁶⁰Symposium on Reconsidering *Monell's* Limitation Upon Municipal Liability for Civil Rights Violations, 31 Urban Lawyer 393 (Summer 1999).

⁶¹A threshold inquiry must be made into the remedial measures, if any, provided by the federal statute itself. Certain federal statutes may provide sufficiently comprehensive and carefully balanced remedial schemes or devices as to "demonstrate congressional intent to preclude the remedy of suits under §1983." *Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). For example, in *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995), the Fifth Circuit held that a §1983 action based upon Title IX of the Civil Rights Act was precluded, since Title VII of the Civil Rights Act already provided a comprehensive remedial scheme and administrative process for claims of sex discrimination.

a department or agency thereof.⁶² For example, in *Monell*, the Department of Social Services and the Board of Education had officially adopted a policy requiring pregnant employees to take unpaid maternity leaves before medically necessary. In that case, the Supreme Court examined local government liability [in this case liability of two city agencies] for an unconstitutional employment policy and held that a municipality is a “person” for purposes of being held liable for the unconstitutional policies of its executive departments, and that a municipality may be held liable under §1983 if the municipality itself caused the constitutional deprivation. *Monell v. Dept. of Social Services*, 436 U.S. at 690. Subsequent decisions of the United States Supreme Court and lower courts have vastly expanded the scope of local government liability under §1983, as discussed below.

Final Policymaking Authority

A municipality, County or other local government unit is subject to suit under §1983, but, as noted above, it does not incur §1983 liability for injury that is inflicted solely by its agents or employees. As the Supreme Court made clear in *Monell*, *respondeat superior* will not suffice to impose §1983 liability on a municipality.⁶³ Rather, a municipality is only liable when the constitutional deprivation or injury is caused by the execution of the local government’s policy or custom. It is only those local government officials who have “final policymaking authority”⁶⁴ who may by their actions subject the local government entity to §1983 liability. “[W]hether a particular official has final policymaking authority is a question of state law.⁶⁵ “Official policy” in the context of County or municipal liability under §1983 was defined by the District Court in *Padgett v. Palmer*, 856 F. Supp. 1185, 1188 (S.D. Miss. 1994), as follows:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality’s lawmaking officers or by an official to whom the lawmakers have delegated policymaking authority; or
2. A persistent widespread practice of city officials or employees, which although not authorize by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policymaking authority.

⁶²*Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001), the Fifth Circuit described the proof required to attribute municipal liability under § 1983 as follows:

Under the decisions of the Supreme Court and this court, municipal liability under Section 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional right whose "moving force" is the policy or custom.

⁶³*Board of Commissioners of Bryan County v. Brown*, 520 U. S. 397, 403 (1997); *Piotrowski v. City of Houston*, 237 F. 3d 567, 584 (5th Cir. 2001).

⁶⁴*City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).

⁶⁵*Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989).

Actions of officers or employees of a municipality do not render the municipality liable under §1983 unless they execute official policy as above defined. *Id.* at 1188.

Where a policy is made by a local government official under authority to do so give by the governing authority, the policy is that of the local government entity. *Padgett v. Palmer, supra* at 1188, citing *Bennett v. Slidell*, 728 F.2d 762, 769 (5th Cir. 1984)(“Policymakers act in the place of the governing body in the area of their responsibility; they are not supervised except as to the totality of their performance.”).

Padgett was a §1983 action brought by the owner of a truck and trailer against a farmer who had retained the truck and trailer during a dispute over shipment of a load of watermelons, during which dispute Deputy Sheriffs intervened. District Judge Charles Pickering held that the Deputy Sheriffs were not under a duty to force the farmer to return the truck and trailer to its owner, so as to subject the County to §1983 liability, noting:

The question that confronts this Court is what, if any, official custom or policy of the County Defendants caused the Plaintiffs to be subjected to a deprivation of constitutional rights. The Plaintiffs make no allegations in this regard. They merely assert that the deputies had a duty to force Padgett (the farmer) to return the truck and trailer to them. What the plaintiffs assert is untenable. Placing the burden of deciding the legal decision as to who is entitled to disputed property on the deputy sheriffs who were dispatched to keep the peace in a potentially violent confrontation is absurd. Plaintiffs have offered no proof of a custom or policy of Greene County, Mississippi, which has caused the complained of injuries. *Padgett v. Palmer, supra* at 1189.

Policy Violating Civil Rights

Applicable case law thus recognizes three ways in which a local government’s policy can violate an individual’s civil rights. First, by an express policy that, when in force, causes a constitutional deprivation; second, by a widespread practice that, even though it is not authorized by written law or express local government policy, is so permanent and well-settled as to constitute a “custom or usage” with the force of law; or, third, a constitutional injury may be caused by a person with “final policymaking authority.” *McTigue v. City of Chicago*, 60 F.3d 381, 382 (7th Cir. 1995).

Moreover, before a supervisory employee of a local government entity may be held liable under §1983 for the constitutional torts of a subordinate, the plaintiff must show that the supervisor either encouraged the specific incident of misconduct or in some other way directly participated in it, and the liability of the supervisor cannot be grounded solely upon his right to control employees. *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1989), cert. denied, 495 U.S. 932 (1990), cited in *Thompson v. City of Norton*, 61 F.3d 904 (6th Cir. 1995).

Single Incident of Unconstitutional Activity

The Supreme Court held over eighteen years ago that “proof of a single incident of unconstitutional

activity is not sufficient to impose liability...unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.” *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985). That same year the U. S. Court of Appeals for the Fifth Circuit decided *Grandstaff v. City of Borger, Texas*, 767 F.2d 161 (5th Cir. 1985), in which the entire night shift of a city’s police department opened fire upon and killed an innocent person after mistaking him for a fugitive. Affirming liability against the City, the Fifth Circuit held that the concerted action of the officers indicated a prior existing policy authorizing the reckless use of deadly force, and that a prior unconstitutional policy could also be inferred from the City’s subsequent failure to reprimand, discharge or admit error on the part of its officers. It was this additional evidence, according to the Fifth Circuit, that allowed a factfinder to reasonably infer a municipal policy based on a single incident of conduct.

Other courts have noted that the inferences permitted by the *Grandstaff* decision “approach dangerously close to dissolving the direct liability rationale of *Monell* and imposing *respondeat superior* liability upon a city,” *Caughen v. City of Greenville*, 745 F. Supp. 377, 384 (N.D. Miss. 1990), and for that reason the Fifth Circuit has expressly limited *Grandstaff* to “equally extreme factual situations.” *Coon v. Ledbetter*, 780 F.2d 1158, 1161 (5th Cir. 1986).

While proof of a single incident of unconstitutional activity is not sufficient under *Tuttle* to impose §1983 liability, the Fifth Circuit has recognized that a single constitutional decision can create an unconstitutional policy if the causal link between the decision and the unconstitutional result is too compelling to ignore. *Brown v. Bryan County*, *infra*.

Also distinguishable from the single incident principle enunciated in *Tuttle* is the concept that a single act by one policymaker may constitute a local government policy sufficient to provide the basis for imposition of liability under §1983. As the Supreme Court noted in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986):

Once a municipal policy is established, it requires only one application...to satisfy *Monell*’s requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality’s official policy.

Failure to Train/Negligent Hiring

A local government policy that merely permits or tolerates unconstitutional acts by government employees may serve as the basis for §1983 liability. “Tolerance” in the form of failure to investigate, discipline or correct violations, such as the persistent failure of a local government entity to discipline subordinates who violate civil rights, may give rise to an inference of an unlawful and unconstitutional local government policy of ratification of such unconstitutional conduct. Circumstantial evidence may be presented in the form of notice to the local government entity of charges of unconstitutional conduct by government employees, followed by repeated failure to make any meaningful investigation into such charges. Thus, while a municipality or County may not be subjected to §1983 liability on a theory of *respondeat superior* for the actions of non-policymaking government employees, it may incur §1983 liability for the actions of its employees when an official policy or custom of hiring or training causes those actions.

Adequacy of Training Procedures

Expanding on *Monell*, the Court held in *City of Canton v. Harris*, 489 U.S. 378 (1989), that "under certain circumstances, liability for constitutional violations resulting from a municipality's failure to train its employees could result in rejecting arguments that municipal liability could be imposed only where there exists an unconstitutional policy. *Id.* at 380." The Court concluded "there are limited circumstances in which an allegation of 'failure to train' can be the basis for liability under § 1983." *Id.* at 387. As to the degree of fault required for municipal liability to be imposed, the Court held:

[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition in *Monell*, 436 U.S. at 694 ... that a municipality can be liable under §1983 only where its policies are the "moving force [behind] the constitutional violation." Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983.... Municipal liability under § 1983 attaches where-and only where-a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers.... Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality-a "policy" as defined by our prior cases-can a city be liable for such a failure under § 1983.

Unsatisfactory training of an officer does not, by itself, constitute municipal liability.... To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the City "could have done" to prevent the unfortunate incident.... Thus, permitting cases against cities for their "failure to train" employees to go forward under § 1983 on a lesser standard of fault would result in de facto *respondeat superior* liability on municipalities-a result we rejected in *Monell*, 436 U.S. at 693-694....

It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism. (internal citations and quotation marks omitted)

Direct Causal Link

The Court also held in *City of Canton* that a local government body could be liable under 42 U.S.C. §1983 for constitutional violations resulting from failure to train its employees if there was a direct causal link between the failure to train and the resulting injury, using this test for causation:

Only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police came in contact.⁶⁶

⁶⁶The Fifth Circuit has observed that "*Bryan County* underscores the need for *Monell* plaintiffs to establish both the causal link ("moving force") and the City's degree of culpability ("deliberate indifference")

Deliberate Indifference

The Court gave this example of factual situations which may meet the “deliberate indifference” standard of liability:

For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force...can be said to be “so obvious,” that failure to do so could properly be characterized as “deliberate indifference” to constitutional rights.

Single Hiring Decision

In 1997, the United States Supreme Court addressed the question of whether and under what circumstances a single hiring decision by a local government policymaker, in this case the Sheriff of Bryan County, Oklahoma, can give rise to liability under 42 U.S.C. §1983. In *Board of County Commissioners of Bryan County v. Brown*, 117 S. Ct. 1382, 1388 (1997), the record showed that while Mrs. Brown was riding as a passenger in a truck driven by her husband, they came upon a police checkpoint which Mr. Brown sought to avoid by turning the truck around and attempting to drive back over the Oklahoma state line into Texas. A Deputy Sheriff and Reserve Deputy began pursuing the Browns, and the chase ended four miles later with the deputy aiming the gun toward the truck and ordering the Browns to get out. The Reserve Deputy, Stacy Burns, approached the truck from the passenger side and ordered Mrs. Brown to get out, and when she failed to obey the order, he physically removed her from the vehicle by grabbing her arm at the wrist and elbow, pulling her from the vehicle and throwing her to the ground. Reserve Deputy Burns had a long record of driving infractions, assault and battery, public drunkenness and resisting arrest, a record which Mrs. Brown in her subsequent §1983 action claimed the Sheriff had failed to adequately investigate. The Court held that the County could not be held liable solely for the Sheriff’s decision to hire Reserve Deputy Burns:

As our municipal liability jurisprudence illustrates, however, it is not enough for a §1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the “moving force” behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Addressing Mrs. Brown’s claim that the cause of her injuries was the Sheriff’s hiring decision, the Court found that a “lack of scrutiny may increase the likelihood that an unfit officer will be hired, and that the unfit

to federally protected rights). These requirements must not be diluted, for “where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability.” *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998)

officer will, when placed in a particular position to effect the rights of citizens, act improperly.” Such a showing is not enough, since it is

only a generalized showing of risk. The fact that inadequate scrutiny of an applicant’s background would make a violation of right more likely cannot alone give rise to an inference that a policymaker’s failure to scrutinize the record of a particular applicant produced a specific constitutional violation. After all, a full screening of an applicant’s background might reveal no cause for concern at all; if so, a hiring official who failed to scrutinize the applicant’s background cannot be said to have consciously disregarded an obvious risk so that the officer would subsequently inflict a particular constitutional injury. *Id.* at 1392.

As to what type of “failure to scrutinize” might amount to deliberate indifference sufficient to result in **Monell** liability, the Court said:

Only where adequate scrutiny of an applicant’s background would lead a reasonable policymaker to conclude that the plainly obvious consequences of the decision to hire the applicant would be the deprivation of a third party’s federally protected right can the officials’ failure to adequately scrutinize the applicants’ background constitute “deliberate indifference.” *Id.* at 1391.

The burden was upon Mrs. Brown to prove that a reasonable policymaker would have realized that it was “plainly obvious” that the reserve deputy would inflict excessive force upon citizens with whom he came into contact. The record in **Bryan County** was inadequate to satisfy this requirement.

The Mississippi Supreme Court recently addressed the adequacy of training procedures in **Elkins v. McKenzie**, 2003 Miss. LEXIS 585 (Miss. 2003), providing an excellent analysis of the constitutional requirements for a **City of Canton/Bryan County** claim under 42 U.S.C. §1983. In **Elkins**, the decedent pointed a gun at officers of the City of Columbia police department, backed into his house, and after refusing the officers’ demands that he put down the gun, fired on the defendant shooting officer. The shooting officer returned fire as he followed the decedent into the house, mortally wounding the decedent in the exchange. The Court affirmed the trial judge’s grant of summary judgment to the City since the decedent’s widow failed to show a facially invalid city policy, any deliberate indifference on the part of the City to any known or obvious consequences that might have resulted in any constitutional deprivation from execution or any city policy or any persistent, widespread practice or custom, and any causal relationship between any city policy or custom such that it was the moving force for the shooting officer’s actions. The Court held the shooting officer was entitled to qualified immunity because the decedent had pointed a loaded gun at officers, refused to lower the gun, and backed into the house, which made the officer feel that he and others were in imminent danger.

Police Pursuit Liability Under 42 U.S.C. §1983

In **County of Sacramento v. Lewis**, 118 S. Ct. 1708 (1998), the Supreme Court addressed a substantive due process challenge brought by the parents of a teenager who was killed during the course of a police pursuit of a motorcycle. In a chase which lasted about 75 seconds and reached speeds of up to 100

miles per hour, the motorcycle driver unsuccessfully attempted a sharp left turn and tipped, and the chasing officer was unable to stop his vehicle in time to avoid striking the Plaintiff's decedent. In an action alleging violations of the decedent's substantive due process rights secured by the Fourteenth Amendment, the Supreme Court considered whether or not the Plaintiff had asserted a viable constitutional claim by addressing two questions: Was a more specific provision of the Constitution controlling? If not, were the factual allegations sufficiently set forth to support a due process claim? Reasoning that the Fourth Amendment covered only searches and seizures, the Court concluded that no seizure had occurred, citing *Brower v. County of Inyo*, 489 U.S. 593 (1989). The Court then applied a substantive due process analysis to answer the question of whether the Plaintiff had stated a viable claim under the Fourteenth Amendment, concluding that the applicable standard for determining whether there had been a violation of substantive due process was the shock-the-conscience standard. Holding that the Plaintiff had failed to state a viable claim for substantive due process violations, the Court stated that there was a lack of malicious intent on the part of the officer and that the officer had responded instinctively to the driver's decision to run:

Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressable by an action under §1983.

Independent Contractors in Prison Setting: No Immunity

In *Richardson v. McKnight*, 117 S.Ct. 2100 (1997), the Supreme Court refused to extend qualified immunity to prison guards who were employed by a private firm. Reasoning that §1983 liability is imposed primarily upon state actors, the Court held that the special policy concerns raised in suits against government officials were not implicated with private actors, and that the historically recognized qualified immunity was thus unavailable. Looking to the history and purposes of the qualified immunity doctrine to determine whether the protection should be applied, the Court noted that prisoners could recover from privatized prison management under the common law, *Id.* at 2104, and that there was no conclusive historical evidence of a tradition of immunity for private companies or their employees, nor did history provide significant support for application of qualified immunity in this case. Since the Defendant prison guards were employees of a private company, the Court also reasoned that market pressures provided the same pressures that qualified immunity provides in the context of public employees, and that the privatized management system has the incentive to perform its duties aggressively or face the risk of replacement by competitors. The Court held that the prison guards were more akin to private employees than public employees, and that

our examination of history and purpose thus reveals nothing special enough about the job or about its organizational structure that would warrant providing these private prison guards with governmental immunity. *Id.* at 2107.

Qualified Immunity

The defense of qualified immunity in §1983 cases is designed to shield from civil liability "all but the plainly incompetent for those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The purpose of the defense in actions brought under §1983 is to limit the deleterious effects that the risks of

civil liability would otherwise have on the operations of government. As the Supreme Court noted in *Harlow v. Fitzgerald*, *infra* at 807, “for executive officers in general,... qualified immunity represents the norm.” The Court has stated that the measure of what is “clearly established” in American law is an objective one. See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). It is inevitable that the inescapably imperfect, discretionary decisions by government actors will sometimes impact upon the lives of private individuals with harmful effects, especially in the context of law enforcement work wherein decisions are often made in an atmosphere of great uncertainty. This has led the courts to refrain in many instances from holding law enforcement officers liable in hindsight for every injurious consequence of their actions, since to do otherwise would paralyze law enforcement functions. The defense of qualified immunity accordingly allows officials the freedom to exercise fair judgment and shields those officials from civil liability under §1983 unless their actions violated “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, *infra* at 818. The linchpin of the defense is the objective reasonableness of the officer’s actions, and no liability will attach so long as those actions, viewed from the perspective of the officer at the time of the incident, can be seen within the range of reasonableness.

To defeat the defense of qualified immunity, a §1983 Plaintiff cannot rely on general conclusory allegations or broad legal truisms to show that the alleged violated right is clearly established. On the contrary, it is the Plaintiff’s burden to show that “when the official acted, the law established the contours of a right so clearly that a reasonable official would have understood his acts were unlawful.” *Anderson v. Creighton*, *supra* at 640. “If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.” *Id.* If, on the other hand, this “bright line” can be drawn so as to make it clear that no reasonable person in the position of the Defendant could have thought that the facts were such that they justified the actions of the Defendant, then the Plaintiff can defeat the assertion of qualified immunity.

A recent example of a Court’s rejection of the qualified immunity defense is *Brady v. Ft. Bend County*, 58 F.3d 173 (5th Cir. 1995). In that case, the Fifth Circuit held that a Sheriff was not entitled to qualified immunity with respect to a §1983 action brought against him by Deputy Sheriffs who alleged that they were not rehired because they supported the Sheriff’s opponent. Both the District Court and the Fifth Circuit rejected the qualified immunity defense on the basis that the Sheriff’s actions violated clearly established Fifth Circuit law that a public employee cannot be terminated for the exercise of First Amendment rights arising from partisan affiliation or political activity in the absence of an allegation of disruption of governmental functions. The Court noted that as far back as 1985, the established law in the Fifth Circuit had been that a public employer could not retaliate against an employee for expression protected by the First Amendment merely because of the employee’s status as a policymaker.

Failure to Protect: Prisoners and Pretrial Detainees

In Hare v. City of Corinth, Mississippi, 135 F.3d 320 (5th Cir. 1998), the Fifth Circuit articulated the state’s duty to tend to a pretrial detainee posing a risk of suicide. A wrongful death claim was brought by survivors of a pretrial detainee based on a jail suicide. The Fifth Circuit focused upon the standard of liability for jail officials sued in their individual capacity. This was the second appeal to the Fifth Circuit after the District Court again denied Summary Judgment on qualified immunity grounds. The specific issue before the Fifth

Circuit was whether the individual jail officials were entitled to qualified immunity as a matter of law. The Fifth Circuit panel held that Plaintiffs had alleged violation of a clearly established constitutional right by consistently alleging that the individual jail officials knew or should have known that the deceased, a pretrial detainee, was exhibiting suicidal tendencies and that their actions and inactions in placing the decedent in an isolated cell without removing a blanket--strips of which she fashioned into a noose and hung herself--constituted deliberate indifference to her serious medical and psychiatric needs. Finding that the plaintiffs satisfied the first prong of qualified immunity under *Siegert v. Gilley*, 500 U.S. 226, 231 (1991), the Court then turned to the second prong of the qualified immunity test: this is a two-part inquiry into whether the allegedly violated constitutional rights were clearly established at the time of the incident, in this case 1989, and if so, whether the defendant jail officials' conduct was objectively unreasonable in light of the then clearly established law.⁶⁷

Objective Reasonableness vis a vis Subjective Deliberate Indifference

At the outset of its evaluation and analysis of objective reasonableness, a question of law for the Court, the Fifth Circuit panel in *Hare* concluded that under the deliberate indifference standard, "the actions of the individual defendants are within the parameters of objective reasonableness." *Id.* at 329. The Court then noted that the objective reasonableness standard as used and applied in the qualified immunity context is analytically different from and should not be confused with the subjective deliberate indifference standard used for addressing the merits of a plaintiff's claim. The latter "serves only to demonstrate the clearly established law in effect at the time of the incident." *Id.* at 328. Although summary judgment should have been granted to the individual jail officials on qualified immunity grounds by the trial court, the Fifth Circuit panel nonetheless cautioned that "our holding does not insulate all public officials from liability for suicides by pretrial detainees." *Id.* at 329. The Court also emphasized that the objective reasonableness analysis employed in this case could result in a denial of qualified immunity to the officials if evidence were forthcoming that the officials were subjectively deliberately indifferent in gaining actual knowledge of the substantial risk of suicide and then responding with deliberate indifference. *Id.* at 329. See *Hare v. City of Corinth, Mississippi*, 74 F.3d 633, 650 (5th Cir. 1996)(en banc).

Failure to Protect Against Private Violence

The nature and scope of a constitutional duty to protect against private violence was addressed in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), a landmark case in which the United States Supreme Court rejected a general duty to protect individuals from criminal misconduct. In *DeShaney*, the County Department of Social Services received a number of reports that a young boy, Joshua DeShaney, was being abused by his father. As the child abuse continued, several social service workers personally observed injuries that had been inflicted on the child and new firsthand of the threat to the

⁶⁷Accord, *Thornhill v. Breazeale*, 88 F. Supp. 2d 647 (S. D. Miss. 2000)(Pickering, J.), holding that a sheriff and deputy were entitled to qualified immunity under the *Hare* standard where the proof showed they did not act with deliberate indifference by placing a pretrial detainee in a cell with a non-breakaway shower rod and by neglecting to remove his shoes, an omission described by the Court as an episodic act or omission. Challenges to numerous jail policies and conditions, however, survived summary judgment, since there were factual issues as to whether the jail's lack of a written policy for suicide prevention was reasonably related to a legitimate governmental interest.

boy's safety. They nonetheless failed to remove the child from his father's custody or otherwise protect him from child abuse, until finally the father beat the child so violently that the child suffered serious brain damage. The mother brought a §1983 action on behalf of the child, arguing that the County and its employees had deprived the child of his liberty interests without due process by failing to provide adequate protection against his father's violent acts.

The U. S. Supreme Court held that there was no §1983 liability under these circumstances, noting that the due process clause of the Fourteenth Amendment does not require governmental actors to affirmatively protect life, liberty or property against intrusion by private third parties, but instead works only as a negative prohibition on state action. "Its purpose was to protect the people from the state, not to insure that the state protected them from each other." Since the Due Process Clause did not require the state to provide its citizens with particular protective services, the Court concluded that the state could not be held liable under the Due Process Clause for injuries that could have been averted had it chosen to provide them, and that a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause, except in "limited circumstances".

Custodial Situations

The Court in *DeShaney* did recognize that there are certain limited circumstances under which the Constitution may impose upon the state (and political subdivisions thereof) affirmative duties of care and protection with respect to particular individuals, for example, pretrial detainees held in a County jail. A good discussion of cases recognizing such affirmative duties of care and protection can be found in *Fickes v. Jefferson County, Texas*, 1995 WL 552851 (E.D. Tex. 1995), wherein the Court noted that a pretrial detainee is protected by the Due Process Clause of the Fourteenth Amendment, and in certain instances may be accorded rights that are not enjoyed by a convicted prisoner. The Court noted the conflicting case law in the Fifth Circuit, and observed that the standard for failure to protect claims brought by convicted inmates is "deliberate indifference" which requires a showing of a deprivation that is so serious as to deprive the prisoner of minimal civilized measures of life's necessities such as the deprivation of a basic human need, coupled with a showing that the official is both aware of facts from which an inference could be drawn that a substantial risk of serious harm exists, and also draws the inference. The Court also noted a number of Fifth Circuit cases which have held a different standard applies to failure to protect cases involving pretrial detainees, the test for liability being whether the action was reasonably related to a legitimate government purpose or whether it was done for the purpose of punishment or retaliation, there being no necessity for the pretrial detainee to establish that the individual involved acted with "deliberate indifference". See *Grabowski v. Jackson County Public Defenders' Office*, 47 F.3d 1386 (5th Cir. 1995).

Public Housing: Subsidy Not Same as Custody

The mere fact that individuals are living in a public housing project has not yet been found sufficient to give rise to an affirmative duty to protect individuals. In *Dawson v. Milwaukee Housing Authority*, 930 F.2d 1283 (7th Cir. 1991), a resident of a municipal public housing project was shot by another resident. The Plaintiff argued that the City owed him an affirmative duty of protection because his presence in the Housing Authority Project was the functional equivalent of custody. The Court rejected this argument and refused to

equate “subsidy with custody,” holding that no affirmative duty to protect was owed.

No Affirmative Duty to Protect from Domestic Violence

In *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995), the Fourth Circuit rejected a §1983 claim by a mother who alleged that a police officer had an affirmative duty to protect and safeguard her children from the criminal depredations of her ex-boyfriend.

The tragic facts of this case started with a law enforcement officer responding to a domestic disturbance call at Plaintiff's home. The Plaintiff's former boyfriend had broken into her home, pushed her, punched her, threw objects at her and was screaming and threatening both the Plaintiff and her children, saying he would murder them all. A neighbor had subdued the former boyfriend and restrained him until the police officer arrived. The officer arrested the former boyfriend, confined him in the squad car, and returned to the Plaintiff's house, where she informed him of prior threats, including a conviction of attempted arson at the Plaintiff's residence ten months earlier. The Plaintiff wanted to know if it would be safe for her to return to work that evening, and the officer assured her that the former boyfriend would be locked up overnight. However, the former boyfriend was brought before a magistrate for an initial appearance that evening, charged with misdemeanor offenses of trespassing and malicious destruction of property, and was released on his own recognizance and warned to stay away from the Plaintiff's home. Upon release he returned to the Plaintiff's home, set fire to it and while the Plaintiff was still at work, her three children died of smoke inhalation while sleeping.

The boyfriend was arrested, charged with first degree murder and was serving three life sentences without possibility of parole at the time the Plaintiff brought her §1983 action against the County Commissioners and the police officer. The officer argued in the lower court that he did not have a constitutionally-imposed affirmative duty to protect the Plaintiff and her children and that he was shielded from liability by the doctrine of qualified immunity, which shields officials from civil liability unless their actions violate “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

On appeal to the Fourth Circuit, the Court rejected the Plaintiff's claim that the officer's express promises to her created a “special relationship,” which in turn gave rise to an affirmative duty to protect her under the Due Process Clause of the Fourteenth Amendment, and that no such due process right to protection was clearly established, and, accordingly, the police officer was entitled to qualified immunity. Citing *DeShaney*, the Fourth Circuit noted that an affirmative duty to protect may arise when the state restrains persons from acting on their own behalf, as when the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself and also fails to provide for his basic human needs. The specific source of that affirmative duty to protect referred to in *DeShaney* was the custodial nature of a “special relationship,” and that such an affirmative duty had to be triggered by some sort of confinement of the injured party, such as incarceration, institutionalization or the like. Since there was no custodial relationship between the law enforcement officer and the plaintiffs in this case, since the officer had not restrained the Plaintiff's freedom to act on her own behalf and since the Plaintiff was never incarcerated, arrested or otherwise restricted in any way, and no such limitation was imposed on her liberty, *DeShaney* compelled the conclusion

that the Plaintiff was due no affirmative constitutional duty of protection from the state, and the officer would not be charged with liability for the criminal acts of a third party.

No Special Relationship Arising from Promise of Aid

The Fourth Circuit in *Pinder* also rejected the Plaintiff's argument that the officer's explicit promises that the former boyfriend would be incarcerated overnight created the requisite "special relationship" contemplated in *DeShaney*, reasoning that mere promises of aid do not create a special relationship:

Promises do not create a special relationship--custody does. Unlike custody, a promise of aid does not actually place a person in a dangerous position and then cut off all outside sources of assistance. Promises from state officials can be ignored if the situation seems dire enough, whereas custody cannot be ignored or changed by the persons it affects. It is for this reason that the Supreme Court made custody the crux of the special relationship rule. Lacking the slightest hint of a true "special relationship," *Pinder's* (Plaintiff's) claim in this case boils down to an insufficient allegation of a failure to act.

Workplace Violence

Workplace shooting victims sought to recover against the city's police department in *Hernandez v. City of Goshen, Indiana*, 324 F.3d 535 (7th Cir. 2003), alleging in their § 1983 action that the police department violated their constitutional rights by not acting to prevent the shooting after it received a phone call from the workplace manager reporting threat of violence to employees. 7th Circuit upheld dismissal of the action on the ground that, in light of *DeShaney*, these allegations did not state claim under § 1983 for violation of any constitutional rights, in the absence of allegations that police department created or increased the danger faced by the victims. The Court distinguished cases such as *County of Sacramento v. Lewis*, 523 U. S. 823 (1998)(affirming the "shocked the conscience" test but finding police were not liable under § 1983 for causing the death of a bystander in high speed police chase of a motorcycle), noting that in that case § 1983 liability arose from state action or inaction based on a recognized duty or affirmative course of conduct between the defendant state actor and the injured plaintiff. "The critical difference in this case is that the City had no duty to the residents of Goshen to provide a police department whose policy is to investigate threats of violence, even credible ones, made by private persons and reported by private persons." The Court further reasoned that "police departments have no constitutional duty to protect private persons from injuring each other, at least where the police department has not itself created the danger," and thus in this case, "no matter how egregious Hernandez and Garza might find the City's failure to investigate credible threats of private violence such as the one posed by Wissman, the City's conduct was not unconstitutional." *Id.* at 538.

School Violence

Congress, in an attempt to prevent school-related violence, enacted the **Gun Free Schools Act of 1994**, which requires public school districts to expel students found with weapons on school grounds for at least one academic year, or risk losing federal educational funds under the Elementary and Secondary Education Act. Since passage of the **Gun Free Schools Act**, several states have adopted zero-tolerance

policies to assure conformity with federal funding requirements. Paul M. Bogos, **Expelled. No Excuses. No Exceptions. -Michigan's Zero-Tolerance Policy in Response to School Violence: M.C.L.A. Section 380.1311**, 74 U. Det. Mercy L. Rev. 357, 358 (1997)

Eric Harris and Dylan Klebold, the Columbine High School students who committed the horrendous acts and subsequently committed suicide, had previously been under investigation after the Sheriff's office received a complaint from a Jefferson County citizen that Eric Harris often talked about making pipe bombs and using them to kill numerous people and that Klebold knew Harris' bomb making activity. See *Ireland v. Jefferson County Sheriff's Dep't*, 193 F.Supp.2d 1201, 1209-10 (D.Colo.2002). The Sheriff's office knew that Harris maintained a web site containing death threats including statements that Harris and Klebold were planning to use pipe bombs, other explosive, and guns to kill numerous people. See *id.* at 1210. Columbine's Resource Officer, and other school and Sheriff's office personnel received a copy of the website printout and had seen or had information available to them about bizarre, hate-filled and threatening behavior of Harris and Klebold, including video tapes made by both students showing them in possession of and discharging firearms in a mock attack killing Columbine students. See *id.* Harris' web site was later amended to include the phrase "Preparing for the big April 20! You'll all be sorry that day." See *id.* at 1211. The Sheriff's department allegedly took initial steps to prepare and obtain a search warrant in connection with Harris' and Klebold's activities but later aborted the investigation. See *Id.*

The litigation that resulted from the Columbine school massacre is chronicled in *Sanders v. Board of County Comm'rs*, 192 F.Supp.2d 1094 (D.Colo.2001); *Ireland v. Jefferson County Sheriff's Dep't*, 193 F.Supp.2d 1201 (D.Colo.2002); *Castaldo v. Stone*, 192 F.Supp.2d 1124 (D.Col.2001); *Schnurr v. Board of County Comm'rs*, 189 F.Supp.2d 1105 (D.Colo.2001); *Ruegsegger v. Jefferson County Board of County Comm'rs*, 2001 WL 1808532 (D.Colo.2001); and *Ruegsegger v. Jefferson County School District R-1*, 187 F.Supp.2d 1284 (D.Colo.2001). These lawsuits were initiated by parents of slain high school students, representatives of teachers and other school personnel, and injured students and teachers alleging § 1983 violations and negligence claims against several defendants including the Jefferson County Sheriff Department, its employees, the Sheriff individually, and the School District. Despite compelling facts alleging gross mishandling of events leading up to this tragedy, all of these cases, barring one, were dismissed by the District Court as insufficient to state a claim and as barred by qualified immunity. Accepting the above recitation of facts as true in all the lawsuits, the District Court concluded that Defendants did not have a special relationship with Plaintiffs, that the officers and school district were not liable under the state-created or enhanced danger doctrine, and that Harris and Klebold were the "moving force" behind Plaintiffs' injuries.⁶⁸ The District Court Judge dismissed all the above cited cases except the *Sanders* case. See *Sanders v. Board of County Comm'rs*, 192 F.Supp.2d 1094 (D.Colo.2001).

In the §1983 action against various law enforcement officers and the Board of County Commissioners alleging violation of the substantive due process rights of a teacher who died in the Columbine school massacre, the district court in *Sanders v. Board of County Com'rs of County of Jefferson, Colorado*, 192 F.Supp.2d 1094 (D. Colo. 2001), denied the defendant County's motion to dismiss, holding that the personal

⁶⁸Cf. *Niziol v. Pasco County Dist. School Bd.*, 240 F. Supp. 2d 1194 (M.D. Fla. 2002)

representative of teacher sufficiently stated that officers put teacher at substantial risk of serious, immediate, and proximate harm, that the officers acted recklessly in conscious disregard of risk that teacher would die, that the federal court's conscience was shocked by alleged conduct of officers, who had a "special relationship" with the teacher, and that the representative sufficiently set out essential elements for supervisory liability. The court found that the state-created danger jurisprudence under which claim was made was "clearly established."

Allegations of the Sanders suit

As alleged in the complaint, William Sanders, a Columbine teacher, was wounded while assisting several students and teachers to safety from the assailants. The Defendants knew of Mr. Sanders deteriorating condition and exact location and also knew, by no later than 12:30 p.m., that Harris and Klebold lay dead in the library. Nonetheless, Defendants foreclosed the use of available fire trucks, ladders and equipment to achieve direct entry through the Science Room's exterior southwest windows to rescue him. Defendants prohibited paramedics and other emergency medical personnel from going to his *aid*. Defendants barred the SWAT units from attempting a surgical entry into the Science Room from the roof or through one of the exterior doors beneath it. By 4:00 p.m., Mr. Sanders' apparently survivable wounds had become fatal and he died. Based on these factual allegations, the District Court of Colorado concluded that at some point between 12:30 and 4:00 p.m. that afternoon, the Defendants in charge of the command post gained the time to reflect and deliberate on their decisions. The Court noted that the command Defendants not only cut off all private avenues of rescue but also forbade the resources at their command from coming to the aid of Mr. Sanders for more than three hours. Therefore, the Court concluded that Plaintiff had properly asserted a violation of the Fourteenth Amendment right to substantive due process under the state-created danger doctrine. See *Sanders*, 192 F.Supp.2d at 1114.

Zero Tolerance and IDEA

Columbine-copycat cases seemed to spring up in every corner of the nation. Mississippi was not spared. In *Woodham v. State*, 779 So. 2d 158 (Miss. 2001), the Mississippi Supreme Court affirmed the conviction of a Pearl High School student for killing his mother, his ex-girlfriend, and another student, and for injuring seven other people while on a shooting spree at his school.

The United States District Court was keenly aware of the *Woodham* case when it was confronted with the inevitable dilemma in *Colvin ex rel. Colvin v. Lowndes County*, 114 F. Supp. 2d 504 (N. D. Miss. 2000), when a student with a history of learning disabilities and scholastic difficulties was expelled for one calendar year when he was found to be in possession of a Swiss Army knife on school premises. The student invoked the Individuals with Disabilities in Education Act, 20 U.S.C. §1400, and alleged that he was deprived of due process. The district court remanded the case to the school board with directions that it reconsider the question of appropriate penalty under the correct legal standard and that it give proper recognition to due process guarantees in view of the fact that it had applied an erroneous standard in considering the student's case. The devastation school violence can reap is nowhere more apparent than in the State of Mississippi. While this court is cognizant of the unenviable position of the school boards of this and other states and of their aim to create a school environment conducive to learning, by eliminating the fear of crime and violence, such efforts must be balanced with the constitutional guarantees afforded to the children that enter the school house

door.

Education is perhaps the most important function of state and local governments It is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.⁶⁹

State-Created Danger

The Fifth Circuit has come close to deciding, but has yet to decide, whether to recognize and adopt the state-created danger exception to immunity alluded to in *DeShaney*. A panel of the Fifth Circuit adopted the state-created danger theory in *McClendon v. City of Columbia*, 258 F. 3d 432, 436 (5th Cir. 2001), but after en banc review, the panel's ruling was vacated, "and with it our recognition of the theory." *Rivera v. Houston Independent School District*, 349 F. 3d 244, 249 (5th Cir. 2003),⁷⁰ citing *McClendon v. City of Columbia*, 305 F. 3d 314, 333 (5th Cir. 2002) and *Scanlan v. Texas A & M University*, 343 F. 3d 533 (5th Cir. 2003)(finding that "this Court has never explicitly adopted the state-created danger theory," *Id.* at 537, but still not recognizing the theory despite remanding the case to the district court for further proceedings).

Other cases, including several decided prior to *DeShaney*, have recognized an affirmative duty to protect that arises outside the traditional custodial context, usually under circumstances where the state takes a much larger and more direct role in "creating" the danger itself. In those cases where the state has created the dangerous situation that results in a victim's injury, the state is not merely accused of failing to act but is more akin to an actor itself directly causing harm to the injured party. For example:

- when the state brought inmates into a victim's workplace, *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989);

- when the state brought dangerous prisoners to the victim's store, *Wells v. Walker*, 852 F.2d 358 (8th Cir. 1988), cert. denied, 489 U.S. 1012 (1989);

- when the state provided a squad car to an unsupervised parolee, *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987);

- when prison authorities allegedly knew of the special danger posed to hospital employees who were murdered by an inmate shortly after his release from the state penitentiary, *Beck v. Kansas University Psychiatry Foundation*, 580 F. Supp. 527 (D.Kan. 1984); and

- where a registered nurse at a medium-security custodial institution for young male offenders was raped and terrorized by an inmate, the Court noting that *DeShaney* does not require custody where the state

⁶⁹*Brown v. Board of Education*, 347 U. S. 483, 493 (1954).

⁷⁰"We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process clause. ... We again decline to do so." *Id.* at 249.

affirmatively creates the danger, in this case the likelihood of a violent sex offender who had failed all treatment programs at the institution committing a violent crime if placed alone with a female, *L. W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992).

In *Pinder v. Johnson*, *supra*, the Court reasoned that these and other cases relied on by the Plaintiff to establish an affirmative duty to protect based on a special relationship were cases that had been decided months or years after the officer in question had dealt with the Plaintiff and were thus irrelevant to the Court's assessment of the clearly established law at the time of the incident, thus presenting a classic case for application of the qualified immunity doctrine, which "forecloses the need for officials to guess about such future developments in constitutional law."

Degree of Knowledge and Culpability

Other courts have addressed the "state-created danger" theory of §1983 liability, where under certain limited circumstances the constitution may impose upon the state an affirmative duty of care and protection with respect to particular individuals. Under this theory of liability, a plaintiff in order to qualify for relief would have to demonstrate (1) the state actors increased the danger to the plaintiff and (2) the state actors acted with deliberate indifference. Illustrative of the "state-created danger" theory of liability are the following:

• *Johnson v. Dallas Independent School District*, 38 F.3d 198, 200-01 (5th Cir. 1994)(noting that the key to the state-created danger cases lies in the state actors' culpable knowledge and conduct in "affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources or private *aid*."');

• *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), cert. denied, 498 U.S. 938 (1990)(female passenger raped by a stranger who offered her a lift, after police officer arrested drunken driver and impounded his car, leaving the female passenger alone at night and without any means to go home in a neighborhood known for criminal activity);

• *K.H. ex rel Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990)(state officials could be guilty of knowingly subjecting 16-month-old child to serious psychological damage, where state removed child from her parents' custody and over next four years shuttled her among 11 foster homes, in at least two of which she was molested or abused);

• *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979)(state held liable for injuries to minor children left in car on side of busy highway after state officer arrested driver); and

• *D.R. v. Middlebucks Area Vocational Technical School*, 972 F.2d 1364 (3rd Cir. 1992)(en banc), cert. denied, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993)(school exonerated from liability for series of sexual assaults committed against two female students in unisex bathroom and darkroom of school's graphics arts class, where "the abuse allegedly occurred during class, virtually under the of a teacher trainee, two to four times weekly for an entire semester," court finding no sufficient demonstration that state placed plaintiffs in danger, increased their risk of harm or made them more vulnerable to danger, and also finding that the risk that

some students will sexually molest other students during a class was not foreseeable to or known by school officials.).

Post-DeShaney Litigation Trends

The courts have continued to struggle with a clear definition of what constitutionally-imposed duty, if any, governmental entities owe and under what limited circumstances and in what special relationships an affirmative duty to protect will be recognized. The Fifth Circuit has not been not alone in its struggle with whether or not to recognize the state-created danger theory in *McClendon*, *Scanlan*, and *Rivera*. In addition to §1983 actions based on custodial or state-created danger exceptions recognized in the above cases, a number of litigation trends are developing under state tort law in the context of premises liability security. These include cases finding liability based on failure to take adequate security measures to protect employees, business invitees and others from criminal activities on or about the premises. See *Brock v. Watts Realty Co., Inc.*, 582 So. 2d 438 (Ala. 1991); *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456 (Tex. 1992); *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437 (Iowa 1988); *Taco Bell v. Lannon*, 744 P.2d 43 (Colo. 1987); *Isaacks v. Huntington Memorial Hospital*, 695 P.2d 653 (Cal. 1985); *Lay v. Dworman*, 732 P.2d 455 (Okla. 1986).

In this area of developing case law, counties and other governmental entities that no longer enjoy the blanket of sovereign immunity may anticipate that such premises liability security claims will eventually be asserted in the public sector. See generally *Crain v. Cleveland Lodge 1532*, 641 So. 2d 1186 (Miss. 1994)(good discussion of duty imposed on premises owners to protect invitees from foreseeable acts by third persons).⁷¹

ADA Litigation

The Americans With Disabilities Act prohibits covered employers from discriminating against a

⁷¹See, e. g., *Rolison v. City of Meridian*, 691 So. 2d 440 (Miss. 1997) (city granted summary judgment in plaintiff's action against city for damages resulting from injuries sustained at a softball game conducted under the supervision of officials chosen and compensated by the city, where a player threw a bat that struck the plaintiff, court finding under Crain and its progeny that "damages must be reasonably foreseeable. Ordinary care does not require that a person prevision unusual, improbable or extraordinary occurrences. Failure to anticipate remote possibilities does not constitute negligence.")(citations omitted); *Corley v. Evans*, 835 So. 2d 30 (Miss. 2003)(declining to adopt the more liberal California rule regarding premises liability as to third-party conduct); *Mulloy v. Sears, Roebuck & Co.*, 1997 U.S. Dist. LEXIS 9916 (N. D. Miss. 1997)("Plaintiff contends that defendant knew or should have known that one of its employees, or someone else with access to the attic, was spying on customers using the ladies rest room.... Clearly, defendant owes a duty to its customers (invitee) to have its premises in a reasonably safe condition for use in a manner consistent with the invitation, or at least not to expose the customer to an unreasonable risk.... This duty has been described as a duty by the business to exercise reasonable care to protect an invitee from reasonably foreseeable injury.... "Foreseeability" is an important component of the existence of that duty and indeed is the "touchstone" of liability....")(citations omitted).

“qualified individual with a disability because of the disability of such individual” in regard to various facets of the employment relationship, including hiring,⁷² discipline and discharge. 42 U.S.C. §12112(a). The ADA defines the term “disability” as

- (a) a physical or mental impairment that substantially limits one or more of the major life activities....;
- (b) a record of such impairment; or
- (c) being regarded as having such an impairment.

42 U.S.C. §12102(2).⁷³

Substantially Limited in Major Life Activity

Under the applicable regulations, 29 C.F.R. §1630, three factors have to be considered in determining whether an individual is substantially limited in a major life activity:

- (1) The nature and severity of the impairment;

⁷²EEOC regulations and guidelines provide “significant guidance.” *Dutcher v. Ingalls Shipbuilding*, 53 F. 3d 723, 726 (5th Cir. 1995). The EEOC published guidelines on October 10, 1995, concerning questions interviewers may ask the job applicants. See ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, EEOC Compliance Manual, Vol. II, filed after §902 (October 10, 1995). These guidelines are an attempt to clarify the reach of the Americans With Disabilities Act of 1990 in the interview setting. These are examples of prohibited pre-offer questions:

- Do you have a disability that would interfere with your ability to perform the job?
- Have you ever filed for workers' compensation benefits?
- Have you ever been injured on the job?
- Do you have AIDS?
- Do you have cancer?
- Have you ever been treated for mental health problems?
- Have you ever been unable to handle work-related stress?
- How many sick days were you out last year?
- Why were you sick so often?

⁷³As a threshold requirement, an ADA Plaintiff must establish that he has a disability. *Rogers v. Int'l Machine Terminals, Inc.*, 87 F. 3d 755, 758 (5th Cir. 1996). A lenient interpretation of “disability” under the ADA “would expand the class of disabled persons far beyond Congress’s expectations.” *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 197 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999). Accordingly, the court must conduct “a rigorous and carefully individualized inquiry” into a Plaintiff’s claimed disability to fulfill its “statutory obligation to determine the existence of disabilities on a case-by-case basis.” *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999).

- (2) The duration or expected duration of the impairment; and,
- (3) The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.

“Direct Threat” Standard

The Americans With Disabilities Act was enacted in order to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,” in part by eliminating the continued existence of “unfair and unnecessary discrimination and prejudice” resulting from stereotypical assumptions “not truly indicative of the individual abilities of such individuals to participate in, and contribute to, society.” 42 U.S.C. §12101(a)(7), (9), 12101(b)(1) (1994). There are times, however, when the competing interests between the law, medical science and public policy can place undue strains upon the effectiveness of the Americans With Disabilities Act, and one means by which the ADA seeks to accommodate these competing interests is to permit an employer to use “qualification standards” to show that the qualifications are lawful even though they may disadvantage a protected individual. 42 U.S.C. §12113(b) states that the qualification standards “may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.” The statute defines “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 U.S.C. §12111(3).

Under the Americans With Disabilities Act, if an employer seeks to exclude an otherwise qualified individual from employment because of that individual’s disability or a condition perceived as a disability, the ADA may preclude the employer from doing so. In determining whether an individual is qualified for the employment he or she seeks, holds or from which he has been excluded, the ADA applies to those individuals who are able to perform the essential functions of the employment position with or without reasonable accommodation. 42 U.S.C. §12111(8).

The “direct threat” standard, the only express qualification standard provided by the ADA, has been further interpreted in the EEOC’s technical assistance manual, TAM Section I-4.5--4.6, under which the employer has the burden to show “significant risk,” defined as a high probability of substantial harm, in a “direct threat” analysis. It is the employer’s burden to identify the specific risk and to show what particular aspect of disability poses a direct threat. The Technical Assistance Manual requires the employer to address such factors as the duration of the risk, whether present constantly or only intermittently, the nature and severity of the potential harm, the likelihood that potential harm will occur, and the imminence of potential harm. TAM Sec. I-4.5.

Migraine Headaches Not Disability

An individual who is disabled must be able to perform the essential functions of her job to receive the protection afforded by the ADA. Attendance at work is an essential function of all jobs.

In *Barfield v. BellSouth Telecommunications, Inc.*, 886 F. Supp. 1321 (S.D. Miss. 1995), a telephone company’s service representative was discharged for excessive absenteeism and thereafter sued her employer for alleged violation of the Americans With Disabilities Act, claiming that her migraine headaches

constituted a disability and that her employer was required to make reasonable accommodations for her absenteeism since the predominant cause for her absences was such migraine headaches.

The District Court concluded that the Plaintiff failed to present sufficient proof that she suffered from a disability to withstand the employer's Motion for Summary Judgment. The Court reasoned that an impairment is a disability only if it “substantially limits one or more of the major life activities” of the impaired individual, and in this context major life activities are the basic activities that an average person can perform with little or no difficulty, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. §1630.2(i). The Court concluded that the evidence was insufficient to support a finding that the Plaintiff's headaches substantially limited a major life function, noting that “one whose impairment merely affects one or more major life activities is not disabled,” and that an individual is disabled within the meaning of the ADA only if her impairment substantially limits a major life activity “which, in that it either makes the individual either unable to perform a major life activity, or severely restricts her ability to perform a major life activity as compared to the general population.”

The Plaintiff in this case presented no medical proof that her headaches imposed any limitations on her, or that they were so severe on such a consistent basis as to substantially limit her ability to perform any major life activities. On the contrary, while the Plaintiff undertook to describe how her headaches affected her, limited her life and kept her from “doing things that I want to do that other people simply take for granted,” and despite Plaintiff's proof that her headaches were sometimes so intense that they caused her to miss planned outings and prevented her from performing some basic life functions,

there is no proof as to the frequency with which headaches of such an intensity occur. Nor has Plaintiff presented proof as to the duration of such episodes. For these reasons, the Court views her proof as insufficient to support a finding that her impairment substantially limits a major life activity other than working.

With regard to the effect of the Plaintiff's headaches on her working, the Court found that while the Plaintiff's headaches may prevent her from talking to customers while stationed at a computer terminal, she had not shown that they preclude her from performing a wide range of jobs and thus had not shown that she had a disability cognizable under the ADA. Moreover, the Court found that the Plaintiff would not be able to establish a violation of the ADA “since she has not shown that she is otherwise qualified to perform the essential functions of the job of service representative, whether with or without reasonable accommodation. Manifestly, an individual who is disabled still must be able to perform the essential functions of her job to receive the protection afforded by the ADA.” The Court concluded as a matter of law that an essential function of the job of service representative was regular and predictable attendance and that it was unreasonable for the Plaintiff to argue that her employer should never count on her working and performing her job “but should instead allow her to work when she feels like it.” In this regard, the Court noted that while “job restructuring” or “part-time or modified work schedules” are included in the definition of “reasonable accommodation” under the Americans With Disabilities Act, 42 U.S.C. §12111(9)(B), the Plaintiff in this case was asking too much of her employer, and that such “open-ended work when able” schedules have been held in other cases not to be reasonable accommodations but requirements which would otherwise place an undue hardship on the employer.

Barfield was followed in *Howard v. North Miss. Medical Ctr.*, 939 F. Supp. 505 (N.D. Miss. 1996), an ADA case in which an employee took a medical leave of absence because of problems associated with severe migraine headaches, allergies and equilibrium problems, then returned to work but requested a transfer to a new position that did not involve travel. When the employee was not hired for any of the positions she sought and was discharged, she filed suit alleging that her dismissal violated the ADA. Summary judgment was granted in favor of the employer on the ground that the employee had not shown an impairment that substantially limited a major life activity and thus could not establish a disability under the ADA. In granting summary judgment, the district court reasoned:

While employers do have an obligation under the ADA to reasonably accommodate disabled persons, the employer is not required to find or create a new job for the disabled....The Medical Center followed its policy of allowing thirty days to effect a transfer and, further, exceeded company policy by allowing Howard to file eight transfer request forms. Howard claims she was qualified for the positions, including the two in which she was denied interviews. The Medical Center argues that "more" qualified individuals were hired into the positions. Howard has offered no evidence to refute the Medical Center's claim. In fact, Howard does not even know who was hired in these positions. Therefore, even if Howard could successfully establish a disability under ADA, it would be to no avail.

See J.H. Verkerke, **Is the ADA Efficient?** 50 U.C.L.A. L. Rev. 903 (2003)(ADA includes many provisions that rely on economic factors to limit an employer's duty to accommodate”).

High Blood Pressure Controlled Through Medication

In *Oswalt v. Sara Lee Corp.*, 889 F. Supp. 253 (N.D. Miss. 1995), a former employee sued his former employer for wrongful discharge in violation of the Americans With Disabilities Act, alleging that his high blood pressure was a disability within the meaning of the ADA and that this condition, together with the temporary side effects from medication, qualified as a disability. The Court found that the Plaintiff did not have a record of an impairment that substantially limited a major life activity, and that while his doctor authorized him to stay away from work for almost a month while his body adjusted to the blood pressure medication, there was no evidence that the Plaintiff was suffering from any ill effects of the medication. In rejecting the Plaintiff's claim, Chief Judge L. T. Senter reasoned that

The ADA was never intended to extend to persons suffering from temporary conditions and, although hypertension is unfortunately only treatable and not curable, it was not hypertension the Plaintiff was using as a reason for his disability, rather, it was the temporary adjustment to the medicine used to treat the hypertension.... The ADA was not meant to cover every ailment or infirmity that renders an employee temporarily unable to perform the duties of his position. Temporary absence from work due to side effects of or adjustment to medication does not give an employee a record of impairment. Millions of Americans are diagnosed with high blood pressure which can be controlled through medication. Some world-class professional athletes have high blood pressure and control it effectively with modern drug therapy and never miss a game. High blood pressure alone, without any evidence that it substantially affects one or more major life activities, is insufficient to bring an employee within the protection of the ADA.

To sustain a claim of wrongful discharge under the ADA, Oswalt must be a person with a "disability." The statutory definition of "disability" includes "a physical or mental impairment that substantially limits one or more of the major life activities."

The Fifth Circuit affirmed in *Oswalt v. Sara Lee Corp.*, 74 F.3d 91 (5th Cir 1996). Addressing the employee's claim that his physical impairment was his high blood pressure, and this impairment substantially limited a major life activity when his doctor authorized him to miss work while he adjusted to medication, the Fifth Circuit held:

In this case, Oswalt has provided no evidence to show that either the high blood pressure or the alleged side effects from the medication substantially limited his job. We agree with the district court that "high blood pressure alone, without any evidence that it substantially affects one or more major life activities, is insufficient to bring an employee within the protection of the ADA." *Oswalt*, 889 F. Supp. at 258. We do not imply that high blood pressure in general can never be a "disability," as defined by the statute. We hold only that Oswalt failed to provide any evidence that his high blood pressure substantially limited a major life activity.

See *Starling v. Auto Zone*, 1999 U.S. Dist. LEXIS 14488 (N.D. Miss. 1999)(Plaintiff did not have an impairment that substantially limited a major life activity, where the record showed that he had been released from his doctor's care in June 1998, and since that time had not been under a doctor's care for his ankle or foot and was capable of playing golf. The district court concluded "It is clear that the plaintiff can perform "the normal activities of daily life" without a problem; therefore, his injury does not meet the definition of "disability" covered under the Act.") and *Waldrip v. General Electric Company*, No. 02-30155 (5th Cir. 2003)(chronic pancreatitis treated as an impairment and also fit within the definition of "physical impairment" adopted by the EEOC under 29 C.F.R. §1630.2 (h)(1).

Expert Testimony and ADA Claims: *Daubert*'s Applicability to Civil Rights Litigation

In making the requisite inquiry into the reliability of scientific and other expert testimony under *Daubert*, the Supreme Court offered an illustrative, but not exhaustive, list of factors that district courts may use in evaluating the reliability of expert testimony. These include whether the expert's theory or technique:

- (1) can be or has been tested;
- (2) has been subjected to peer review and publication;
- (3) has a known or potential rate of error or standards controlling its operation; and
- (4) is generally accepted in the relevant scientific community.

In the later case of *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court emphasized that the *Daubert* analysis is a "flexible" one, and that "the factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." The district court's responsibility is "to make certain that an expert, whether

basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."

The Fifth Circuit gave a cautionary word of advice to the bench and bar in *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 250 (5th Cir. 2002), that care must be taken by the trial court in exercising its role as gatekeeper to avoid transforming a *Daubert* hearing into a trial on the merits. The Court emphasized that the gatekeeper role of the trial court "is not intended to serve as a replacement for the adversary system," and that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."

In *Frank v. State of New York*, 972 F. Supp. 130 (N.D. N.Y. 1997), an ADA claim was brought against the state as employer. At trial Plaintiff sought to introduce medical testimony by doctors concerning "multiple chemical sensitivity." The idea behind multiple chemical sensitivity was that a person's immune system could be depressed by a variety of environmental insults to the point that the exposed person would become hypersensitive to other chemicals and naturally occurring substances. The trial court rejected the doctors' proffered expert testimony, reasoning that any hypothetical cause-and-effect relationship between exposure and the development of MCS symptoms was not capable of being tested or replicated, and that peer review had revealed numerous flaws in the MCS theory.

Accord, *Treadwell v. Dow-United Technologies*, 970 F. Supp. 974, 981-84 (M.D. Ala. 1997).

Applicability of *Daubert* to Other than Scientific Testimony

The Fifth Circuit applied *Daubert* to expert testimony in an eminent domain proceeding. *United States v. 14.38 Acres of Land, More or Less Situated in Leflore County, State of Mississippi*, 80 F.3d 1074 (5th Cir. 1996). In that case the district court refused to admit expert testimony of Rip Walker and Rogers Varner regarding severance damages resulting from an exercise of eminent domain. The opinions were deemed "speculative and not based on reliable foundations" providing "no aid to the finder of fact in determining just compensation in this case." *Id.* at 1076. The experts expressed uncertainty about the extent of flooding on the property in the event of heavy rainfall resulting in the district court's decision that the burden to demonstrate a diminution in the value of the landowner's property was not met. *Id.* at 1077. This application of the reliability test was overly stringent. *Id.*

A detailed discussion of *Daubert*'s applicability to Voting Rights litigation appears *infra*.

Mississippi's Modified *Daubert* Test

Questions about the applicability of *Daubert* are no longer confined to litigation in the federal courts of Mississippi. The Mississippi Supreme Court recently adopted a modified version of the *Daubert* rule in *Miss. Transp. Comm'n v. McLemore*, 2003 Miss. LEXIS 532 (Miss. 2003). The Court found that the current, newly amended version of Rule 702 recognized that the *Daubert* rule, as modified, provided a superior analytical framework for evaluating the admissibility of expert witness testimony. The Court took into consideration its May 2003 adoption of revised Rule 702 of the Mississippi Rules of Evidence, together with

additional language found in the federal counterpart to Rule 702, and adopted the federal standard as applicable to amended Rule 702 for assessing the reliability and admissibility of expert testimony:

This standard recognizes the distinction between lay and expert witnesses. Like the Federal Rules, our rules grant wide latitude for experts to give opinions even when the opinions are not based on the expert's firsthand knowledge or observations. With a focus on relevance and reliability, this approach is superior to the "general acceptance" test in Frye, because the Frye test can result in the exclusion of relevant evidence or the admission of unreliable evidence.

In adopting this modified version of *Daubert*, the Court emphasized that "the gatekeeping function of the trial court is consistent with the underlying goals of relevancy and reliability in the Rules. *Daubert* ensures that the relevancy requirements of the rules are properly considered in an admissibility decision. Rule 702 gives the judge "discretionary authority, reviewable for abuse, to determine reliability in light of the particular facts and circumstances of the particular case." *Kumho Tire*, 526 U.S. at 158.

The Court in *McLemore* expressed confidence that our state's trial judges would properly assume the role as gatekeeper on questions of admissibility of expert testimony, stating:

The modified *Daubert* test does not require trial judges to become scientists or experts. Every expert discipline has a body of knowledge and research to aid the court in establishing criteria which indicate reliability. The trial court can identify the specific indicia of reliability of evidence in a particular technical or scientific field. Every substantive decision requires immersion in the subject matter of the case. The modified *Daubert* test will not change the role of the trial judge nor will it alter the ever existing demand that the judge understand the subjects of the case, both in terms of claims and defenses. We are certain that the trial judges possess the capacity to undertake this review.

Sexual Harassment Litigation

Title VII of the Civil Rights Act of 1964

Title VII renders it an unlawful employment practice for an employer to

discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or natural origin.⁷⁴

Under the EEOC's sexual harassment guidelines which were issued in 1980, "sexual harassment" was defined as

unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual naturewhen (1) submission to such conduct is made either explicitly or implicitly a term or condition of the individual's employment, (2) submission to or rejection of such conduct

⁷⁴42 U.S.C. § 2000(a)(1) (1994).

by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offense working environment.⁷⁵

Two types of sexual harassment are defined in these guidelines, quid pro quo harassment (paragraphs 1 and 2) and hostile working environment harassment (paragraph 3). These guidelines emphasize that "prevention is the best tool for the elimination of sexual harassment."⁷⁶ The guidelines also place appropriate emphasis on the need for a clearly expressed policy against sexual harassment, including employer-expressions of strong disapproval of sexual harassment, procedures for implementing appropriate sanctions and for fully informing employees not only of the right to raise but how to raise the issue of sexual harassment, and procedures for conducting appropriate, adequate and ongoing sexual harassment training for employees, particularly those in a supervisory capacity.

Meritor Savings Bank v. Vinson

In the first case decided by the United States Supreme Court involving a hostile working environment challenge, the Court cited these guidelines with approval. *Meritor Savings Bank v. Vinson*⁷⁷ held that the determination of whether a work environment is hostile must be based upon an analysis of the totality of the circumstances. In this case, a female employee of a bank, Mechelle Vinson, claimed that the bank's vice president had repeatedly subjected her to sexual harassment over a four-year term of employment, including demands for sexual favors, sexual intercourse on forty to fifty occasions, and a number of instances of forcible rape. The bank's principal defense was that the plaintiff had failed to report any sexual harassment to the bank's supervisory staff and had failed to use the complaint procedure.

The Supreme Court relied on traditional agency principles in evaluating the bank's liability, reasoning that liability could be imposed upon an employer if it knew or should have known of its supervisor's actions and failed to take effective corrective action⁷⁸, and that an employee's failure to notify the employer would not necessarily insulate the employer from liability in a hostile working environment challenge. Regarding the bank's claim that Vinson had failed to use its complaint and grievance procedure, the Court held that while the

⁷⁵29 C.F.R. § 1604.11(a) (1980).

⁷⁶29 C.F.R. §1604.11(f) (1980).

⁷⁷477 U.S. 57 (1986).

⁷⁸Different standards are usually applied in determining liability where the alleged harasser is a supervisor as opposed to a co-worker. In co-worker cases, the courts have usually required the plaintiff to prove "that the employer, through its agents or supervisory personnel, knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action." *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986). The courts have emphasized that the "new or should have known" standard applies *only* to co-worker cases. On the other hand, in "supervisor" cases, the courts have required the plaintiff to prove that the actions of the supervisor fell within the scope of the supervisor's employment or that the harassing actions were foreseeable to the employer. See *Kaufman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178 (6th Cir. 1991).

existence of a grievance procedure and a policy against sex discrimination would not totally insulate an employer from liability, the effectiveness of such a procedure and policy would be important factors in the employer's favor.⁷⁹

The *Harris* Case

In *Harris v. Forklift Systems, Inc.*⁸⁰, the Court made it clear that it did not intend to limit hostile working environment harassment cases only to those cases where an employee's psychological well-being was affected.⁸¹ The Court enumerated the following circumstances that would be included in the "totality of the circumstances" in determining whether a working environment is hostile:

The frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Applying *Harris v. Forklift System, Inc.*, *supra*, the Seventh Circuit held in *Saxton v. American Telephone and Telegraph Co.*,⁸² that the plaintiff had offered no evidence that the conduct was frequent or severe, that it interfered with her work or that it otherwise created an abusive work environment. It upheld the District Court's grant of summary judgment on the hostile work environment claim, reasoning that the supervisor's misconduct was not so pervasive or debilitating as to create a hostile work environment. The employer's prompt and appropriate corrective actions were held to have negated the hostile work environment claims since they were reasonably likely to prevent the misconduct from occurring. The Seventh Circuit concluded that while the plaintiff was dissatisfied with the employer's response, she was not entitled to the remedy of her choice but rather a remedy reasonably likely to stop the harassment.⁸³

No General Civility Code

While Title VII should not be expanded into a general civility code, *Oncale v. Sundowner Offshore Services*, 118 S.Ct. 998, 1003 (1998), the Supreme Court has served notice in the clearest terms that it will not tolerate exposing employees to disadvantageous terms or conditions of employment because of sex. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 7, 25(1993) (Ginsburg, J., concurring).

Employee Handbooks: Sword or Shield for County Liability for Sexual Harassment?

⁷⁹*Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67, 72 (1986).

⁸⁰115 S.Ct. 267 (1993).

⁸¹According to the Court, as long as a working environment "would reasonably be perceived, or is perceived, as hostile or abusive, there is no need for it to also be psychologically injurious." 115 S.Ct. at 271.

⁸²10 F.3d 526 (7th Cir. 1993).

⁸³*Id.* at 536.

An Employee Handbook can be a blessing if properly drafted. It can be the curse that keeps on giving if it is not.

A carefully drafted and consistently enforced sexual harassment policy is one of the most important components of employee handbooks prepared and disseminated by public sector employers. In post-*Ellerth/Faragher* sexual harassment litigation, public sector employee handbooks play a pivotal role in preventing or minimizing exposure to Title VII liability. This presentation will address the critical need for employee handbooks to contain current, up-to-date sexual harassment policy provisions that (1) address the particular form of harassment involved, (2) provide a reasonable avenue for complaints, and (3) are communicated to affected employees.

EEOC Enforcement Guidance

According to the most recent guidance from the Equal Employment Opportunity Commission, there are several requirements for a valid anti-harassment policy. EEOC Enforcement Guidance 915.002 (June 18, 1999), **BNA EEOC Compliance Manual**, N:4081-4082. At a minimum, an anti-harassment and complaint procedure should contain these elements:

1. A clear explanation of the prohibited conduct;
2. Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
3. A clearly described complaint process that provides accessible avenues of complaint;
4. Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
5. A complaint process that provides prompt, thorough and impartial investigation; and,
6. Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

Elements of Prima Facie Case of Sexual Harassment

In order to establish a prima facie case of liability under Title VII based upon an alleged hostile work environment, a claimant generally must satisfy five elements:

1. The claimant is an employee who belongs to a protected group;
2. The claimant is an employee who was subjected to unwelcome harassment;
3. The harassment complained of was based on sex;

4. The harassment complained of affected a term, condition or privilege of employment; and,
5. The employer knew or should have known of the harassment in question and failed to take prompt remedial action.

Celestine vs. Petroleos de Venezuela SA, 266 F. 3d 343, 353 (5th Cir. 2001).

Title VII Litigation After *Faragher* and *Ellerth*

Sexual harassment law has continued to develop at a brisk pace, particularly since the end of the 1998 term, when the Supreme Court provided definitive guidance for determining an employer's vicarious liability for sexual harassment resulting from a supervisor's misuse of authority. In 1998 the U. S. Supreme Court modified this formulation in Title VII litigation where the harassment was claimed to have been committed by a supervisor with immediate authority over the victim. In *Faragher vs. City of Boca Raton*, 524 U.S.775, 807, 118 S. Ct. 2275, 141 L.Ed. 2d 662 (1998), the Court held that "when the harassment is illegibly committed by a supervisor with immediate (or successively higher) authority over the harassment victim, the plaintiff employee needs to satisfy only the first four of the elements listed above."

Vicarious Liability for Misuse of Supervisors Authority

In *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 1998 U.S. LEXIS 4216, 1998 WL 336322 (1998), and *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257, 1998 U.S. LEXIS 4217, 1998 WL 336326 (1998), the Court clarified what preventative measures employers must take in order to discharge their responsibilities and minimize potential liability exposure under Title VII of the Civil Rights Act of 1964, whether for quid pro quo or hostile environment sexual harassment. The holding in both cases was an amalgamation of established Title VII vicarious liability and general agency principles discussed in the 1986 landmark decision, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), expressed in virtually identical language:

In order to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding.... An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.... The defense comprises two necessary elements: (a) that the employer exercise reasonable care to prevent and correct promptly any sexual harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint

procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion or undesirable reassignment.

Burlington Industries, Inc. v. Ellerth, 118 S.Ct. at 2270 (1998), and ***Faragher v. City of Boca Raton***, 118 S.Ct. at 2292 (1998)(emphasis added).

Facts of Ellerth

Kim Ellerth's supervisor, a middle-level manager, subjected her to constant sexual harassment, repeatedly implying that adverse employment consequences would result if she resisted his advances, even though he never fulfilled those implied threats. At no time prior to Ellerth's leaving her employment did she register a formal complaint with her employer or inform anyone in authority about the repeated boorish and offensive remarks and gestures made by the supervisor.

In her quid pro quo harassment action against her former employer, Burlington Industries, Ellerth alleged that the employer had engaged in sexual harassment and forced her constructive discharge in violation of Title VII. The district court's Summary Judgment in favor of the employer, grounded on lack of actual or constructive knowledge of the supervisor's conduct, was reversed on appeal to the Seventh Circuit, and the Supreme Court affirmed, in a 7-2 opinion delivered by Justice Kennedy. The Court held that when tangible employment action is not taken against an employee who is the victim of sexual harassment by a supervisor, the employer may nonetheless be subjected to vicarious liability for an offending supervisor's sexual harassment conduct against a subordinate employee based on the "general common law of agency" and general agency principles. The employer in such a case cannot find a safe harbor in the general rule that sexual harassment by a supervisor is not conduct "within the scope of employment" since an employer can be liable where its own negligence is the cause of the harassment, as where it knew or should have known about the conduct and failed to stop it. The employer may raise an affirmative defense in such a case that consists of two necessary elements noted above, namely, that the employer exercised reasonable care "to prevent and correct promptly any sexually harassing behavior," and that the offended employee unreasonably failed to take advantage of any employer-provided preventative or corrective measure or to otherwise avoid harm.

The Court in ***Ellerth*** emphasized that the "quid pro quo" or "hostile work environment" label does not determine the vicarious liability issue, the critical factor being whether a tangible job loss or adverse employment action occurred.

While the Court stopped short of finding vicarious liability for all co-worker harassment, it concluded that the employer here was subject to vicarious liability under the "aided in the agency" standard, a developing feature in agency law, and noted that the employer would be allowed on remand to allege and prove the two-element affirmative defense delineated above.

Facts of Faragher

Betty Faragher, a female lifeguard employed by the City of Boca Raton and working for its Park & Recreation Department, alleged that during her employment two department supervisors had touched her and other female lifeguards in a sexually offensive manner, making lewd remarks and engaging in other offensive, unwelcome conduct, including such statements as "date me or clean the toilets for a year." *Faragher*, 118 S. Ct. at 2279.

Over a five year period, one of the supervisors put his arm around one of the female employees with his hand on her buttocks, contacted another female lifeguard in a motion of sexual simulation, made crudely demeaning references to women in general, made disparaging comments on the shape of one of the female employees, pantomimed an act of oral sex, and on at least two occasions told female lifeguards he would like to engage in sex with them. The district court found for the plaintiffs, holding the City as employer vicariously liable for the hostile work environment created by the supervisors which culminated in tangible employment action, and awarded Ellerth one dollar in nominal damages.

The Eleventh Circuit reversed, holding that the City as employer was not liable since the supervisors were not acting within the scope of their employment when they engaged in the sexual harassment, they were not aided in their actions by the agency relationship, and the city had no constructive knowledge of the harassment by virtue of its pervasiveness or actual knowledge on the part of one of the supervisors. The Supreme Court reversed in a 7-2 opinion delivered by Justice Souter, and remanded the case for reinstatement of district court's judgment. The Court held that the *Ellerth* affirmative defense could not be raised by the employer, even though it had a sexual harassment policy, because it had failed to disseminate that policy among its beach employees, and because no attempt had been made to monitor or keep track of the conduct of the offending supervisors. As a matter of law the employer could not have been found to have exercised reasonable care to prevent the sexually harassing behavior of the supervisors, according to the Court.

Opportunity to Screen, Train and Monitor

Both *Ellerth* and *Faragher* are grounded on recognition that employers have the greater opportunity and incentive to screen supervisors, train supervisors and monitor the performance of supervisors. It is now clear, moreover, that mere adoption of a written antiharassment policy and procedures manual will not suffice to insulate an employer from vicarious liability for sexual harassment by supervisory personnel. The employer in *Faragher* had failed to disseminate its sexual harassment policy to employees, including those who harassed Beth Faragher and the other female lifeguards. Such failure to effectively disseminate its sexual harassment policy among its beach employees precluded the employer from relying upon the *Ellerth* affirmative defense as a matter of law. These cases provide dramatic evidence that a substantial majority of the present court will not tolerate a harassing supervisor who is aided in his misconduct and abuse of authority by the supervisory relationship, nor will the employer of such a supervisor be allowed to escape vicarious liability by arguing that the conduct was "outside the scope of employment." Taken together, *Ellerth* and *Faragher* give essential guidance for employers to avoid or minimize potential liability for sexual harassment. Under *Ellerth* and *Faragher*, employers can find solace in the fact that an effective and meaningfully implemented sexual harassment policy may tip the scales in favor of a defense verdict, particularly where the employee does not have a viable reason for failing to complain about alleged sexual harassment. Employees will also find reason to rejoice with the Court's expanded treatment of employer vicarious liability and its placement of the burden of

proof for any affirmative defense on the employer. While the lower courts will continue to litigate issues over tangible vs. intangible employment action, it is a safe bet to conclude that potential harassers will increasingly be deterred from engaging in offensive and unwelcome conduct as more employers in the public and private sector adopt effective antiharassment policies and show that they take harassment not as a "frolic" but as a serious workplace issue to be dealt with decisively and promptly.

Applying the Affirmative Defense

Before the Supreme Court decided *Faragher* and *Ellerth* in 1998, as noted above, it had employed a framework for sexual harassment cases based upon "quid pro quo" harassment and hostile work environment harassment. In a typical quid pro quo harassment case, an employer could be held strictly liable when a supervisor either explicitly or implicitly conditioned job benefits upon the granting of sexual favors by a subordinate, or threatened adverse action for a refusal to participate. In the typical supervisory hostile work environment and harassment case, the harassing comments or actions by a supervisor had to be deemed so severe or pervasive as to alter the terms and conditions of the employee's employment, and liability could be imposed upon the employer only when the employee could show that the employer knew or should have known of the harassment and failed to take the appropriate remedial measures.

Under the new analytical framework and liability standard adopted by the Supreme Court in *Faragher* and *Ellerth*, the basis for determining an employer's liability for harassment by a supervisor underwent a significant change. Under the new standard, the employer's liability was no longer dependant whether the sexual harassment was quid pro quo or hostile work environment, but turned on whether the harassment had culminated in a "tangible employment action." A tangible employment action could include a discharge, failure to promote, or other significant disciplinary action. Thus, if the alleged sexual harassment culminated in tangible employment action, the employer could be held strictly liable for the supervisor's harassment. If the supervisor's harassment did not result in a tangible employment action, however, but was sufficiently severe or pervasive as to be actionable under Title VII, the employer could be held vicariously liable unless it could prove what is now known as the *Faragher/Ellerth* affirmative defense. To assert the defense, the employer must show:

1. It exercised reasonable care to prevent and promptly correct any harassing behavior; and,
2. The employee unreasonable failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise to avoid harm.

Relevance of Policy and Complaint Procedure:

While the existence of a sexual harassment policy and complaint procedure is not absolutely required in order to prove the employer's affirmative defense under *Faragher/Ellerth*, its existence is relevant and usually considered essential to avoid liability where the employer has multiple locations or is a larger employer, as opposed to an employer of a relatively small work force, who may exercise informally "sufficient care to prevent tortious behavior." *Faragher*, 118 S. Ct. at 2293. Indeed, the Supreme Court in *Faragher* held that "while proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment

circumstances may appropriately be addressed in any case when litigating the first element of the defense.”

An employer of a small work force may exercise informally “sufficient care to prevent tortious behavior.” *Faragher*, 118 S. Ct. at 2293. It is not enough for the employer simply to point to an anti-harassment policy of some sort, and the affirmative defense does not “focus mechanically on the formal existence of a sexual harassment policy.” *Hurley vs. Atlantic City Police Department*, *infra* at 118. In this regard, an effective sexual harassment policy is one that the employer has disseminated to all employees, *Durham Life Insurance vs. Evans*, 166 F. 3d. 139, 162 (3rd Cir. 1999).

Larger vis-a-vis Smaller Employers

The EEOC has taken a consistent position, noting in its most recent Enforcement Guidance that even if a small employer does not require a formal policy and complaint procedure, a larger employer may not be able to establish the affirmative defense under *Ellerth/Faragher* without a policy and complaint procedure:

It generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. As the Supreme Court stated, ‘Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms.’ *Ellerth*, 118 S. Ct 2270 While the Court noted that this ‘is not necessary in every instance as a matter of law,’ failure to do so will make it difficult for employer to prove that it exercised reasonable care to prevent and correct harassment. **EEOC Enforcement Guidance 915.002 (June 18, 1999), BNA EEOC Compliance Manual, N:4081.**

Factors Rendering a Sexual Harassment Policy Vulnerable to Attack:

Bypassing the Harassing Supervisor

In *Faragher*, the Supreme Court held as a matter of law that an employer “could not be found to have exercised reasonable care to prevent the supervisor’s harassing conduct,” where the employer’s policy “did not include any assurance that the harassing supervisors could be bypassed in registering complaints.” *Faragher*, 118 S. Ct. at 2293.

Dissemination of policy

Even with a sexual harassment policy in existence, an employer will not be found to have exercised reasonable care to prevent a supervisor’s harassing conduct where the employer has “entirely failed to disseminate its policy against sexual harassment” to its employees, *Faragher*, 524 U.S. at 809. Further, unless an employer is able to prove that the plaintiff “unreasonably failed to take advantage of preventative or corrective opportunities provided,” it will be unable to establish the affirmative defense to liability under *Faragher/Ellerth*.

Training and protection from retaliation

In *Williams vs. Spartan Communications Inc.*, 2000 U.S. App. LEXIS 5776 (4th Cir. 2000), the Plaintiff's immediate supervisor sexually assaulted her three times over a three year period, and after the third assault she reported the attacks to her Sales Manager and Personnel Director. *Id.* at *2. Her harasser resigned two days later, after which the Plaintiff resigned voluntarily. The Plaintiff had admittedly received a copy of the employer's harassment policy and had admittedly waited years before complaining of the harassment. Summary judgment was granted to the employer by the District Court on the basis that the employer had established the two elements of the *Faragher/Elerth* affirmative defense. Reversing, the 4th Circuit held that the employer's harassment policy was so defective that the employer could not satisfy the affirmative defense's first prong that it exercised reasonable care to prevent and promptly correct the harassment. *Id.* at *5. The employer could not satisfy the affirmative defense, according to the 4th Circuit, since the harassing supervisor had testified in his deposition that he had received no training on sexual harassment at all, the employer's harassment policy failed to assure complainants that they would not be retaliated against and instead warned that "an employee who in bad faith falsely accuses another employee of harassment would be subject to discipline up to and including termination."

Complaint falling on deaf ears

The policy in *Williams* directed employees to report complaints of harassment to one of four managers, moreover, one of whom was the plaintiff's harasser, the other three including the Vice President and General Manager who was a good friend of the harassing supervisor, and two managers who reported to the harassing supervisor. *Id.* at *7-8. Evidence in the record that the employer's managers had tolerated and actively participated in lewd conversations in the work place included the following: One of the managers identified in the policy to receive reports of harassment noted that a secretary had been fired because "she didn't give him a blow job," and in discussing female participants in a management training program had said "boys, I have stepped over better than that just to jack off," and, finally, after a sexual harassment training meeting, had asked "does this mean we can't fuck the help anymore." *Id.* at *7.

The 4th Circuit concluded that on the basis of this evidence, an employee reasonably could fear that a sexual harassment complaint would not only "fall on deaf ears" but could even result in discharge, *Id.* at *9, and thus as a matter of law the Court could not find that the employer's harassment policy was reasonably designed to prevent and correct unlawful harassment.

Defective or dysfunctional policy

Similarly, an employer's harassment policy was disapproved by the 4th Circuit in *Smith vs. First Union National Bank*, 202 F.3rd 234 (4th Cir. 2000), where it was "defective or dysfunctional" and therefore not reasonable, particularly in light of the fact that the policy was worded in such a way that it implied that a sexual advance was required in order to constitute sexual harassment. *Id.* at 245. The 4th Circuit also found that the policy gave no indication that harassment because of gender was prohibited and that a genuine issue of material fact precluded the granting of summary judgment in favor of the employer on the first element of the affirmative defense, that it exercised reasonable care to prevent and remedy sexual harassment.

Lack of effective implementation

In *Gentry vs. Export Packaging Company*, 238 F.3d 842 (7th Cir. 2001), the employer’s sexual harassment policy was held not to have been effectively implemented where there was no consensus among the employer’s management as to who held the position of human resources representative. The employer failed to inform its employees of who held that position, although it’s policy indicated [they] may report sexual harassment to “the human resources representative.”

No express anti-retaliation provision

In *Miller vs. Woodharbor Molding and Millworks*, 80 F. Supp 2nd 1026 (N.D.I 2000), affirmed, 2001 WL 388809 (8th Cir. 2001), the court found that the employer’s sexual harassment policy and training were deficient where its policy contained no express anti-retaliation provision, no formal procedure for bringing complaints, and did not identify a person to whom employees were supposed to direct the complaints.

Recent Decisions Addressing the Adequacy of Sexual Harassment Policies

! ***Leopold vs. Baccarat***, 239 F. 3d 243 (2nd Cir. 2001)

The second circuit expressed a preference for anti-harassment policies that contained non-retaliation clauses and guaranteed confidentiality, but held such clauses are not mandatory and the lack thereof is not sufficient to defeat the first prong of the Faragher/ Ellerth affirmative defense.

! ***Breda vs. Wolf Camera & Video***, 222 F. 3d 886 (11th Cir. 2000)

The clear policy published to employees was followed by the employee. The employer’s notice of the harassment was established by the terms of the policy, under which the employer had given a designated person explicit actual authority to handle complaints.

! ***Dayes vs. Pace University***, 2001 WL 99831 (2nd Cir. 2001)

The first element of the affirmative defense was met where the employer had a grievance procedure set forth in its employee handbook and a policy of prohibiting sexual harassment.

! ***Barrett vs. Applied Radiant Energy Corp.***, 243 F. 3d 262 (4th Cir. 2001)

The employee failed to avail herself of a complaint mechanism designed by the employer, whose anti-harassment policy directed employees to lodge complaints with supervisors. In the event they felt uncomfortable bringing the matter to the attention of their supervisor, they could discuss the situation with any member of the company management, including the president.

! ***Hargrave vs. County of Atlantic***, 2003 U.S. Dist. LEXIS 7952 (D.N.J. 2003)

A Title VII claim based on racially and sexually hostile work environment against a County and a supervisor and a §1983 sexually hostile environment claim against a supervisor and a racially hostile environment claim against three supervisors withstood summary judgment in this case. The District Court followed the Third Circuit’s five-factor test for proving the existence of actionable hostile work environment under Title VII:

- a. The plaintiff must have suffered intentional discrimination because of her race or sex.

- b. The discrimination must be pervasive and regular
- c. The discrimination must have detrimentally effected the plaintiff
- d. The discrimination must be such that it would detrimentally effect a reasonable person of the same race or sex in that position, and
- e. Sufficient evidence to establish the existence of *respondeat superior* liability must be presented.

Some of the statements made to women by the supervisors in this case included “you look so good, baby, I could put you on a place and slop you up with a biscuit,” and “the sushi tasted better than a woman” a supervisor had. *Id.* at 402. Other sexually offensive remarks included one of the supervisors often telling jokes about a blind man who passed a fish market, the point of which was that female genitalia smells like raw fish. *Id.* at 403. The court found summary judgment to be inappropriate and that the County was not entitled to invoke the affirmative defense set forth in *Faragher/Ellerth*, emphasizing that:

- a. The affirmative defense is not an element of the plaintiff’s case, and “while the County claims to have had formal sexual harassment and discrimination policies and procedures in place during plaintiff’s employment, it has not provided the court with a copy of those policies and procedures.” *Id.* at 429.
- b. The record contained no evidence that the policies were communicated to the supervisors and staff, the court noting that the affirmative defense does not “focus mechanically on the formal existence of a sexual harassment policy, allowing an absolute defense to a hostile work environment claim whenever the employer can point to an anti-harassment policy of some sort,” citing *Hurley vs. Atlantic City Police Department*, 174 F. 3d 95, 118 (3rd Cir. 1999).
- c. With respect to the sexual harassment hostile work environment claim asserted by the plaintiff, the County had made no reference to “any evidence indicating that plaintiff failed to avail herself of the preventative or corrective opportunities made available to her.” *Id.* at 429.

! *Mancuso vs. City of Atlantic City*, 193 F. Supp. 2d 789, 802 (D.N.J. 2002)

Atlantic City’s Motion for Summary Judgment was denied as to sexual harassment claims where the employee, the second female lifeguard hired by the city’s beach patrol, offered sufficient evidence of genuine issues of material fact as to whether the city had exercised reasonable care to prevent and correct sexual harassment.

Reasonable care to prevent and correct harassment

Throughout the period of time that the plaintiff was being harassed, the Atlantic City Beach Patrol (ACBP) promulgated an “Operations Manual” in which detailed rules and regulations of the agency were set

forth, including a copy of the city's sexual harassment policy applicable to all beach patrol employees. At the start of each beach season, beach patrol employees were given a policy of the rules handbook including its sexual harassment policy and were asked to read, sign and return the policy.

No personal copies of policy given to ACBP employees

Individual employees of the beach patrol were not given personal copies of the sexual harassment policy, but the plaintiff admitted she was aware generally of the existence of the policy and contended that she did not comply with its requirements with regard to most of the incidents of alleged harassment because she "had gone through the chain of command previously and... didn't get anywhere" and because she "didn't believe there was a place that you could go to make a complaint to where you weren't going to experience some type of hostility." *Id.* at 794.

Well-publicized policy not enough to discharge duty of care

Atlantic City argued that it was entitled to summary judgment based on the beach patrol's promulgation of an explicit policy against sexual harassment, and contended that the existence of this well publicized policy, coupled with the plaintiff's unreasonable failure to take advantage of the preventative or corrective opportunities offered to her by the beach patrol, provided an affirmative defense precluding her claims against the city. *Id.* at 797-98. In denying summary judgment, the court emphasized that there was substantial issues of material fact relating to the city's exercise of reasonable care to prevent and correct instances of sexual harassment within its workplace and to the reasonableness of the efforts of the plaintiff to avoid that harassment. *Id.* at 801.

The touchstone of the first element of the affirmative defense articulated in *Ellerth* and *Faragher* is the employer's exercise of reasonable care to prevent and correct any sexually harassing behavior in its workplace. As the Supreme Court noted, "while proof that an employer had promulgated an anti-harassment policy with complaint procedures is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense." *Ellerth*, at 765; *Faragher*, at 807. In this case, there is little question that, given the work environment at the ACBP, Atlantic City's duty of reasonable care included an obligation to promulgate and disseminate an effective anti-harassment policy. Indeed, the workplace at issue in this case appears to be very similar to that involved in *Faragher*, a case also involving a beach patrol. In *Faragher*, the court held that the affirmative defense articulated in that case was unavailable to the defendant as a matter of law, as "the city had entirely failed to disseminate its policy against sexual harassment among the beach employees and... its officials made no attempt to keep track of the conduct of [its] supervisors.... 524 U.S. at 808.

Effective precautions and sensible complaint procedure

The Court also addressed the employer's responsibility for communicating a formal policy against sexual harassment, noting that "those responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure." *Id.* at

General environment of discrimination and harassment

The Court in Mancuso found a further basis for its conclusion that Atlantic City could not exercise reasonable care without the promulgation and dissemination of an effective anti-harassment policy, noting that under Hurley, “in this matter, plaintiff has provided evidence regarding not only the harassment to which she herself was subjected, but also of a general environment of discrimination and harassment persisting at ACBP since it first accepted women in its workplace.”

History of substandard treatment

The Court also noted that there was an apparent history of substandard treatment to which female lifeguard had been subjected before she was employed by the city, including the treatment of the first female lifeguard hired by the beach patrol during the previous decade, who had been subjected to harassment that included male lifeguards painting her lifeguard stand pink and with the term “C1” which stood for “cunt number one”, and had also urinated on and then frozen her bathing suit. The highest ranking officers in the beach patrol had ignored these incidents, which “indelibly colored” the plaintiff’s faith in the beach patrol’s commitment to eliminating sexual harassment. *Id.* at 802. Thus, while the city beach patrol undisputedly had in place a formal anti-harassment policy, “there was substantial evidence which indicates that the ACBP’s policy was, in fact, defective and which therefore could support a conclusion that it failed to exercise reasonable care in implementing that policy.”

Components of an effective policy

In *Mancuso*, the New Jersey Supreme Court relied on *Lehmann vs. Toys “R” Us*, 132 N.J. 587, 626 A. 2d 445 (N.J. 1993), a pre-Faragher/Ellerth sexual harassment case under the New Jersey Law Against Discrimination (LAD), to identify these components of an “effective” anti-harassment policy:

Employers that effectively and sincerely put five elements into place are successful at surfacing sexual harassment complaints early, before they escalate. The five elements are: policies, complaint structures, and that includes both formal and informal structures; training, which has to be mandatory for supervisors and managers and needs to be offered for all members of the organization; some effective sensing or monitoring mechanisms, to find out if the policies and complaint structures are trusted; and then, finally, an unequivocal commitment from the top that is not just in words but backed up by consistent practice.” *Lehmann*, 132 N.J. at 621; *Mancuso*, *supra*.

Thus, while the city’s anti-harassment policy expressly prohibited sexual harassment and provided a general description of conduct prohibited by that policy and described a basic procedure for an employee to follow in order to file a complaint, “what the policy does not contain, however, is any sort of assurance that an employee filing a complaint will not be retaliated against for doing so. Such assurances are an important part of any effective sexual harassment policy.” *Id.* at 803.

Communicating Complaint Process to Employees

The city's defense to this was that the plaintiff had unreasonably failed to take advantage of the preventative or corrective opportunities provided by the employer. The complaint process provided by an employer is indeed relevant to such an inquiry, and here the city's policy did contain an explicit formal complaint procedure, but the Court insisted that "examination of a policy's complaint processes must go beyond the question of the existence of such processes to a consideration of the clarity and detail with which the terms of those processes are communicated to employees and of the ability of employees to invoke that process and rely on its result." *Id.* at 805.

! ***Cavuoti vs. New Jersey Transit Corporation***, 161 N.J. 107, 735 A. 2d 548 (1999)

An employer who promulgates and supports an active anti-harassment policy should be entitled to a form of safe haven from vicarious liability for an employee's harassing conduct of others. This case provides a road map for getting that protection

Factors relevant to extending protection to employer

The Court in *Cavuoti* emphasized that in order for an employer to enjoy the benefit of this protection, a number of circumstances would be relevant, including:

- a. Periodic publication of the employer's anti-harassment policy,
- b. The presence of an effective and practical grievance process for employees to use, and
- c. Training for workers, supervisors and managers concerning how to recognize and eradicate unlawful harassment.

! ***Gaines vs. Bellino***, 173 N.J. 301, 801 A. 2d. 322 (2002)

An employee complaining of sexual harassment successfully overturned the lower court's summary judgment in favor of her supervisor and her employer, Hudson County Correctional Facility, where a supervisor had subjected the plaintiff to unwanted kissing. The plaintiff did not file a formal complaint since she perceived that she would not be believed.

Realistic preventative and protective measures

The New Jersey Supreme Court held that genuine issues of material fact existed as to whether the employer had implemented an anti-sexual harassment workplace policy that provided realistic preventative and protective measures for employees in the event harassment occurred, and that the employee had raised sufficient factual disputes to show that her subjective perception of the workplace and the complaint mechanisms was based on more than mere assertion. Citing *Lehmann*, the Court reasoned that "an employer's sexual harassment policy must be more than the mere words encapsulated in the policy," and that there must be an "unequivocal commitment from the top" that the employer's opposition to sexual harassment is not just words but is backed up by consistent practice. In addressing an employer's due care in a sexual harassment context, the Court also emphasized that merely implementing and disseminating anti-harassment procedures with a complaint procedure does not by itself constitute evidence of due care. As the Court had stated earlier in *Lehmann*, "existence of effective preventative mechanisms provides some evidence of due care on the part

of the employer” but “given the foreseeability that sexual harassment may occur, the absence of effective preventative mechanisms will present strong evidence of an employer’s negligence [in this case under the N.J. Law Against Discrimination]. *Id.* at 333. The plaintiff was held entitled to a jury’s evaluation of the alleged facts, in view of factual issues as to whether the County had an effective policy.

! ***Velez v. City of Jersey City***, 358 N.J. Super. 224, 817 A. 2d 409 (N.J. App. 2003)

A city employee successfully appealed from a summary judgment which had been granted in favor of the city and a councilman on a claim for sexual harassment under the New Jersey Law Against Discrimination, the Appellate Court holding that the employee had sufficiently demonstrated a genuine issue of material fact as to whether the city had violated the LAD by failing to process her immediate complaint of sexual harassment and by violating its own policy in handling her allegations. Summary judgment was avoided by factual issues concerning the reasonableness of the city’s dissemination, implementation, monitoring and enforcement of its sexual harassment policy, and triable issues of fact concerning negligence on the part of the city for failing to adequately enforce its own policy thereby creating the hostile work environment alleged by the former city employee.

No training or enforcement evident

The Court, citing *Gaines* and *Lehmann*, concluded that while the city’s sexual harassment policy was in effect at the time of the incident complained of, the plaintiff and other city employees and officials had not been trained, and there was significant doubt as to whether the policy was enforced, the Court noting that “after the alleged incident, plaintiff promptly complained to both her direct supervisor and her supervisor’s supervisor,...who in turn reported the complaint to his direct supervisor, as well as the person who had direct responsibility for conducting investigations pursuant to the city’s sexual harassment policy. Nevertheless, no investigation was conducted and no effort was made to remediate past conduct or prevent future similar conduct.” *Id.* at 416. It also noted that “the nature of the alleged harassment was so severe and offensive that one could assume that a reasonable employer would not stand by, even if requested to do so by a terrified employee,” particularly where the alleged violator was a councilman who by virtue of his position was a policy-maker for the city employer. *Id.* at 416.

! ***Tarr vs. Bob Ciasulli’s Mack Auto Mall, Inc.***, 360 N.J. Super. 265, 822 A. 2d 647 (N.J. App. 2003)

Where the plaintiff prevailed on her hostile work environment sexual harassment claim but was awarded no damages, the Appellate Court remanded in part for a new trial on damages, where the employee had left her job due to continuous sexual explicit remarks from male coworkers and had been subject to intense humiliation and embarrassment.

Lack of well-publicized and enforced policy

The Court noted that although the owner claimed that he did not have personal knowledge of the workplace sexual harassment and that the plaintiff had never complained to him directly about it, liability of management did not require personal knowledge of sexual harassment, and under *Lehmann*, *Gaines*, and

Velez, a plaintiff may show that an employer was negligent by its failure to have in place well-publicized and enforced anti-harassment policies, effective formal and informal complaint structures, training and/or monitoring mechanisms. In this case, the employer's negligence was shown by the following:

during the time of plaintiff's employment... there was no employee handbook of any kind and no formal written policy respecting sexual harassment. Rather, [the owner] communicated company policies and directives to his employees by individual memoranda, none of which addressed the subject of sexual harassment. There was no complaint mechanism in place. Although the Mack Auto Mall, as all the other franchises, had a poster with a number to call in the case of complaint, there was contrary evidence as to whether the invitation was extended to employees as well as to customers, at least some employees believing that it was not. There was no designated person to take personnel complaints. There was no monitoring and no training. *Id.* at 278.

This evidence, coupled with testimony that the owner had referred to the actions of five other women who had ultimately filed discrimination complaints against him and companies as "bottom feeding and screwing up the whole economy," and that the owner had exhorted his sales people to take money away from female decision makers because "women are stupid," persuaded the Appellate Court that there was abundant evidence from which a jury could have concluded that the owner was the ultimate supervisor, the top management, "whose acts both of omission and commission could have been found by the jury to have contributed to the creation of the hostile workplace."

! ***Durkin v. City of Chicago***, 2003 U.S. App. LEXIS 17541 (7th Cir. 2003)

A police academy trainee sued the city for equal protection violations, sexual discrimination, sexual harassment and retaliation under Title VII, claiming that she had been spoken to in an offensive and demeaning manner during her training. The trial court, and 7th Circuit in affirming summary judgment, concluded that the city could not be held liable for sexual harassment since no tangible employment action, including alleged denial of training, was taken against the trainee, who was actually afforded more training than was customarily given. Further, the city was not negligent in discovering and remedying the harassment since the trainee had failed to use the proper mechanism for reporting the harassment. Addressing the question of whether the city was negligent in discovering or remedying the harassment, the 7th Circuit reasoned that an employer may defend against harassment charges by showing that it has exercised reasonable care to discover and rectify any sexually harassing behavior. "Since an employer is not omniscient, it must have notice or knowledge of the harassment before it can be held liable. We determine whether an employer had notice of sexual harassment by considering the channel for complaints of harassment.... When an employer designates a "point person" to accept complaints, as the city did here, "this person becomes the natural channel for the making and forwarding of complaints, and complainants can be expected to utilize it in the normal case."

Failure to use existing mechanism to report

The Court then turned to the plaintiff's burden of proof in her attempt to survive summary judgment, noting that she had to show she had provided her employer with enough information so that a reasonable employer would think there was some probability she was being sexually harassed. The plaintiff claimed that

the city was negligent because it failed to properly investigate her complaints about harassment, arguing that the city had made a “meager effort” because it merely questioned one individual and no one else, and never corrected any of the sexually harassing behavior since it did not punish or fire anyone. The Court noted, however, that the city had a proper system for making and forwarding complaints about sexual harassment, that the plaintiff’s training had included a lesson on the city’s sexual harassment policies and complaint procedures, and that sexual harassment policy provided for an effective grievance mechanism and had a meaningful process for employees to seek redress for their concerns. The Court concluded: “the city has a reasonable mechanism for detecting and correcting harassment. However, Durkin did not avail herself of the procedure. Probationary officers at the Academy are directed to make complaints of sexual harassment to their home room instructor. Durkin failed to tell her home room instructor, Officer Smith, about the sexual harassment because he was Peck’s friend and she believed it would be “futile.” Durkin’s feelings of futility or unpleasantness did not alleviate her duty to bring her mistreatment to the city’s attention.... An employer is not liable for co-employee sexual harassment when a mechanism to report the harassment exists, but the victim fails to utilize it. *Id.* at *12-13.

! ***McCurdy vs. Arkansas State Police***, 203 U.S. Dist. LEXIS 13854 (E.D. Ark. 2003)

The Court in this sexual harassment case held that the first element of the ***Faragher/Ellerth*** affirmative defense was satisfied, where an employee had taken an advantage of the state police’s sexual harassment policy and promptly reported her allegations. The employer showed, however, that it had an established sexual harassment policy and grievance and investigatory procedure, promptly responded to insulate the employee from further harassment, and promptly and thoroughly investigated the allegations. The Court declined to impose vicarious liability on the employer for a supervisor’s hostile environment actions, and held the employer was entitled to a judgment as a matter of law.

Reasonable care demonstrated

At the heart of this case was the plaintiff’s allegation that one Sergeant Hall had engaged in objectively and subjectively offensive conduct that, in the Court’s view, constituted a hostile work environment. The sergeant, whom the plaintiff had only met one time before this incident, approached her from behind, grabbed her breast, fondled her hair and made sexually suggestive comments. Concluding that no reasonable jury could conclude that the employer failed to satisfy the first element of the *Faragher/Ellerth* defense, that the employer exercised reasonable care to prevent sexual harassment by its employees and took prompt steps to avoid any further harassment of the plaintiff by the sergeant, the Court reasoned that “the employer had in place a detailed sexual harassment policy and a procedure for reporting misconduct,” and that the plaintiff had received a copy of the policy when her employment began and understood that she could promptly report the challenged conduct, which she in fact *did*. Furthermore, sexual harassment training was provided to employees, and the offending sergeant had attended such a seminar in 1996. The Court emphasized the level of care exhibited by the employer:

[T]he focus for the Court is whether the Arkansas State Police’s response was prompt and appropriate. Clearly, there organization responded promptly and took reasonable care to ensure that the plaintiff was insulated from Sergeant Hall. This insulation continued even after the plaintiff’s allegations were not wholly substantiated. The Court is mindful that Title VII does

not obligate an employer to terminate an employee who engages in sexual harassment... Rather, what an employer must do is take prompt remedial action reasonably calculated to end the harassment.... This is precisely what the Arkansas State Police did in the instant case. No reasonable jury could conclude otherwise.

Nipping hostile environment in the bud

The Court in *McCurdy* further noted that to impose vicarious liability under those circumstances would amount to strict liability, even though the plaintiff had not suffered a severe or pervasive change in her working conditions or any adverse employment action. The Court concluded “a standard imposing vicarious liability notwithstanding the employer’s having nipped a hostile environment in the bud would also conflict with the premise of *Ellerth/Faragher*, founded in agency law, that a supervisor who creates a hostile environment is aided by his agency status with the employer in doing so.” *Id.* at *38.

Lip Service vs. Meaningful Monitoring and Enforcement

A properly drafted sexual harassment policy will certainly not bar Title VII claims if an employer gives no more than lip service to the policy, has a lackadaisical attitude toward training and meaningful enforcement, fails to keep in place an effective monitoring mechanism, or disregards the need for a formal as well as informal complaint structure by which an employee is given a clear and understandable avenue to voice complaints other than through an immediate supervisor who may be the source of the harassment. The employer’s burden of proving that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior is not a light one, but the presence of widely publicized and effectively communicated policies and procedures designed to prohibit or minimize sexually harassing behavior will provide a major linchpin for the affirmative defense under *Faragher/Ellerth*. Coupled with an effective training and prevention program, an employer must think proactively so that it will be in the position to demonstrate that a complaining employee, notwithstanding what may amount to a hostile work environment, has indeed unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer. Thorough and systematic distribution of a sexual harassment policy, moreover, will provide “compelling proof” that the employer has exercised reasonable care in preventing and promptly correcting sexual harassment, *Barrett vs. Applied Radiant Energy Corporation*, 85 Fair Empl. Prac. Cas. (BNA) 253 (4th Cir. 2001), which proof can only be rebutted by a showing that the employer adopted or administered the policy in bad faith, or the policy was in some way defective or dysfunctional. *Id.*, citing *Faragher*, 524 U.S. at 808.

The Preemptive Strike

In the wake of Professor Anita Hill's infamous Coca Cola testimony before the Senate Judiciary Committee during what then Supreme Court nominee Clarence Thomas characterized as a “high-tech lynching,” followed by President Bill Clinton’s cigar antics with Ms. Lewinsky that brought oral sex and thongs into America’s dens and living rooms via CNN and FOX, the public has a heightened awareness of sexual misconduct, discrimination and harassment in the workplace. Today to be labelled a sexual harasser is tantamount to contracting leprosy, second only perhaps to be branded a racist. The charge of harassment,

once it has been made public after an aggressive internal investigation and immediate remedial action by the employer if appropriate, can and often does have a major impact on the life of the accused, sometimes irreparably. This new awareness has led to the "preemptive strike," which occurs when employees who believe they on the verge of being fired or disciplined try a preemptive strike by asserting sexual harassment claims against a superior in the outside hope that attention will be diverted from their own predicament and that their job will be protected. Prompt investigation and remedial action by an employer, guided by competent counsel aware of the exigencies of the situation, can beat the preemptive strike. See *Brandon v. Claiborne County*, 828 So. 2d 202 (Miss. App. 2001), cert. denied, 829 So. 2d 1245 (Miss. 2002)(After ad hoc committee of board of supervisors held a hearing on a female employee's sexual harassment complaint against the road manager, the committee voted to terminate the road manager's employment, and the full board of supervisors upheld the termination after another hearing. The road manager appealed the board's decision to uphold his termination and also filed a separate complaint in which he alleged the local government and the individual supervisors wrongfully discharged him and violated his due process rights.)

An employer who settles quickly in the face of a preemptive strike may acquire "a reputation as a cash register for disgruntled employees."⁸⁴ On the other hand, the employer who believes it has recognized a preemptive strike may promptly fire or otherwise discipline the complaining party, who now has a valid cause of action where there was no cause of action before, based on both federal and state statutory protection of employees from retaliation for asserting charges of sexual harassment.⁸⁵

Mediation of Sexual Harassment Complaints

The chances of settling a sexual harassment claim are enhanced by an informal, resolution-oriented atmosphere of mediation, a process which requires careful planning in order to arrive at a satisfactory result. As one of the most flexible forms of dispute resolution, mediation can be resorted to at any stage of a proceeding, even after a civil action has been filed in court. Key components of this process are:

1. Selection of Mediator. Consideration should be given to selecting one female and one male co-mediator to overcome the potential reluctance by each party who may believe that a mediator of the same sex as the party will have a greater understanding of that party's position.
2. Pre-mediation Preparation. In view of the highly charged emotional context in which such claims are asserted, the mediation may be structured so as to defer a face-to-face meeting initially, call for the parties to submit position papers and key documentary evidence before the mediation commences, and to agree to have a meeting of all parties and the mediator only after significant progress has been made toward resolution of the dispute.
3. Privacy and Confidentiality. Mediation also provides the benefits of privacy and confidentiality, giving the employee a private forum with an attendant reduction of the level of emotional trauma, while

⁸⁴*Id.* at 46.

⁸⁵42 U.S.C. § 2000(e)-3; *EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775, 777 (noting the statute "protects employees from employer retaliation for filing complaints with the Commission, even if the charges alleged are false and malicious.").

providing the employer with reduced risk of negative publicity. A confidentiality agreement entered into before the mediation process begins, assuring the parties that anything that may be disclosed will not be used against them if the mediation process does not succeed, will facilitate full, frank and open discussion, with assurance that those disclosures will not be used improperly by the parties nor provided to outside or third parties.

4. Reduced expense. As one of the least expensive and disruptive methods for dispute resolution, mediation bypasses the routine discovery process and often avoids other litigation expenses, with each of the parties to a mediation usually dividing the mediator's fees. Business disruption costs can also be minimized through the mediation process, such as a mediation solution that results in the complaining party returning to work and therefore limiting the wage claim, with a resulting savings to the employer, who may also avoid the cost of extensive discovery by resolving the dispute quickly through mediation, not to mention the savings from improved employer-employee relations, reduction of the amount of work force down time, and the reduction of lost employee hours.

Proactive Risk Management

In view of the strong likelihood that claims of sexual harassment and hostile working environment will continue escalate in numbers and intensity throughout this decade, counties and other governmental employers would be well-advised to take certain prudent measures which may, in the final analysis, be the most effective and viable defense to such claims. These measures include at a minimum:

- effective training;
- adoption and implementation of a grievance, investigatory and internal complaint procedure;
- a speedy yet effective enforcement mechanism; and,
- implementation of a mediation process.

Voting Rights Act Litigation on the Local Government Level

Race, politics and party affiliation are the spices that make the redistricting process at times both lively and incomprehensible. They are the key ingredients in many lawsuits arising under the Voting Rights Act of 1965. They are the backdrop for an unfolding drama as hundreds of counties and other local government entities undertake the daunting task of redistricting following release of the Census 2000 data. Many of these entities face a war on two fronts, sometimes three. Retrogression claims may arise during the Section 5 preclearance process, constitutional claims of intentional discrimination may be asserted under the Fourteenth or Fifteenth Amendments, racial gerrymandering claims may arise under the Equal Protection Clause of the Fourteenth Amendment, and claims may simultaneously be asserted under state law. The changing political landscape and the upheavals in redistricting law during the past eight years provide what is indeed a bewildering backdrop for evaluating at-large, multi-member and single member electoral systems.

The following will focus on recent case law developments involving state and local government

redistricting.

A Different Legal Climate

This decennial reallocation of political power can be a legal minefield in the new millennium. It entails much more than equalizing district population under the one person, one vote standard of the Fourteenth Amendment. For jurisdictions covered by §5 of the Voting Rights Act, compliance with the non-retrogression command of §5 is not always a simple matter, and can easily lead to a contentious battle over the appropriate benchmark for measuring retrogression. For jurisdictions throughout the nation, satisfying the non-dilution or "results" standard of §2 of the Voting Rights Act can become mired in such issues as how to ascertain the "minority-preferred candidate," or to what extent election outcomes are determined by racial bloc voting, or whether nonracial factors have a predominant effect on those outcomes. And for jurisdictions entering the 2002 redistricting arena burdened with a consent decree fashioned during the mid-1980's to mid-1990's era, an era that saw many racially motivated majority-minority districts crafted pursuant to what was then assumed to be the broad remedial power conferred upon Article III Courts, an exceptionally difficult balancing act awaits. We will examine this different legal climate as it has developed during the past decade.

We will also consider how the district courts and courts of appeal evaluate the relevancy of endogenous and exogenous elections, how certain electoral evidence is discounted by reason of "special circumstances" or, under different facts, how the courts give overarching weight to other significant elections as they assess the totality of the circumstances. We will then focus on how the courts evaluate the relationship between voter turnout, money and mobilization, as well as how the United States Supreme Court has instructed the bench and bar (and the legislative branch) on navigating between the Fourteenth Amendment's prohibition against racial gerrymandering and the Voting Rights Act's mandate to provide minority citizens equal access to the electoral process and equal opportunity to participate meaningfully in the political process.

Section 2 and Section 5: The Federal Arsenal

Sections 2 and 5 of the Voting Rights Act of 1965, as amended, have been called "two of the weapons of the federal government's formidable arsenal" in the fight against voting discrimination. They combat different evils, are different in their structure, purpose and application, and they impose different duties upon state and local government bodies.

Understanding that difference is especially important for supervisors, commissioners, council members and attorneys who represent them.

Section 2's Results Test: Legislative History

In 1982 when Congress amended the Voting Rights Act of 1965, one of the most controversial amendments was Section 2. Section 2(a) of the Voting Rights Act applies nationwide and prohibits any "voting qualification or prerequisite to voting or 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." 42 U.S.C.

§1973(a). Section 2(b) provides:

A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered: provided, that nothing in this section establishes a right to have members of protected class elected in numbers equal to their proportion in the population.

The operative definition of vote dilution comes from this revised language of §2 of the Voting Rights Act. It has a judicial gloss. In 1986, the Supreme Court construed newly amended §2 for the first time and held that three necessary preconditions—geographical compactness, minority political cohesion and white racial bloc voting—must be established in order to prove vote-dilution claims and prevail in a §2 vote dilution case:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed,...usually to defeat the minority's preferred candidate.

Thornburg v. Gingles, 478 U.S. 30, 50-51, 106 S.Ct. 2752, 2766-67, 92 L.Ed.2d 25 (1986).

In a lengthy discourse that mirrored the federal judiciary's pre-*Shaw* concerns over the lack of principled legal bounds in the area of race-based redistricting, the Fourth Circuit observed in *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988) that vote dilution is but one of various ways in which the voting rights of racial minorities may be "denied or abridged" in violation of § 2:

But it is a distinctive way which in recent times, with the gradual eradication of most of the more direct historical forms of outright denials or subversions of voting power and access itself - literacy tests, poll taxes, anti-single shot laws and the like - has become the dominant remaining means of voting rights violations, and hence the most frequent focus of contemporary legal challenges. First originating as a judicially recognized special form of voting rights violation, the "vote dilution" concept, stripped of any requirement of discriminatory intent, has now of course been effectively codified as a special form of violation, in amended § 2....

Being less obvious and direct a means by which § 2 voting rights may be violated than the more brutally direct formal devices now largely of the past, the concept underlying vote dilution is correspondingly more subtle and difficult to keep within principled legal bounds - both in the violation and remedial stages of applying § 2. A moment's reflection - confined to the

dilution-by-submergence concept here in specific issue - shows why.

The basic concept, broadly stated, is that racial minorities may not have their group voting power impermissibly "diluted" by multimember districting or at-large electoral processes which "submerge" the minority voting group in a voting constituency in which the voting power of a racially "bloc-voting" white majority always insures defeat for the candidates of the minority group's choice. *Gingles*, 478 U.S. at 46. As so stated, the concept is logically unbounded. It has no implicit limits related to any of its principal components: how racial majority and minority voters are geographically dispersed in the overall voting constituency; their respective population percentages; whether and to what extent the two racial groups vote along racial lines; and the number of representatives involved. All of these are essential functions of the ultimate phenomenon of voting power "dilution" as that term has acquired the legal meaning above summarized. Except as these elements are given bounds, therefore, the concept is simply an open-ended one subject to no principled means of application. Ultimately, unbounded, it could be applied to find "dilution" of a minority group's voting power in any situation where the group had been unable, despite effort, to achieve representation by the election of candidates of its choice in proportion to its percentage of the total voting age constituency.(emphasis added)

The Dole Compromise

During the 1982 debates over amendments to the Voting Rights Act, then-Senator Robert Dole was credited with working out a compromise with the competing majority and minority factions in the Democratically-controlled Senate. The "Dole Compromise" was designed to allay the concerns of a number of Senators that the newly crafted "results test" of Section 2 would be turned into a license for proportional representation. With the addition of the Dole Compromise, enactment of the 1982 Amendments to the Voting Rights Act of 1965, 42 U.S.C. §1973(a), was a done deal. The Dole Compromise appears in the final sentence of Section 2(b):

provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

See *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988)("The same concern to keep the [vote dilution] concept within principled bounds was of course dominant in congressional deliberation leading to its codification, now stripped of any intent requirement, in amended § 2. The concern, specifically addressed, was that without adequate legal constraints upon judicial discretion to find and remedy mere vote dilution "results," the inevitable consequence would be a proportional representation approach. The response, upon which it is generally considered passage finally turned, was the addition to § 2(b) of the "Dole Compromise" proviso, which specifically disclaimed any legislative intent to establish any "right" of proportional representation.") (emphasis added); *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996)("the 1982 amendments were heavily contested, and ultimately were passed only because of the inclusion of the proviso in 42 U.S.C. Section(s) 1973(b) which warns that the Act should not be interpreted to establish a right to proportional representation.")

Senate Report Factors

According to the Supreme Court in *Gingles*, the Senate Judiciary Report which accompanied the 1982 Voting Rights Act Amendments elaborated on the nature of §2 violations and the proof required to establish those violations. The Senate Report specified certain "objective factors" and "enhancing factors" which typically may be relevant to a §2 claim. These factors were culled from the Supreme Court's decision in *White v. Regester*, 412 U.S. 755 (1973), and from the Fifth Circuit's decision in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973)(en banc). These "Senate Report factors" necessarily call for evidence of the circumstances of the local political landscape and include, but are not necessarily limited to, the following:

- (1) The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
- (2) The extent to which voting in the elections of the state or political subdivision is racially polarized;
- (3) The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
- (4) If there is a candidate-slating process, whether the members of the minority group have been denied access to that process;
- (5) The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
- (6) Whether political campaigns have been characterized by overt or subtle racial appeals;
- (7) The extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors which may be probative include:

- (8) Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
- (9) Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Unless all three *Gingles* preconditions are established, there is no necessity to consider the Senate Report/*Zimmer* factors or other proof. *Overton v. City of Austin*, 871 F.2d 529, 538 (5th Cir. 1989). See

N.A.A.C.P., Inc. v. City of Columbia, S.C., 850 F.Supp. 404, 410 (D.S.C. 1993)(“Courts have interpreted this portion of the *Gingles* opinion as setting forth factors that are essential to a plaintiff’s case, but that are not, in and of themselves, conclusive of the existence of dilution.”) See *Burton v. Sheheen*, 793 F.Supp. 1329 (D.S.C.1992), vacated by *Statewide Reapportionment Advisory Comm. v. Theodore*, 508 U.S. 968, 113 S.Ct. 2954, 125 L.Ed.2d 656 (1993). Recent cases like *Solomon v. Liberty County Commissioners, infra*, show how mightily the courts struggle when they engage in the fact-intensive, searching analysis of electoral history called for in the typical vote dilution case, with many a case traveling up and down the appellate ladder not one, not two, but sometimes three or more times before a final resolution is hammered out.

Section 5's Non-Retrogression Test

Congress enacted §5 of the Voting Rights Act, 42 U.S.C. §1973c, to establish a centralized review procedure in our federal system, by which a "covered jurisdiction" such as a state or political subdivision subject to §5, may change a "voting qualification or prerequisite to voting," or "standard practice or procedure with respect to voting," only if that change has been precleared by either the United States District Court for the District of Columbia or by the Attorney General of the United States.

Compared with the nationwide applicability of §2 and its corresponding broader mandate based on the "results test" legislatively enacted in 1982, §5, with its centralized review procedure for changes in voting, electoral systems and practices, has a more limited purpose than §2.

Section 5 governs changes in voting procedures that have a discriminatory purpose or effect and prevents a covered jurisdiction from enacting or seeking to administer such voting changes unless and until they are precleared. A little over one year ago the Justice Department issued guidance concerning administrative review of redistricting plans submitted to the Attorney General for Section 5 preclearance. This guidance, while not legally binding, was issued in light of *Shaw v. Reno* (1993), *Abrams v. Johnson* (1987), *Reno v. Bossier Parish School Board* (2000) and related Supreme Court decisions and with the intent of providing assistance to entities and persons affected by Section 5's preclearance requirements. See generally **Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act**, 42 U.S.C. 1973c; 66 Federal Register, No. 12 (January 18, 2001).

As noted above, a covered jurisdiction may either seek to obtain administrative or judicial preclearance of a changed voting practice. If it opts to seek administrative preclearance, it submits the enactment to the Attorney General of the United States and may thereafter enforce the legislation if the Attorney General does not formally object to the new procedure within sixty days of the submission. Administrative submissions to the Attorney General under Section 5 are made pursuant to detailed procedural requirements set forth in “Procedures for the Administration of Section 5 of this Voting Rights Act,” 28 C.F.R. Part 51, available through the Voting Section’s website at <http://www.usdoj.gov/crt/voting>. If the covered jurisdiction decides to seek judicial preclearance, it may obtain judicial preclearance, either after the Attorney General has interposed an objection to the voting change or by filing a declaratory judgment action in the United States District Court for the District of Columbia for an adjudication that the subject practice "does not have purpose and will not have the effect of denying or abridging the right to vote on account or race or color...." 42 U.S.C. §1973c.

Whether preclearance is sought administratively through a Section 5 submission to the Attorney General or through a declaratory judgment action in the D.C. District Court, a proposed plan runs the risk of being found retrogressive under the Section 5's "effect" prong if it has the net effect of reducing minority voters' "effective exercise of the electoral franchise" when compared to the benchmark plan. See **Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act**, at 4, citing *Beer v. United States*, 425 U.S. 130, 141 (1976).

The effective exercise of the electoral franchise usually is assessed in redistricting submissions in terms of the opportunity for minority voters to elect candidates of their choice. The presence of racially polarized voting is an important factor considered by the Department of Justice in assessing minority voting strength. A proposed redistricting plan ordinarily will occasion an objection by the Department of Justice if the plan reduces minority voting strength relative to the benchmark plan and a fairly-drawn alternative plan could ameliorate or prevent that retrogression.

The consequences of submitting a retrogressive redistricting plan and the relevance of available alternatives to a retrogressive plan are also addressed by the Justice Department in its Guidance, at 4-5:

[1] If a retrogressive redistricting plan is submitted, the jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot reasonably be drawn. In analyzing this issue, the Department takes into account constitutional principles as discussed below, the residential segregation and distribution of the minority population within the jurisdiction, demographic changes since the previous redistricting, the physical geography of the jurisdiction, the jurisdiction's historical redistricting practices, political boundaries such as cities and counties, and state redistricting requirements.

[2] In considering whether less-retrogressive alternative plans are available, the Department of Justice looks to plans that were actually considered or drawn by the submitting jurisdiction, as well as alternative plans presented or made known to the submitting jurisdiction by interested citizens or others. In addition, the Department may develop illustrative alternative plans for use in its analysis, taking into consideration the jurisdiction's redistricting principles. If it is determined that a reasonable alternative plan exists that is non-retrogressive or less retrogressive than the submitted plan, the Department will interpose an objection. Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person one-vote principle. See 52 FR 488 (Jan. 6, 1987). Similarly, preventing retrogression under Section 5 does not require jurisdictions to violate *Shaw v. Reno* and related cases.

[3] The one-person one-vote issue arises most commonly where substantial demographic changes have occurred in some, but not all, parts of a jurisdiction. Generally, a plan for congressional redistricting that would require a greater overall population deviation than the submitted plan is not considered a reasonable alternative by the Department. For state legislative and local redistricting, a plan that would require overall population deviations greater than 10 percent is not considered a reasonable alternative.

[4] In assessing whether a less retrogressive alternative plan can reasonably be drawn, the geographic compactness of a jurisdiction's minority population will be a factor in the Department's analysis. This analysis will include a review of the submitting jurisdiction's historical redistricting practices and district configurations to determine whether the alternative plan would (a) abandon those practices and (b) require highly unusual features to link together widely separated minority concentrations.

[5] At the same time, compliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria. For example, criteria which require the jurisdiction to make the least change to existing district boundaries, follow County, city, or precinct boundaries, protect incumbents, preserve partisan balance, or in some cases, require a certain level of compactness of district boundaries may need to give way to some degree to avoid retrogression. In evaluating alternative plans, the Department of Justice relies upon plans that make the least departure from a jurisdiction's stated redistricting criteria needed to prevent retrogression.

[6] In those instances in which a plan is found to have a retrogressive effect, as well as in those cases in which a proposed plan is alleged to have a retrogressive effect but a functional analysis does not yield clear conclusions about the plan's effect, the Department of Justice will closely examine the process by which the plan was adopted to ascertain whether the plan was intended to reduce minority voting strength. This examination may include consideration of whether there is a purpose to regress in the future even though there is no retrogression at the time of the submission. If the jurisdiction has not provided sufficient evidence to demonstrate that the plan was not intended to reduce minority voting strength, either now or in the future, the proposed redistricting plan is subject to a Section 5 objection.(emphasis added)

In any event, a new voting practice cannot be enforced unless the covered jurisdiction has been successful in obtaining preclearance, whether judicial or administrative, and in the case of an unprecleared voting change subject to §5 preclearance, plaintiffs are entitled to an injunction that prohibits the change from being implemented.

The Search for the Correct Benchmark

The last legally enforceable redistricting plan in force for a jurisdiction covered by Section 5 is the “benchmark” against which a proposed new plan will be compared. That benchmark plan may be the most recently precleared plan or a plan drawn by a federal court. Under Section 5, a covered jurisdiction has the burden of establishing that a proposed new redistricting plan has neither the purpose nor the effect of worsening the position of minority voters with respect to the effective exercise of the electoral franchise, when compared to that jurisdiction’s “benchmark” plan. Section 5 preclearance will be denied if the jurisdiction fails to show the absence of such a prohibited purpose or effect. As the Justice Department makes clear in its Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, Shaw has indeed had a major impact on the preclearance process and the search for the correct benchmark for retrogression analysis:

[1] When a jurisdiction has received Section 5 preclearance for a new redistricting plan, or a federal court has drawn a new plan and ordered it into effect, that plan replaces the last legally enforceable plan as the Section 5 benchmark. See *McDaniel v. Sanchez*, 452 U.S. 130 (1981); *Texas v. United States*, 785 F. Supp. 201 (D. D.C. 1992); *Mississippi v. Smith*, 541 F. Supp. 1329, 1333 (D. D.C. 1982), appeal dismissed, 461 U.S. 912 (1983).

[2] [A] redistricting plan found to be unconstitutional under the principles of *Shaw v. Reno* and its progeny [can] not serve as the Section 5 benchmark. Therefore, a redistricting plan drawn to replace a plan found by a federal court to violate *Shaw v. Reno* will be compared with the last legally enforceable plan predating the unconstitutional plan. Absent such a finding of unconstitutionality under *Shaw* by a federal court, the last legally enforceable plan will serve as the benchmark for Section 5 review.

[3] [A] jurisdiction is not required to address the constitutionality of its benchmark plan when submitting a redistricting plan and the question of whether the benchmark plan is constitutional will not be considered during the Department's Section 5 review. (emphasis added)

Moreover, in the post-2000 census round of preclearance proceedings under § 5 of the Voting Rights Act, recent cases like *Sanders v. Dooly County*, *infra*, also confirm that the preceding decade of racial gerrymandering may have a major impact on retrogression analysis, as where the Attorney General is precluded from using constitutionally defective plans forged through consent decrees as a baseline or “benchmark” for identifying the last legally effective plan for purposes of measuring retrogression under §5.

Racial Gerrymander Litigation

Development of the Race-Predominant Standard

The first decade of vote dilution litigation under expanded §2 pushed many courts into an unfortunate bean-counting mode of decision making. Contrary to the express disclaimer against proportional representation, lower courts were quick to impose liability upon a tenuous showing of the *Gingles* preconditions, coupled with "some" evidence bearing on the Senate Report factors. Routinely rejected (or overlooked) were defenses based on evidence that minority-preferred candidates were being elected to office in significant numbers, the government's underlying interest in this electoral system was substantial, crossover voting was taking place in an increasing number of electoral contests, causes or factors unrelated to race were accounting for many electoral results, and racially gerrymandered hypothetical districts stringing together discrete minority population concentrations were improperly being accepted as proof of "geographical compactness." In short, §2 was being driven by a race-based single-minded goal of proportional representation—a goal that was contrary to the assurances provided by key Senators during the tense debate over amended §2. Racial gerrymandering emerged as a by-product of the redistricting process.

Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 125 L.Ed.2d 511 (1993), made it clear that an allegation that the State deliberately segregated voters into districts on the basis of race without compelling justification stated a claim for relief under the Equal Protection Clause of the Fourteenth Amendment, sufficient to survive a Motion to Dismiss.

Justice Sandra Day O'Connor observed in *Shaw v. Reno* that "it is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past." While race conscious redistricting is not always unconstitutional, she observed, and while the Court had never held that race conscious state decisionmaking was impermissible in all circumstances, it now confronted a redistricting plan so extremely irregular on its face that it could rationally be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without a sufficiently compelling justification.

Addressing the bizarre shape of the challenged district, Justice O'Connor then said:

Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.... By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

"Race or Politics" as predominant explanation for district boundaries

In *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court held that the Equal Protection Clause's central mandate is "racial neutrality in government decisionmaking," a mandate which clearly prohibits purposeful discrimination between individuals on the basis of race.

In *Shaw v. Hunt*, 517 U.S. 899 (1996), the Supreme Court held that a reapportionment scheme will not survive strict scrutiny if proven to be predominantly based upon race without sufficient regard to, or in subordination of, traditional districting criteria and is not shown to be narrowly tailored to serve a compelling state interest.

In *Bush v. Vera*, 517 U.S. 952 (1996), in invalidating three race-based congressional districts, the Supreme Court refused to overturn the District Court's finding that race predominated over other traditional redistricting principles since the State of Texas' supporting data was not available to the legislature in any organized fashion before the challenged district was created. Justice O'Connor in her plurality opinion noted that this was a mixed motive case in which the state conceded that one of its goals in creating the three Congressional districts in question was to produce majority-minority districts, but that other goals, particularly incumbency protection, played a role in drawing the district lines. Based on a careful review of the lower

court's factual findings and the record, Justice O'Connor was convinced that the lower court's determination that race was the predominant factor in the drawing of the districts had to be sustained. She concluded that "[t]he district court had ample bases on which to conclude both that racially motivated gerrymandering had a qualitatively greater influence on the drawing of district lines than politically motivated gerrymandering, and that political gerrymandering was accomplished in large part by the use of race as a proxy."

In *Hunt v. Cromartie (I)*, 526 U.S. 541 (1999), the computer system used in this post-*Shaw* case was revealed by a smoking gun e-mail to have used such "exact racial percentages when constructing districts" as to give rise to the clear inference that a motive existed to compose a new Twelfth Congressional District "with just under a majority-minority in order for it not to present a prima facie racial gerrymander." According to the Court, "using a computer to achieve a district that is just under 50 percent minority is no less a predominant use of race than using it to achieve a district that is just over 50 percent minority." Extensive direct and circumstantial evidence showed that the legislature used facial race-driven criteria by (a) drawing the district to collect precincts with high racial identification rather than political identification, (b) bypassing precincts with higher partisan representation, that is, more heavily Democratic precincts in favor of precincts with a high African-American population, (c) eschewing traditional districting criteria such as contiguity, geographical integrity, community of interest and compactness in redrawing the plan, and (d) using race as the predominant factor in drawing the district, through its apparent use of race as a proxy for political characteristics.

The District Court held on remand, following a 3-day trial, that the North Carolina Legislature had used race-driven criteria in drawing the 1997 boundaries of the 12th Congressional District. On April 18, 2001, however, the Supreme Court reversed in what many saw as a retreat from the race predominant standard for invalidated excessively race-driven districts. In *Hunt v. Cromartie (II)*, 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430, 2001 WL 387427 (2001), the Supreme Court held that the District Court's conclusion that the state had violated the Equal Protection Clause in drawing those boundaries was based on clearly erroneous findings concerning the district's shape, its splitting of towns and counties, and its heavily African-American voting population. The Supreme Court's extensive review of the District Court's findings was warranted because, according to the majority opinion by Justice Breyer, there was no intermediate appellate court review, the 3-day trial was not lengthy, the key evidence consisted primarily of documents and expert testimony, and credibility evaluations played only a minor role. The critical determination by the District Court that "race, not politics," predominantly explained the 1997 boundaries of the 12th Congressional District rested upon three findings which the Supreme Court had previously found insufficient to support summary judgment, *Hunt v. Cromartie (I)*, 526 U.S. 541 (1999), and those findings could not in and of themselves, as a matter of law, support the judgment of the District Court. Moreover, the Supreme Court concluded that the District Court's determination rested upon five new subsidiary findings which the Supreme Court could not accept as adequate. Those findings were:

(1) Evidence of voting registration, not voting behavior, were primarily relied upon by the District Court, and the Supreme Court considered this precisely the kind of evidence that it had found inadequate in the 1999 appeal. Since white registered Democrats cross over to vote Republican more often than do African-Americans, who register and vote Democratic 95 to 97 percent of the time, the Supreme Court reasoned that a legislature attempting to secure a safe Democratic seat by placing reliable Democratic precincts within a district may well end up with a Congressional district containing more heavily African-American

precincts for political reasons, rather than racial reasons.

(2) The Plaintiffs' expert evidence through Dr. Ronald Weber pointed out that a reliably Democratic voting population of 60% was necessary to create a safe Democratic seat, but the 12th Congressional District was 63% reliable, that African-American Democratic precincts were included while certain white Democratic precincts were excluded, that one precinct was split between two districts, and that other plans would have created a safely Democratic district with fewer African-American precincts, did not provide significant additional support for the conclusion reached by the District Court.

(3) The District Court did not reject much of the significant supporting factual information provided by the state's expert, which showed that African-American Democratic voters were more reliably Democratic and that the Congressional district's boundaries were drawn to include reliable Democrats.

(4) A statement by the legislative redistricting leader about racial balance shows that the North Carolina Legislature considered race along with other partisan and geographic considerations, but said little about whether race played a predominant role in the drawing of boundaries. Moreover, an e-mail sent by a legislative staff member responsible for drafting the Congressional districting plans offered less persuasive support for the District Court's conclusion than other kinds of direct evidence that the Supreme Court has found significant in other redistricting cases.

(5) Finally, the Plaintiffs' maps that summarized voting behavior evidence tended to refute the conclusion of the District Court that "race, not politics" was the predominant explanation for the 1997 Congressional District boundaries.

Thus, while the Supreme Court treated the issue in this case as evidentiary and recognized its obligation to review the District Court's findings only for "clear error," it engaged in an extensive review of those factual findings and concluded that were clearly erroneous, stating:

In a case such as this one where majority-districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that the districting alternatives would have brought about significantly greater racial balance. Slip Op. at 11.

In a dissenting opinion by Justice Clarence Thomas, joined in by Chief Justice Rehnquist, Justice Scalia and Justice Kennedy, the dissent took the majority opinion to task for going far beyond clear error review of factual findings, citing prior cases which had been reviewed under the clearly erroneous standard "which obviously did not have the benefit of another layer of review." Thomas, J., Slip Op. at 2. The dissent also expressed doubt about the majority opinion's characterization of the length of the trial as "not lengthy," emphasizing that the trial was not "just a few hours" long, but lasted for 3 days in which the District Court heard the testimony of 12 witnesses, sifted through hundreds of pages of deposition testimony and expert analysis, including statistical analysis, and "gained a working knowledge of the facts of this litigation in myriad ways over

a period far longer than 3 days," particularly in view of the fact that one member of the 3-judge District Court panel had reviewed the iterations of the 12th Congressional District since 1992. Slip Op. at 2. Noting that deference to the factfinder was "the rule, not the exception," Justice Thomas saw no reason to depart from this rule, and criticized the majority for having "emptied clear error review of meaningful content in the redistricting context" through its "foray into the minutiae of the record." Slip Op. at 2.

Justice Thomas concluded in his dissenting opinion that "it is not my role to weigh evidence in the first instance. The only question that this Court should decide is whether the District Court's finding of racial predominance was clearly erroneous. In light of the direct evidence of racial motive and the inferences that may be drawn from the circumstantial evidence, I am satisfied that the District Court's finding was permissible, even if not compelled by the record." Slip Op. at 4.

Implementation of a Coherent Constitutional Standard

The tension that resulted from numerous state and local government attempts to satisfy the race-conscious mandate of §2 of the Voting Rights Act, while not running afoul of the Fourteenth Amendment's prohibition against race-predominant decision making, has led to the creation of a body of constitutional precedent. Beginning and ending with the North Carolina Congressional District litigation in *Shaw v. Reno*, *Shaw v. Hunt* and *Hunt v. Cromartie(I and II)*, this body of decisions has matured, from Miller v. Johnson's invalidation of Georgia's Eleventh Congressional District, followed by the Texas and North Carolina congressional district cases of *Vera v. Bush* and *Shaw v. Hunt*, respectively, coupled with the Court's summary affirmance in *DeWitt v. Wilson*.

Nature and Scope of Judicial Deference

Included in that body of constitutional precedent are two Supreme Court decisions which have helped clarify the nature and scope of judicial deference in this context. The first is *Abrams v. Johnson*, 521 U.S. 74 (1997), which held that a redistricting plan found unconstitutional under the race-predominant standard of *Shaw v. Reno* and its progeny could not serve as the Section 5 benchmark. In *Abrams*, the United States Supreme Court rejected constitutional challenges to a redistricting plan for Georgia's congressional delegation drawn by the District Court after the Georgia Legislature could not reach agreement on drawing a new plan, following remand in *Miller v. Johnson*. Appellants, various minority organizations and the United States, challenged the District Court's redistricting plan on several grounds, all of which were rejected by the Supreme Court. Appellants in *Abrams* argued that the court-ordered plan contravened §2 of the Voting Rights Act, a position which the Supreme Court rejected as based on the premise the impermissible vote dilution resulted from the failure to create a second majority-black district. The §2 findings of the District Court were entitled to deference, including its findings that the black population was not sufficiently compact for a second majority-black district, as well as its findings that minority political cohesion and white racial bloc voting had not been established in light of evidence of significant white crossover voting. The District Court's findings were upheld by the Supreme Court, which noted that the minority group failed to meet the *Gingles* preconditions, and the mere fact that the District Court did not hold a separate hearing on whether the remedial plan violated §2 did not alter that result. In affirming the District Court's judgment, the Supreme Court concluded:

The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies. Here, the legislative process was first distorted and then unable to reach a solution. The district court was left to embark on a delicate task with limited legislative guidance. The court was careful to take into account traditional state districting factors, and it remained sensitive to the constitutional requirement of equal protection of the law.

The second decision is *Lawyer v. Department of Justice*, 521 U. S. 567 (1997). In *Lawyer*, the Court focused on the traditional judicial deference to the role of a legislative body performing its task of redistricting and reapportionment, a task in "which the federal courts should make every effort not to pre-empt." The Supreme Court in *Lawyer* emphasized that judicial deference is triggered by two things: (1) "the state should be given the opportunity to make its own redistricting decisions so long as it is practically possible," and (2) "the state must choose to take that opportunity." When the state does take that opportunity, "the discretion of the federal court is limited except to the extent that the plan itself runs afoul of federal law." *Id.*

Limitations on Use of Summary Judgment and Judicial Remedial Power

Just as *Hunt v. Cromartie (I)* made it clear that it is usually inappropriate to resolve a racial gerrymandering case on summary judgment, due for the most part to the intensely factual nature of any inquiry into legislative motivation, the Fifth Circuit's recent decision in *Prejean v. Foster, infra*, also strongly suggests that summary judgment practice is not particularly suited for this type of litigation. Moreover, cases like *Wilson v. Minor, infra*, teach us that there are principled limits on the power of a federal court when it seeks to fashion a suitable remedy to address a perceived §2 violation, limits originating with such landmark decisions as *Hall v. Holder*, which held that a change in the size of a governing body is not a proper remedy for a §2 violation.

Caselaw Development after *Gingles*

Hays standing

In *United States v. Hays*, 515 U.S. 737 (1995), the Supreme Court held that unconstitutional use of race in drawing the boundaries of majority-minority districts does not necessarily involve an unconstitutional use of race in drawing the boundaries of neighboring majority-white districts. Plaintiffs bringing a racial gerrymander challenge with respect to Louisiana's 4th Congressional District lacked standing to maintain their challenge where they had not shown a cognizable injury under the Fourteenth Amendment because they did not reside in the majority-minority district and had not otherwise shown that they had "personally been denied equal treatment." *Id.* at 739-42. Their failure to show the requisite injury was not changed by the fact that the racial composition of their own district might have been different had the legislature drawn the adjacent majority-minority district another way. In *Hays*, the Court concluded that the appellees lacked standing to maintain their challenge where they had not shown a cognizable injury under the Fourteenth Amendment because they did not reside in the majority-minority district and had not otherwise shown that they had "personally been denied equal treatment." *Id.* at 744-746. The appellees' failure in *Hays* to show the requisite injury was not changed by the fact that the racial composition of their own district might have been different had

the legislature drawn the adjacent majority-minority district another way. *Id.* at 746.

Hays standing was declared lacking in *Sinkfield v. Kelley*, 121 S. Ct. 446 (U.S. 2000), following a three-judge court's invalidation of seven majority white legislative districts on the ground that they were the product of unconstitutional racial gerrymandering. The Supreme Court on direct appeal held that Plaintiffs, white voters residing outside the challenged districts, lacked standing to claim that Alabama's legislative redistricting plan was racial gerrymandering in violation of the Equal Protection Clause, under *United States v. Hays*, 515 U.S.737, at 739-742.

The Plaintiffs' position in *Kelley* was "essentially indistinguishable" from that of the appellees in Hays. Plaintiffs were challenging their own majority-white districts as the product of unconstitutional racial gerrymandering under a redistricting plan whose purpose was the creation of majority-minority districts, some of which border Plaintiffs' districts. Like the appellees in *Hays*, the Plaintiffs here neither alleged nor produced any evidence that any of them was assigned to his or her district as a direct result of having "personally been subjected to a racial classification." *Id.* at 745. The Supreme Court also rejected the Plaintiffs' suggestion that they were entitled to a presumption of injury-in-fact because the bizarre shapes of their districts reveal that the districts were the product of an unconstitutional racial gerrymander, reasoning that

[t]he shapes of appellees' districts, however, were necessarily influenced by the shapes of the majority-minority districts upon which they border, and appellees have produced no evidence that anything other than the deliberate creation of those majority-minority districts is responsible for the districting lines of which they complain. Appellees' suggestion thus boils down to the claim that an unconstitutional use of race in drawing the boundaries of majority-minority districts necessarily involves an unconstitutional use of race in drawing the boundaries of neighboring majority-white districts. We rejected that argument in *Hays*, explaining that evidence sufficient to support a *Shaw* claim with respect to a majority-minority district did "not prove anything" with respect to a neighboring majority-white district in which the appellees resided. *United States v. Hays*, 515 U.S. at 746. Accordingly, "an allegation to that effect does not allege a cognizable injury under the Fourteenth Amendment." *Id.*

Nonretrogression as "absence of backsliding"

In Lopez v. Monterey County, 525 U.S. 266 (1999), the Supreme Court held, with respect to the basic nature of the §5 preclearance process, "Congress designed the preclearance procedure to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process and will accomplish this by giving exclusive authority to pass on the discriminatory effect or purpose of an election change to the Attorney General or the United States District Court for the District of Columbia."

In Reno v. Bossier Parish (II), 528 U.S. 320 (2000), the Supreme Court held that "§5 of the Voting Rights Act of 1965, as amended, does not prohibit preclearance of a redistricting plan enacted with a 'discriminatory but non-retrogressive purpose.'" Justice Scalia, speaking for the majority in this 5-4 decision decided January 24, 2000, concluded that §5's purpose requirement applies only to plans adopted with a retrogressive intent and that §5 preclearance has a "limited meaning" and is "nothing more than a determination

that the voting change is no more dilutive than what it replaces." The Court rejected the Justice Department's efforts to blur the distinction between §2 and §5 by shifting the focus of §5 from non-retrogression to vote dilution and by changing the §5 benchmark from a jurisdiction's existing plan to a hypothetical, undilutive plan. In refusing to extend §5 to discriminatory but non-retrogressive vote-dilution purposes, the Court in Bossier Parish II noted that the Justice Department's reading of the §5 preclearance provision "would also exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts,... perhaps to the extent of raising concerns about §5's constitutionality...." Justice Scalia emphasized that preclearance "does not represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive than it what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedures of §5, but must be attacked through the normal means of a §2 action. As we have repeatedly noted, in vote-dilution cases §5 prevents nothing but backsliding, and preclearance under §5 affirms nothing but the absence of backsliding."

“Abject surrender” to a minority district maximization agenda

In *Prejean v. Foster*, 227 F. 3d 504 (5th Cir. 2000), after the District Court rejected a racial gerrymander challenge to the state's legislatively enacted settlement of a lengthy suit over its system of electing trial judges and granted summary judgment in favor of the state, the Fifth Circuit reversed and remanded. In an October 2, 2000 panel opinion by Circuit Judge Edith Jones. The state's settlement created majority-minority electoral subdistricts within a number of trial court districts. It was attacked by the Plaintiffs, residents of the district of the 23rd Judicial District Court, as intentionally discriminatory and violative of Section 2 of the Voting Rights Act and the 14th and 15th Amendments. Specifically, the district was 70% white and 30% black and contained two subdistricts, one black and one white.

The black Subdistrict One contained 20% of the total population and a 75% black majority from which one district judge was elected, and the white Subdistrict Two contained 80% of the total population and an 80% white majority from which four district judges were elected. Voters in the black subdistrict could only elect one of the five judges and had no right to vote for four of the judges, and voters in the white subdistrict could vote for four of the judges but not for the fifth one. A black judge was elected in Subdistrict One. Plaintiffs' racial gerrymander claim was based on the premise that the state had created racially identifiable subdistricts for electing district judges and thus effected an impermissible racial gerrymander, with race being the "sole and singular" motivation, as evidenced by the shape of the districts, racial statistics, the litigation history and the state's Section 5 preclearance submissions. The Plaintiffs' evidence was mostly dismissed by the trial court without discussion. The Defendants in this case were collectively the state and black voter intervenors, who submitted the affidavit of the black judge of Subdistrict One, who had drawn the subdistricting scheme which the state legislature adopted.

This affidavit was given to support their position on summary judgment that race was not the predominant factor in drawing the subdistrict lines, and that the districting plan implemented by the state was narrowly tailored to meet the compelling state interests of complying with §§2 and 5 of the Voting Rights Act and of terminating the lengthy litigation. The Fifth Circuit reasoned that, under *Hunt v. Cromartie(I)*, the trial court was required to perform a sensitive inquiry into such circumstantial and direct evidence as may available, that under *Miller v. Johnson*, a plaintiff was required to show that traditional districting principles were

subordinated to race, that is, race was the predominant factor motivating the legislature's redistricting decision, and that under *Shaw v. Hunt*, legislative motivation or intent is a paradigmatic fact question. The black judge who submitted the affidavit stated that politics as opposed to race motivated the electoral scheme in question, that he followed traditional districting principles, that race did not predominate, and that he drew the district lines to accommodate his candidacy. He was not a member of the state legislature, however, and thus his statement of intent in drawing the subdistrict lines could not be taken as conclusive proof of the legislature's intent. According to the Fifth Circuit, it was equally plausible to infer that the legislature was "ready to adopt whatever proposal would satisfy its objective of creating a black subdistrict," an inference which the trial court should have drawn in favor of the Plaintiffs in considering their evidence on summary judgment. Furthermore, the Fifth Circuit found that "the ballet between the state and the U.S. Department of Justice over Section 5 preclearance" reinforced the sense of "legislative preoccupation with the racial makeup of judicial districts," all coincidentally during the same period of time as the DOJ was pressing the State of Georgia to effectuate a "max-black" congressional districting plan that was later overturned in *Miller* as a racial gerrymander.

Focusing on correspondence between the state and DOJ, contemporaneous communications by the state's attorney general, as well as the drastic nature of the changes in judicial election procedures that the state had agreed to, the Fifth Circuit also concluded that it had become obvious during the §5 submission process that the DOJ would accept nothing less than "abject surrender" to a minority district maximization agenda, that the major purpose of the legislative settlement was to create a majority-minority subdistrict, and that the inference could be drawn that "the state was rushing headlong into the arms of the DOJ regardless of legal consequences." Demographic information used by the legislature and submitted to the DOJ during the preclearance process, moreover, referred only to the racial composition of the total population and voting age population of the district and was "another powerful indicator of the state's intent." Finally, the Fifth Circuit noted that the shape of the judicial subdistricts appeared problematic on closer inspection, resembling the Eleventh Congressional District invalidated in *Miller*, with several parts of the black subdistrict protruding out to include predominately black populations. One segment, the "Lutcher thrust", was a "thin, finger-like extension that, at its tip, encompasses part of the City of Lutcher," which was roughly 50% black. The portion of Lutcher included in the black subdistrict was 99.4% black. The splitting of communities was found to affect the majority-white subdistrict, contiguity did not exist, and the disregarding of township lines was probative, specially where as here the parish and town-splitting subdistricts defied the notion of "common thread of interests." Traditional districting principles were not discussed in the DOJ correspondence, in the attorney general's announcements, or in the data that accompanied the §5 submissions, and when such evidence was viewed in the light most favorable to the Plaintiffs as non-movants, "one could infer that the legislature was motivated primarily by racial considerations." Since the summary judgment evidence raised a factual issue as to whether race was the predominant motivation, it was error for the district court to resolve the disputed fact of motivation at the summary judgment stage. Material fact issues, moreover, precluded the district court's alternative conclusion that the legislative settlement was narrowly tailored in compliance with the narrow tailoring requirement of strict scrutiny. Similarly, as with the 14th Amendment racial gerrymandering claim, the question of discriminatory intent violative of the 15th Amendment likewise could not be resolved as a matter of law on summary judgment.

Presumption of Legislative Good Faith

In *Chen v. City of Houston*, 206 F. 3d 502 (5th Cir. 2000), the Fifth Circuit upheld the District Court's granting of summary judgment in favor of the City of Houston, rejecting the Plaintiffs' claim that the City's redistricting plan violated the one-person, one-vote principle, and that the districts created constituted an impermissible racial gerrymander under *Shaw v. Reno*. The Fifth Circuit distinguished *Hunt v. Cromartie (I)* on the ground that the Plaintiffs in *Chen* bore the burden of persuasion, and the presumption of legislative good faith and integrity added to and did not lessen the Plaintiffs' burden facing summary judgment. Noting that "a plaintiff is required to do more than merely demonstrate that the Department of Justice has had somewhat effective input in the process to trigger strict scrutiny," the Fifth Circuit suggested that the only direct evidence that could suffice to establish predominance of race in a *Shaw v. Reno* challenge would consist of either "brazen admission that race predominated" over traditional districting principles or a clear pattern of Department of Justice pressure similar to Shaw's "end-product of DOJ intervention" [which was] "a monstrosity that massively violated traditional districting principles..." or similar to "the rabid extremes of the Department of Justice conduct in *Miller*."

Similarly, in *Theriot v. Parish of Jefferson*, 185 F. 3d 477(5th Cir. 1999), the Fifth Circuit accorded great deference to the legislative decisionmaking of a Parish Council in devising a race-conscious redistricting plan. In upholding the District Court's judgment that the Plaintiffs had failed to carry their burden of proving that race predominated in the design and configuration of a councilmanic district, the Fifth Circuit flatly rejected any suggestion that mere consideration of race, even where it is de minimis, mandates a finding that race predominates, and noting that "[i]ssues of race were relevant, inasmuch as the Parish Council was directed to remedy a §2 violation, yet did not predominate." The Fifth Circuit found that race is inherently a consideration where, as here, a governing body must respond to violations of §2 of the Voting Rights Act. Plaintiffs objected to the District Court's consideration of evidence pertaining to communities of interest based on social and economic needs and conditions the district residents had in common. They argued that such information—showing the neighborhoods and subdivisions comprising the district contained low income residents who are "less educated, more often unemployed, and more poorly-housed than voters in other districts"—was not available to the councilpersons at the time they drew the districts. Plaintiffs based their objection on *Bush v. Vera*, where the Supreme Court had refused to overturn the District Court's finding that race predominated over other traditional redistricting principles since the State of Texas' supporting data was not available to the legislature in any organized fashion before the challenged district was created. The Fifth Circuit in *Theriot* reasoned that "[t]he Court [in *Bush v. Vera*] also held that the state was not required to compile a comprehensive administrative record and courts are not required to dismiss facts not explicitly mentioned in the redistricting plan's legislative history."

Changes in governing body's size to remedy Section 2 violation

In *Hall v. Holder*, 512 U.S. 874, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994), the Supreme Court recognized that there are limits on the remedial powers of the federal courts under §2 and that these limits prohibit a district court from changing the size of a County governing body to remedy a Section 2 violation. *Holder* provided what has been recognized as the most significant legal clarification of that remedial power and clear precedent establishing that a change in the size of a governing body is not a proper remedy for a §2 violation.

Six years after the *Holder* decision had laid to rest any doubt that the size of a governing body is not subject to a vote dilution challenge under §2 of the Voting Rights Act, the Eleventh Circuit confronted the issue again in *Wilson v. Minor*, 220 F.3d 1297 (11th Cir.2000), this time a the direct result of a single-minded Justice Department intent upon disregarding the clear import of Supreme Court precedent. Notwithstanding the clear holding of the Supreme Court in *Holder* that a federal court exceeds its power under §2 when it changes the size of a governmental body for the ostensible purpose of remedying a §2 violation, the Department of Justice insisted that such remedial power was possessed by the federal court. The DOJ was wrong. The Eleventh Circuit helped it understand why.

The record in *Wilson* showed that before 1978 the Dallas County Commission consisted of four commissioners elected from at-large residency districts for concurrent four year terms, each serving in a part-time capacity, with a probate judge acting as the ex-officio chairperson of the Commission. The probate judge, a full-time position, was elected at-large to a six year term and presided over Commission meetings but voted only in the event of a tie among the four commissioners. In his capacity as probate judge, the probate judge also had authority to vote with the Commission in filling certain local office vacancies.

In 1978 the DOJ brought a §2 vote dilution challenge to the at-large method of electing members to the Dallas County Commission. In 1982, the district court held that the at-large method of electing County commissioners did not violate §2 because the United States had not proved that the statute under which the at-large method of election was established was motivated by discriminatory intent or that it diluted black voting strength in Dallas County. The Eleventh Circuit affirmed in part, reversed in part, and remanded the case to the district court with specific instructions to consider the role of racially polarized voting and the lingering effects of discrimination in the County, and on remand, the district court found that the at-large election scheme for the Dallas County Commission diluted minority voting strength in violation of §2.

As a remedy for the §2 violation, the district court ordered the County to adopt an election scheme with four single-member districts, retaining the at-large probate judge as the ex-officio chairperson of the Commission. On August 4, 2000, the Eleventh Circuit reversed again and held that the continued inclusion of the at-large elected probate judge as the ex-officio chairperson of the Commission did not fully cure the §2 violation and ordered Dallas County to adopt a five single-member districting plan for the County Commission with the chairperson of the Commission to be chosen from among the five commissioners. The plan created majority-minority districts with bvap's of 72.4% and 70%, two white majority districts with wvap's of 65% and 64%, and a fifth swing district containing a bvap of 61.3%. This plan required the Commission to consist of five full members, each serving the same four year term and each having the same full voting rights.

No longer was the probate judge to serve as ex-officio chairperson of the Commission, to preside over meetings, or to vote in the event of a tie, although the probate judge did retain authority to vote with the other commissioners when filling certain vacancies in local office just as he had prior to the 1988 injunction. As the Eleventh Circuit in the instant appeal noted, "In short, the injunction replaced the role of the probate judge as ex-officio chairperson of the Commission with a full commissioner elected specifically to that position. The role of the probate judge as probate judge, however, remained intact."

Impact of *Holder*

The plan was ultimately invalidated by the Eleventh Circuit, which found that the law relevant to a federal court's remedial power under §2 was "now clear and undisputed." The Eleventh Circuit cited *Holder* and its progeny, *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc), cert. denied, U.S. 1083, 115 S.Ct. 1795, 131 L.Ed.2d 723 (1995), as the basis for its conclusion that a federal court exceeds its power under §2 when it changes the size of a governmental body for the ostensible purpose of remedying a §2 violation:

A federal court cannot modify the size of an elected governing body in order to remedy a section 2 violation because there is no principled reason to choose a legislative body of one size over one of a different size for the purposes of determining whether there has been vote dilution.

Reasonable Alternative Practice as Benchmark

Citing the plurality opinion in *Hall v Holder*, 512 U.S. at 880, 114 S.Ct. at 2585, the Eleventh Circuit in *Wilson v. Minor* reasoned that in order to find §2 liability, a court must be able to identify a reasonable alternative practice as a benchmark against which to measure whether the existing voting practice results in vote dilution. Moreover, "the search for a benchmark is quite problematic when a §2 dilution challenge is brought to the size of a government body" because "[t]here is no principled reason why one size should be picked over another as the benchmark for comparison." *Id.* at 881, 114 S.Ct. at 2586. For that reason the plurality in *Holder*, and the Eleventh Circuit here, concluded that "a plaintiff cannot maintain a § 2 challenge to the size of a government body." *Id.* at 885, 114 S.Ct. at 2588. The Eleventh Circuit then focused on the pivotal issue whether the probate judge acting as ex-officio chair of the Dallas County Commission played a significantly different role on the Commission than did the full Commission member with whom he was replaced. If he did, then the size of the Commission did change, meaning there had not been a proper remedy for a §2 violation.

We have since held twice that *Holder* limits the remedial powers of the federal courts under §2 and prohibits district courts from changing the size of a County governing body. In *Nipper* we rejected a §2 vote dilution challenge brought by black registered voters and an association of black attorneys to the at-large election system used to elect the judges of Florida's Fourth Judicial Circuit Court. The plaintiffs contended that the use of at-large elections diluted black voting strength. They sought the creation of subdistricts that would ensure their ability to elect black judges of their choice. *Nipper*, 39 F.3d at 1496-97. In rejecting the plaintiffs' claim for relief, we emphasized that "under *Holder*, federal courts may not mandate as a §2 remedy that a state or political subdivision alter the size of its elected bodies.... Federal courts may not [] alter the state's form of government itself when they cannot identify 'a principled reason why one [alternative to the model being challenged] should be picked over another as a benchmark for comparison.'" *Id.* at 1532 (quoting *Holder*, 512 U.S. at 881, 114 S. Ct. at 2586).

Similarly, in *White*, we vacated the district court's approval of a settlement agreement entered into between a class of black voters in Alabama and the State of Alabama which would have increased the size of the Alabama courts of appeals. *White*, 74 F.3d at 1061. In *White*, a class composed of all black voters in Alabama argued that the at-large election process used to elect members of Alabama's appellate courts diluted the voting strength of black voters in

violation of §2 of the Voting Rights Act. *Id.* at 1059. The parties entered an agreement, which the United States Department of Justice precleared, that would have restructured the Supreme Court of Alabama, the Court of Criminal Appeals, and the Court of Civil Appeals by increasing the size of those courts and creating a selection process that would ensure that the black voters of Alabama had at least two "representatives of their choice" on each court. *Id.* at 1061. The district court approved the agreement and made it part of the final judgment. *Id.* at 1061. Again, we held that in approving such relief the district court exceeded its authority under §2 and vacated the district court's judgment. *Id.* at 1061. We emphasized that under *Holder* and *Nipper*, the district court "lacked the authority to require Alabama to increase the size of its appellate courts." *Id.* at 1072.

No one disputes that this is binding authority applicable in this case. The primary issue, then, is the factual one of whether the 1988 injunction imposed by the district court changed the size of the Dallas County Commission. More specifically, the question boils down to this: whether the pre-injunction probate judge acting in his role as ex-officio chairperson of the Commission should be counted as a full member of the Commission for the purposes of determining the pre-injunction size of the Commission. If the probate judge acting as chairperson of the Commission in an ex-officio capacity had essentially the same duties, power, and purpose as the full Commission member with whom he was replaced, then we must find that the size of the Commission did not change. If however, the probate judge acting as ex-officio chair of the Commission played a significantly different role on the Commission than did the full Commission member with whom he was replaced then the size of the Commission did change. We conclude that because the differences between the role of the probate judge acting as chairperson of the Commission in an ex-officio capacity and the role of a full Commission member are indeed substantial and important, the district court did not clearly err in finding that the 1988 injunction changed the size of the Dallas County Commission.

Change in Size as Impermissible Remedy

After a thorough review of all of the evidence, the Eleventh Circuit concluded in *Wilson* that such a change in the size of the County's governing body was an impermissible remedy for a §2 violation, and that the district court did not abuse its discretion in vacating that remedial order, stating:

We emphasize that the issue before us is the narrow and discrete factual question of whether the change from a Commission composed of four full commissioners plus a probate judge acting as chairperson in an ex-officio capacity—who was elected to a different position, holds office for a different term of years, and has different voting powers on the Commission than the full members—to a Commission composed of five full Commission members (one of whom is designated as chairperson)—who were all elected specifically to that office, all hold office for the same term of years, and all possess the same voting powers—is significant enough for us to conclude that a change in the size of the Commission occurred. We recognize that real arguments exist on the other side and that the determination of whether the probate judge acting as ex-officio chairperson looks like a full Commission member for purposes of comparing the

sizes of the pre and post injunction Commissions is largely a judgment call. However, we find that the differences in role, purpose, and power between the probate judge acting as chairperson of the Commission in an ex-officio capacity and a full Commission member are significant and compel us to conclude that the 1988 injunction effectively changed the size of the Dallas County Commission.

Probative Value of Minority-Preferred Candidate's Electoral Success

In *Solomon v. Liberty County Commissioners*, 221 F.3d 1218 (11th Cir. 2000), the Eleventh Circuit provided what is perhaps the most thorough analysis of when and to what extent probative value should be given to evidence of a minority-preferred candidate's electoral success.

The §2 "totality of the circumstances" inquiry requires a searching practical evaluation of the past and present reality, and is dependent upon "the trial court's particular familiarity with the indigenous political reality. Recognizing the broad and demanding scope of that inquiry in a vote dilution case, the Eleventh Circuit has rejected a bright-line rule that a federal district court must discount the probative value of a minority candidate's electoral success when the election takes place after the filing of the pending §2 litigation. At issue was the five-member at-large electoral system by which the County commission and the school Board in Liberty County were elected. Liberty County was divided into five residential districts, with candidates for the County commission and the school Board running from the district in which they resided.

In both the party primary and general elections, the entire County electorate voted for one candidate from each district, with the candidate who received a majority of the Countywide vote being selected as his or her political party's nominee in the general election. If no candidate received a majority of the vote in the party primary, a run-off primary election was held. In the general election, candidates had to obtain a plurality of the Countywide vote to win election. Because most candidates in Liberty County were Democrats, voters usually decided races during the party primary elections.

In 1985, four Plaintiffs, African-American residents of the County, challenged the at-large method of electing County commissioners and school Board members as violative of §2 of the Voting Rights Act. After several trips up and down the appellate ladder, the Eleventh Circuit en banc ultimately held on August 10, 2000, that the at-large system did not violate §2, applying the clearly-erroneous test of Rule 52(a) as the appropriate standard for appellate review of the district court's factual findings regarding the *Gingles* factors, the Senate Report factors, and the totality of circumstances.

Clearly Erroneous Standard

The principal contention of the Plaintiffs in *Solomon* was that the district court had erred in assigning the probative weight that it did to the electoral success of an African-American who was elected to the Liberty County Commission in 1990, and reelected in 1992 and 1996. The district court had relied upon this evidence in concluding that African-Americans had not been excluded from the unofficial candidate slating process in the County, and that minority-preferred candidates had enjoyed sustained electoral success in recent years. Plaintiffs argued, however, that since this black candidate had been elected during the pendency of this

litigation, the probative value of his election should be discounted as a matter of law. The Eleventh Circuit affirmed in a far-reaching decision that highlighted the efficacy of the clearly erroneous standard in vote dilution litigation and underscored the fact-intensive nature of the judicial inquiry, particularly when confronted with a claim that certain elections be disregarded under the special circumstances doctrine:

A district court may find that the subsequent electoral success of a minority candidate who was first appointed to his or her position is a strong indicator that the minority group is not being excluded from the political process, see *Askew*, 127 F.3d at 1384 n. 18, or may dismiss the candidate's electoral success because he or she was first appointed, see *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1572 (11th Cir.1984). Most important in the instant case, a district court may (but is not required to) discount the electoral success of a minority candidate who was elected during the pendency of §2 litigation against the state or subdivision in which he or she was elected. See *Gingles*, 478 U.S. at 76, 106 S. Ct. at 2779.

Fact-Intensive Section 2 Inquiry

The Eleventh Circuit began its discussion of the probative value of such minority electoral success evidence by emphasizing that a §2 inquiry "is particularly dependent upon the facts of each case and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms, thus making Rule 52(a) the appropriate standard for appellate review of a finding of vote dilution." It noted that the inquiry into the *Gingles* preconditions and Senate Report factors does not end the inquiry and that

[t]o prevail on a claim of vote dilution under §2, plaintiffs must, at a minimum, establish the three now-familiar *Gingles* factors: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) that the minority group is "politically cohesive;" and (3) that sufficient racial bloc voting exists such that the white majority usually defeats the minority's preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S.Ct. 2752, 2766-67, 92 L.Ed.2d 25 (1986). Proof of these three factors does not end the inquiry, however. In *Johnson v. De Grandy*, the Supreme Court made clear that if *Gingles* so clearly identified the three as generally necessary to prove a §2 claim, it just as clearly declined to hold them sufficient in combination, either in the sense that a court's examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution. 512 U.S. 997, 1011, 114 S.Ct. 2647, 2657, 129 L.Ed.2d 775 (1994). This is because it is entirely possible that bloc voting (as defined by *Gingles*) could exist, but that such bloc voting would not result in a diminution of minority opportunity to participate in the political process and elect representatives of the minority group's choice. Other circumstances may indicate that both the degree and nature of the bloc voting weigh against an ultimate finding of minority exclusion from the political process. The degree of racial polarization may be not be sufficiently intense, for example; or what appears to be bloc voting on account of race may, instead, be the result of political or personal affiliation of different racial groups with different candidates. "[T]o be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice

that depends on race or color, not on account of some other racially neutral cause." *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir.1994) (en banc) (Tjoflat, C.J., plurality opinion).

Close Analysis of Unusually Complex Factual Patterns

Turning to the matter of whether to discount or minimize the probative value of certain types of electoral evidence, as in a case where a minority candidate runs for office after the filing of a §2 suit and is elected, the Eleventh Circuit emphasized the value of circumspection in assessing electoral history, the need to engage in "close analysis of unusually complex factual patterns," and the importance of remaining sensitive to the potential that vote dilution cases carry for "serious interference with state functions." Noting that it has strictly adhered to Rule 52(a)'s requirements and has required district courts to explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning, the Eleventh Circuit then addressed the issue of "special circumstances" and whether or not to adopt a per se rule of exclusion, stating that "neither this court nor the Supreme Court has ever held that a district court must discount the probative value of a minority candidate's electoral success because of the timing of the election." Its reasoning was a clear reflection of the fundamental purpose of Rule 52(a):

The clearly erroneous standard extends to an appellate court's review of a district court's finding that different pieces of evidence carry different probative values in the overall §2 investigation. The findings made within the framework of the three *Gingles* preconditions, and the nine non-exhaustive "Senate factors," will be more or less probative depending upon the facts of the case.... Most important in the instant case, a district court may (but is not required to) discount the electoral success of a minority candidate who was elected during the pendency of §2 litigation against the state or subdivision in which he or she was elected. See *Gingles*, 478 U.S. at 76, 106 S.Ct. at 2779. All of the district court's findings regarding the probative value assigned to each piece of evidence are reviewed for clear error.

Consistent Electoral Success by Minority-Preferred Candidates

The Eleventh Circuit found that the testimony relied on by the district court in reaching its conclusion was "credible and virtually uncontradicted," and that it did not clearly err in finding that "blacks have not been excluded from Liberty County's informal slating process." Moreover, the Eleventh Circuit held that the district court did not clearly err in finding consistent electoral success by minority-preferred candidates:

We also hold that the district court did not clearly err in finding that "the more recent history of elections in Liberty County shows consistent electoral success by the black candidate of choice for public office." *Id.* at 1566 ("Senate factor" 7). It is undisputed that Jennings won a seat on the Liberty County Commission in 1990, and then retained his seat in 1992 and 1996. Plaintiffs ask us to join them in speculating that powerful white interests manipulated the electoral process in Liberty County in order to assure Jennings' success, so as to preempt a finding of §2 liability by this court. This we decline to do. The main problem with plaintiffs' argument is that they have offered no evidence to support their white-manipulation theory, other than that which might flow from a fertile imagination. "[O]nce the defendants produce evidence of Jennings'

repeated success, it is the plaintiffs who shoulder the burden of controverting such success." *Solomon III*, 166 F.3d at 1152 (Black, J., dissenting); see *Gingles*, 478 U.S. at 77, 106 S. Ct. at 2780 (finding that district court erred in "ignoring the sustained success [of] black voters" in electing candidates of choice, where the plaintiffs "failed utterly ... to offer any explanation for the success of black candidates") (emphasis in original).

Sinister Plots and Conspiracies (and other Special Circumstances)

Finally, the Eleventh Circuit rejected the Plaintiffs' argument that the subject minority electoral success should be ignored because there was some kind of "active conspiracy among the white electorate to allow the black community a token representative." The Plaintiffs had produced no evidence of such a sinister plot. The Court also found that none of the cases cited by the Plaintiffs supported their argument the Court had ever employed a bright-line rule limiting the probative value of minority electoral success, when the minority candidate was elected during the pendency of §2 litigation. Citing *Rollins v. Fort Bend Indep. Sch. Dist.*, 89 F.3d 1205, 1213-14 (5th Cir.1996), the Court refused to adopt an impossibly high standard sought by the Plaintiffs, akin to "heads I win, tails you lose," for assigning probative value to minority electoral victories:

The *Gingles* Court's comment regarding circumstances that may explain a single minority candidate's victory cannot be transformed into a legal standard which requires the court to force each and every victory of several minority candidates to fit within a prescribed special circumstance. Every victory cannot be explained away as a fortuitous event.... [*Gingles* does] not compel the district court...to automatically pigeonhole the...minority victories into the prescribed special circumstances. If the victories could be explained with the special circumstances, the district court was free to do so; however, because the special circumstances did not fit, the district court was not required to force it.

Relevance in Absence of Electoral Manipulation

In conclusion, the Eleventh Circuit stressed that it was not implying that district courts should ignore the timing of a minority candidate's election in §2 cases. Indeed, a district court can "appropriately take account of the circumstances surrounding recent black electoral success in deciding its significance to [a §2] claim." Affirming the district court's holding that African-Americans have equal access to the political process and an opportunity to elect representatives of their choice to the Liberty County Commission and the Liberty County School Board, and that the Plaintiffs had failed to prove their claims of vote dilution under §2, the Eleventh Circuit summed up its approach to evaluating the probative value of minority electoral success and the impact that the timing of a particular election has on that probative value:

We mean only that district courts are not required to discount the success of a minority candidate merely because he or she was elected during the pendency of §2 litigation. Courts should still approach elections that occur after a §2 suit has been filed with some caution. But where the plaintiffs bring forth no evidence of electoral manipulation, other than vague speculation about whites scheming to defeat the plaintiffs' lawsuit, a district court is not required to ignore the relevance of obviously probative evidence. Any other rule would subvert the

framework established by the Supreme Court in *Gingles* and *De Grandy*, which requires courts to undertake a "searching practical evaluation of the past and present reality" with the full totality of the circumstances in view. *Gingles*, 478 U.S. at 79, 106 S.Ct. at 2781.

Laches & Baseline for Retrogression Analysis

On March 29, 2001, the Eleventh Circuit handed down *Sanders v. Dooly County*, 245 F.3d 1289 (11th Cir. 2001), highlighting the effect that a decade of racial gerrymandering may have on traditional retrogression analysis. In November 1998, voters in Dooly County, Georgia filed a *Shaw-Miller* equal protection challenge against County officials, seeking injunctive and declaratory relief with respect to a districting plan effectuated by a 1992 consent decree. Plaintiffs contended that the plan contained racially gerrymandered districts in violation of *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993), *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995) and their progeny. The district court granted summary judgment in favor of the County defendants as to both injunctive and declaratory relief on laches grounds, holding that the Plaintiffs had inexcusably delayed filing suit until over six years after the first use of the districting plan and five years after *Shaw v. Reno*. The district court reasoned that this delay prejudiced the defendants and citizens of the County in that (1) redistricting late in the decade would lead to back-to-back redistrictings (the court-ordered one and the one using new census data) that would confuse voters and be unnecessarily costly to the County; and (2) the census data available to redistrict now are over ten years old and thus unreliable.

The Eleventh Circuit reversed in part, holding that the district court overstepped its discretion in judging the claims for declaratory relief to be similarly barred, because the third element of a laches defense—prejudice resulting from the unexcused delay—was missing. According to the Eleventh Circuit,

None of the grounds for prejudice that the district court relied on applies to the plaintiffs' claims for a declaration that the 1992 plan violates the Equal Protection Clause. There is no risk of confusion from a redistricting, obviously; no burden to the County to redistrict; and no use of out-of-date census data. An effect of a grant of such declaratory relief could be to prevent the Attorney General from using the 1993 consent-decree plan as a baseline for retrogression analysis in the post-2000 census round of preclearance proceedings under §5 of the Voting Rights Act, but that effect is no more prejudicial to the defendants now than it would have been in 1993. (emphasis added)

Singular Combination of Unique Factors

In *Citizens for Good Government v. Quitman*, 148 F.3d 472 (5th Cir. 1998), after the district court found the city's at-large electoral system violative of §2 of the Voting Rights Act, and after the city and a citizens' group jointly declined the district court's invitation to collaborate and develop a redistricting plan for the upcoming 1997 aldermanic elections, the district court appointed a Special Master to devise a remedial redistricting plan. The Special Master recommended a 4-1 plan which provided for an at-large district and four single-member districts. The district court adopted that 4-1 plan, directing that it govern the election of aldermen until the city devised a new plan that was precleared by the Attorney General under §5 of the Voting

Rights Act. The citizens' group appealed to the Fifth Circuit, which reversed the District Court's decision to adopt a permanent redistricting plan that included an at-large district, noting that the district court had "quite limited" discretion to depart from the long-standing general rule of preference for single-member districts to be used in judicially crafted redistricting plans. Citing *Mahan v. Howell*, 410 U.S. 315 (1973), the Fifth Circuit held that only if the District Court identified a "singular combination of unique factors" could it justify the abandonment of this clear judicial preference for single-member districts. In this case, the District Court's explanation of why the case presented a rare or exceptional circumstance that allowed for a court-fashioned electoral system incorporating an at-large district was found insufficient as a matter of law. The Fifth Circuit remanded with instructions for the trial court to "either sufficiently articulate the relevant unique circumstances justifying the inclusion of an at-large seat in its redistricting plan" or enter an Order dividing the City into five single-member districts. On remand, the District Court ultimately approved a redistricting plan for the city that included an at-large seat, based upon an express finding supported by substantial evidence that such relevant unique circumstances indeed existed and that a singular combination of unique factors did in fact support utilization of such a plan as an alternative to a single-member district plan.

Key precedent

Lewis v. Alamance County, N.C., 99 F.3d 600 (4th Cir. 1996), cert. denied, 520 U.S. 1229 (1997).

Black voters brought a Section 2 challenge in which they argued that Alamance County's at-large method of electing its County commissioners denied them an equal opportunity to elect representatives of their choice through vote dilution. The district court granted summary judgment for the County on the ground that the plaintiffs failed to carry their burden of proving as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986), that minority-preferred candidates are usually defeated by white bloc voting. The Fourth Circuit affirmed. The record showed that black candidates had run for seats on the County Board of commissioners in eight of fourteen election cycles since passage of the Voting Rights Act of 1965, and only one black candidate had been elected, albeit three times after first being appointed to fill a vacancy. The record also showed that white candidates had repeatedly won election by receiving the support of what was often a substantial majority of black voters, either in the primary or general election, or both. According to the 1990 census, the County had a 79.8% white population and 81.2% white voting age population, as compared to a 19.2% black population and 18.0% black voting age population. Moreover, the Court noted, "[w]hile 59% of all registered voters in the County are Democrats, blacks in Alamance County are overwhelmingly Democrats (94%)."

In affirming the lower court, the Fourth Circuit took the plaintiffs' expert to task with regard to a bivariate ecological regression analysis of the eleven primary and general elections in which a black candidate was on the ballot, on the basis of which the expert had estimated the level of support or voter preference among black voters for each candidate. Plaintiffs proffered these voter preference estimates as proof of minority political voter cohesion and white racial bloc voting sufficient to usually defeat minority-preferred candidates. The district court rejected this evidence as insufficient to satisfy the *Gingles* precondition of legally significant white racial bloc voting on the ground that plaintiffs had not shown that minority-preferred candidates were usually defeated.

The Fourth Circuit agreed, noting that the plaintiffs' expert admitted in his depositions that twenty of the thirty-one candidates "generally preferred" by minority voters in the select number of elections he had analyzed either won election or nomination, that thirteen of twenty-two candidates "strongly preferred" by minority voters won election or nomination, and that eleven of the seventeen candidates "strongest preferred" by minority voters won election or nomination. Hoisting the plaintiffs' expert on the petard of his own testimony, the Fourth Circuit concluded that "[i]f only the five general elections analyzed by plaintiffs' expert are considered, eight of the eleven candidates most strongly preferred by black voters were elected to seats on the Board."

In affirming the district court, the Fourth Circuit (1) rejected the claim of the plaintiffs that the white candidates who received overwhelming support from black voters in general elections, assertedly only because they were Democrats, should not have been considered as black-preferred candidates by the district court, (2) rejected their argument that the district court should have discounted the repeated success of one of the minority-preferred candidates because of the alleged effects of incumbency, (3) agreed with the plaintiffs that it was improper for the district court to aggregate primary and general election results, and that the district court had not conducted an individualized determination into whether some candidates should be treated as black-preferred candidates, and (4) concluded that it was error for the district court to base its decision regarding the *Gingles* precondition of legally significant white racial bloc voting "exclusively on data from elections in which a black candidate was on the ballot, rather than on a more representative sample of elections."

Representatives of Choice not limited to Candidates of Same Race

On this last point, the Fourth Circuit reasoned that by limiting its consideration to elections in which a candidate of the minority's race was on the ballot, "the district court may have failed to include as black-preferred candidates some white candidates who may very well have been the representatives of choice of the black community." The Fourth Circuit explained why it was affirming in the face of these errors by the lower court, citing the burden of proof that must be carried by a plaintiff claiming that an electoral system is violative of Section 2:

Although we recognize that this election data was the only data proffered by plaintiffs, we believe that, without a larger, more representative sample of elections, the district court simply did not have before it sufficient evidence to determine whether the black-preferred candidates usually were defeated, unless one is willing to assume (which we are not) that the black community will never have a preferred candidate in an election in which no black candidate is on the ballot, or, more fundamentally, that a black voter can never prefer a candidate who is white. Although the district court erred in this regard, we do not reverse its judgment because of this error, for it is the plaintiffs' burden to establish a violation of Section 2, and therefore their burden to proffer data from a sufficient number of elections to enable the district court to determine whether white bloc voting usually defeats minority-preferred candidates. Where, as here, plaintiffs fail to carry their burden to proffer sufficient evidence, and the district court correctly concludes on the basis of the proffered evidence that no Section 2 violation has been established, then the plaintiffs cannot be heard to complain. ...

Minority-Preferred Candidate as Minority or Non-Minority

The Fourth Circuit also offered an impassioned plea for balance and racial neutrality in vote dilution litigation that had become perhaps too focused on racial separatism and racial classifications, emphasizing that a “minority- preferred candidate” may be either a minority or a non- minority:

[A] minority- preferred candidate may be a non-minority, just as a minority candidate may be the preferred candidate of the voters of the majority's race. The black community may prefer a white candidate, as the white community may prefer a black candidate. A Martin Luther King, Jr. or a Colin Powell can represent white Americans, no less than a John Fitzgerald Kennedy or a Hubert Humphrey can represent black Americans. To indulge the contrary presumption, that every black person necessarily prefers a black candidate over a white candidate, or that every white person necessarily prefers a white candidate over a black candidate, would itself constitute invidious discrimination of the kind that the Voting Rights Act was enacted to eradicate, effectively disenfranchising every minority citizen who casts his or her vote for a non-minority candidate. To acquiesce in such a presumption would be not merely to resign ourselves to, but to place the imprimatur of law behind, a segregated political system -- in Judge Cabranes' words, an "electoral apartheid," *NAACP v. City of Niagara Falls, N.Y.*, 65 F.3d 1002, 1016 (2d Cir. 1995) -- in derogation of the most fundamental principles of our representative democracy and in betrayal of our most cherished beliefs about individual autonomy and political self- determination. Our understanding of Section 2 that the minority-preferred candidate may be either a minority or a non-minority, and therefore that both elections in which the candidates are of the same race and elections in which the candidates are of different races must be considered in order to determine whether white bloc voting usually defeats the minority- preferred candidate, is confirmed within Section 2 itself, by the express proviso that "[t]he extent to which members of a protected class have been elected to office" is but "one circumstance which may be considered" in assessing whether minority voters have been denied an equal opportunity "to participate in the political process and to elect representatives of their choice." ...In short, though some courts have held that black- white elections are more probative than white- white elections, see, e.g., *Uno*, 72 F.3d at 988 n.8; *Jenkins*, 4 F.3d at 1128; *LULAC*, 999 F.2d at 864; *Smith*, 687 F. Supp. at 1316, to our knowledge, no court has held that a white candidate cannot, as a matter of law, be a minority- preferred candidate, and therefore that white- white elections are irrelevant to the *Gingles* third element inquiry.(emphasis added)

Overreliance on Bivariate Ecological Regression Analysis

Finally, although burying most of its discussion of the subject in a lengthy footnote, the Fourth Circuit leveled a resounding criticism against the improper use and perhaps excessive reliance upon bivariate ecological regression analysis as a means of estimating voter preferences in vote dilution litigation:

In the face of the County's intended challenge to the use of such statistical evidence, we again caution against overreliance on bivariate ecological regression analysis in the estimation of voter preferences for purposes of a vote dilution claim. See, e.g., *Smith v. Brunswick County, Va., Bd. of Supervisors*, 984 F.2d 1393, 1400 n.6 (4th Cir. 1993). Bivariate regression

analysis, as used in Voting Rights Act cases, only allows one to determine the correlation between the percentage of the vote received by a particular candidate and the racial composition of voting precincts. See, e.g., *Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.*, 4 F.3d 1103, 1119 n.10 (3d Cir. 1993) (citing Richard L. Engstrom & Michael D. McDonald, **Qualitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting**, 17 URB. LAW. 369, 374 (Summer 1985)), cert. denied, 114 S. Ct. 2779 (1994); *City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1556 (11th Cir. 1987), cert. denied, 485 U.S. 936 (1988). The relevant correlation for vote dilution claims, however, is that between the race of the voters and the votes cast for a particular candidate, not that between the racial composition of precincts and the votes cast for a particular candidate, for it is only the former from which one can accurately estimate actual voter preferences. One can derive estimates of voter preferences from the regressions employed here only by assuming that the level of minority support for the candidate is fairly constant across precincts -- an "ecological" assumption that runs counter to the common sense observation that blacks and whites who live in integrated neighborhoods are more likely to vote for candidates of another race. See, e.g., *Bernard Grofman, et al., Minority Representation and the Quest for Voting Equality* 89 (1992) ("The principal disadvantage [of ecological regression is] the possibility of errors owing to ecological inference."); *Id.* ("[T]he 'ecological fallacy' ...is the error of attributing the average behavior of voters in a given geographic area (ecological unit) to all voters in that area."). In other words, the bivariate ecological regression analysis merely assumes that which it is the purpose of the analysis to prove -- political cohesiveness and constancy of candidate preference among minority voters and racial bloc voting among majority voters. See *Overton v. City of Austin*, 871 F.2d 529, 539 n.12 (5th Cir. 1989) ("[Bivariate ecological regression analysis] assumes that the voters in most precincts voted according to their ethnicity."); *Id.* at 539 ("[T]rial court should not ignore the imperfections of the data used nor the limitations of [bivariate ecological regression] analysis").

Individualized Determination of "Minority-Preferred" Status

The district court's methodology in determining whether a candidate was "minority-preferred" was upheld by the Fourth Circuit, leading to this clear statement of the applicable yardstick for comparison and measurement in vote dilution cases:

Accordingly, we now hold that, in multi-seat elections in which voters are permitted to cast as many votes as there are seats, at the very least any candidate who receives a majority of the minority vote and who finishes behind a successful candidate who was the first choice among the minority voters is automatically to be deemed a black-preferred candidate, just like the successful first choice. Cf. *Niagara Falls*, 65 F.3d at 1018 n.18 (noting that parties did not dispute that candidates who received more than 50% were black-preferred).

Candidates who receive less than 50% of the minority vote, but who would have been elected had the election been held only among black voters, are presumed also to be minority-

preferred candidates, although an individualized assessment should be made in order to confirm that such a candidate may appropriately be so considered. The district court appears generally to have conducted its analysis in the manner that we have described as appropriate. It considered as black- preferred candidates only those candidates who received substantial support from black voters; it did not unquestioningly denominate as black- preferred the top two or three vote-recipients among the black community. Moreover, the court seems to have made an individualized determination before considering, as black- preferred, candidates such as Fleming who, in 1976, received slightly less than 50% of the black vote (47%), and in rejecting Paris, who in that same election only tied for third, with 16% of the black vote. We accordingly discern no reason to disturb the district court's determinations with respect to those candidates who finished second and third among minority voters, behind the minority community's successful first choice. Those determinations are not clearly erroneous. (emphasis added)

Counting Primary Election Winners as well as General Election Winners

The Fourth Circuit also rejected the proposition that a minority-preferred candidate's success in a general election should be entitled to less weight in a vote dilution case when a candidate who received far greater minority support suffered defeat in the primary election. Citing *Niagara Falls*, 65 F.3d at 1018, the Court rejected such a view as

grounded in the belief that minority voters essentially take their marbles and go home whenever the candidate whom they prefer most in the primary does not prevail, a belief about minority voters that we do not share. And such a view ignores altogether the possibility that primary election winners will become the minority's preferred candidate during the general election campaign, or that where, as here, the overwhelming majority of blacks vote in the Democratic primary, that a Republican could in fact become the black-preferred candidate in the general election by addressing himself to issues of interest to the minority community in a way that appeals to them as participants in the political process. (emphasis added)

Similarly, in *Clay v. Board of Education of City of St. Louis*, 90 F. 3d 1357 (6th Cir. 1996), the expert testimony with respect to the minority-preferred candidate was pivotal. Dr. Ronald Weber's expert testimony in *Clay v. Board of Education* was a central factor in the district court's holding that Plaintiffs failed to satisfy the *Gingles* threshold requirements for a successful §2 challenge to the at-large system for electing members to the St. Louis' Board of Education. In his analysis of white bloc voting, Dr. Weber identified the minority-preferred candidates in all contested Board elections since 1977 and all exogenous elections since 1986, in which at least one African-American candidate participated. His statistical method and data found that black voters elected "their preferred candidates to the [b]oard 57.9% of the time, [and moreover,] when [blacks] voted cohesively, they were able to elect their preferred candidate to the [b]oard 80% of the time." After finding that the plaintiffs had failed to prove legally significant white racial bloc voting, the court turned to the totality of the circumstances and addressed the Senate Report factors, including past history of discrimination and its effect upon black access and participation, and in turn rejected Plaintiffs' effort to base §2 liability on a mere showing of low minority voter turnout, reasoning that past discrimination and socioeconomic

factors are not relevant unless they are shown, in fact, to hinder the ability of blacks to participate in the political process.

In *Collins v. City of Norfolk, Va.*, 768 F.2d 572 (4th Cir. 1985), appeal after remand, 816 F.2d 932 (4th Cir. 1987), appeal after remand, 883 F.2d 1232 (4th Cir. 1989), cert. denied, 498 U.S. 938 (1990), 54 percent of blacks' preferred black candidates were elected in the ten City Council elections studied, although black voters had not been able to elect more than one of their preferred candidates of any race during any single election. The Fourth Circuit panel found a §2 violation based on a finding that the white majority normally voted sufficiently as a bloc to frustrate black voters' efforts to elect a second black councilman.

In *Cane v. Worcester County, Md.*, 35 F.3d 921 (4th Cir. 1994), deference to legislative policy choices was the key concern in this appeal from a district court's remedial order following a finding of Section 2 liability. In *Cane*, the Fourth Circuit Court of Appeals held the order of the United States District Court for the District of Maryland mandating the implementation of a cumulative voting system for County elections to be an abuse of discretion. The unanimous court based its decision on the district court's failure to give adequate deference to the expressed governmental interests and policy preferences underlying the County's existing electoral system. In holding that the District Court abused its discretion in adopting the cumulative voting scheme proposed by plaintiffs, the Fourth Circuit reasoned that the district court had failed to give due deference to the County's legislative judgment and "clearly expressed...preference for residency requirements that would ensure that the Board members were knowledgeable of and responsive to the diverse interests of the various regions of the [c]ounty." As the Court stated in its reversal of the district court:

In adopting the cumulative voting plan..., the district court failed to defer to this expressed legislative preference. It abolished the residency districts, imposing a plan that would permit all five seats on the Board to be filled by individuals living in the same general area of the County. In sum, it failed to adequately defer to the "variety of political judgments about the dynamics of [the] overall electoral process that rightly pertained to the legislative prerogative of" the County.

In *Gause v. Brunswick County*, 92 F.3d 1178 (4th Cir. 1996), the central feature of this vote dilution case was the lack of geographical compactness. African-American voters and politicians brought a Section 2 claim against Brunswick County, NC, alleging that the County's modified at-large electoral system diluted minority votes. The County was divided into five residency districts, with the candidate from each district who received the most votes, compared only to other candidates living in the same district, serving. Voters could vote for any candidate, regardless of where they or the candidate lived. The facts were undisputed that no African-American has been elected to the Board of Commissioners since 1982, and that African-Americans had run for Board of Commissioners in 9 elections since 1972 and had been elected 3 times. The facts were also undisputed that the County had experienced substantial demographic shifts since the 1960 census, growing from 20,278 to 50,985, mostly as a result of an influx of snowbirds from colder climates. During this same period, the black population declined from 35% to 18%, and by 1990 the County's white population was 83% as compared to a black population of 16%. Not only was the African-American population of the County small, but only 14% of registered voters were African-American, and of the County's 22 election precincts, African-Americans constitute a majority in only one. In seven precincts, over 90% of the registered voters were white. With African-Americans constituting a majority in less than 6 percent of the

County's Census block and a majority in none of the County's six townships, the district court granted summary judgment to the defendants based on the undisputable fact that the lack of any electoral success by the candidates of African-Americans' choice was due to the small number of African-American voters and their geographical dispersion throughout the County.

The district court and the Fourth Circuit concluded that plaintiffs had failed to establish the *Gingles* precondition of geographical compactness and thus failed to establish a prima facie case of vote dilution, rejected the plaintiffs' claim that African-Americans had been unable to elect their preferred candidates to the Board and that the County's election structure is responsible, and rejected the plaintiffs' demand that a majority African-American voting district be created to ensure that African-Americans were adequately represented on the Board of Commissioners, reasoning that "African-Americans in Brunswick County are too few and too dispersed." The evidence showed that the African-American population was dispersed and spread evenly throughout the County, constituting a majority in no single township and a majority in only one election precinct, which was the County's smallest.

Rationale behind Geographical Compactness

The Fourth Circuit in *Gause* elaborated on the reason underlying the geographical compactness precondition:

The reason that a minority group making a [vote dilution] challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. *Gingles*, 478 U.S. at 50-51 n.17 (emphasis in original). In other words, minority voters must show that their votes have been diluted by discriminatory elements of the election process, and not simply that their votes are diluted. See *DeGrandy*, 114 S. Ct. at 2659-60; *McNeil*, 851 F.2d at 946. (emphasis supplied).

Bizarre-shaped "75 mile-long question mark"

Finally, the Fourth Circuit rejected the plaintiffs' attempts to prove that a reasonably compact majority African-American voting district could be constructed, noting that one of their proposed districts was boomerang-shaped, "unreasonably irregular, bizarre,[and] uncouth," and followed a tortured path that seemed to meander aimlessly around the legs of the triangular County, at points only one census block wide. The Court concluded that "[i]ronically, as positioned on the page in the joint appendix, this narrow, winding district looks like a 75 mile-long question mark." The Plaintiffs' second proposed district had an even more serious flaw in that it violated the one-person/one-vote requirement of the Equal Protection Clause of the Fourteenth Amendment.

Deviation Over 10% Unsupported by Substantial, Legitimate State Concerns

Noting that a total deviation of greater than 10 percent presumptively violates the Equal Protection

Clause, the Fourth Circuit observed that such a deviation may be upheld if "supported by substantial and legitimate state concerns," such as allowing district lines to track natural geographic barriers, significant topological features, or longstanding political boundaries. In this case, however, the plaintiffs' second proposal could not be justified on the basis of such traditional concerns, and it respected neither township nor precinct lines, nor were its boundaries mandated by geography.

Deviation to Redress Minority Vote Dilution Without Showing of Compactness

The plaintiffs' last attempt to get around the geographical compactness requirement was their most creative and also received careful scrutiny by the Fourth Circuit. The plaintiffs argued that it was permissible to have such a large population deviation in order to allow the creation of a majority African-American voting district. In other words, plaintiffs asked the Fourth Circuit to endorse race-conscious districting by finding that it would be a narrowly tailored method of furthering a compelling state interest, and thus permissible under *Shaw v. Hunt* and *Vera v. Bush*. The Fourth Circuit rejected this as an effort to bootstrap their way out of *Gingles*' compactness requirement by claiming that some unconstitutionally small district was "compact:

The plaintiffs' asserted rationale does not justify drawing districts whose populations deviate so dramatically. The plaintiffs claim that the extreme deviation must be allowed in order to redress the dilution of minority votes. This argument, however, is fatally circular because no dilution has yet been proven, nor can dilution be proven absent an independent showing of geographical compactness. The plaintiff cannot show a compelling

interest in redressing vote dilution without first proving compactness. Compactness is an essential element of a vote dilution claim, and that element must be satisfied by showing that a minority representation district can be drawn in a manner that complies "with the overriding demands of the Equal Protection Clause." *Sanchez v. Colorado*, 861 F. Supp. 1516, 1523 (D. Colo. 1994).

[A] plaintiff seeking to meet its burden of showing compactness under the first *Gingles* precondition should not be permitted to rely on a plan which, if subsequently adopted by the Court after a finding of a Section 2 violation, would have no chance of being found to be narrowly tailored to redress the violation. *Reed v. Town of Babylon*, 914 F. Supp. 843, 871 (E.D. N.Y. 1996). If we were to accept the plaintiffs' argument, every §2 plaintiff could bootstrap his way out of *Gingles* compactness requirement by claiming that some unconstitutionally small district is "compact." This we cannot allow. See *McNeil*, 851 F.2d at 946. (emphasis added)

In *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988), at stake was the extent of a federal court's remedial power in reviewing a legislatively adopted plan designed by a County in response to a court order to remedy a stipulated violation of Section 2 of the Voting Rights Act. The Fourth Circuit's decision

turned on the Dole Compromise, the §2 proviso that disclaims any right to proportional representation, and which in this case prevented a district court from rejecting a remedial legislative districting plan which provided the maximum opportunity for representation possible by that means for the sole reason that the representation possible did not sufficiently approximate proportionality. Black citizens made up 43.9% of the County's total population, 40.8% of its voting age population, and 39.5% of its registered voters, but despite these numbers and despite the fact that a number of black residents have run for election to the Board, no black has ever been elected to the Board. The County stipulated that its at-large electoral system for electing members to the Board of County Commissioners violated Section 2 of the Voting Rights Act, and the Fourth Circuit would later note that the specific violation alleged and established by this stipulation and consent decree was "classically one of "vote dilution" by the "submergence" of minority voters' potential voting power through the use of an at-large electoral process." The district court directed the parties to attempt to agree on a remedy, failing which the County was ordered to submit a proposed remedial plan. The parties failed to agree, and the County submitted a proposed single-member district plan, which increased the seats on the Board from five to seven. This plan had earlier been given §5 preclearance by the Attorney General. Plaintiffs then contended that single-member districting was shown by the plan's demographics to be inadequate as a remedial device in the County. The very best plan possible, according to the Plaintiffs, provide only one "safe" district and one in which there was only than a "fighting chance." Their objection to the County's SMD plan was that it would not provide black citizens "a chance to elect a number of commissioners that is commensurate with their portion of the population and with their voting strength."

The district court rejected the County's remedial plan, ordering instead a modified version of the plaintiffs' proposed plan based upon "limited voting" in at-large elections. Under plaintiffs' proposal, the Board would be consist of seven members elected concurrently on a Countywide at-large basis, with voters allowed to vote for any three or fewer candidates as they chose. Plaintiffs apparently convinced the district court that this limited voting plan would give black voters a fair chance of electing three commissioners, or 42% of the Board, in proportion to their population.

The Fourth Circuit reversed, holding that it was error for the district court to reject the County's plan, and remanded for implementation of the County's proposed remedial plan. The dispositive issue before the Fourth Circuit was "whether the district court properly could reject the County's remedial single-member district plan and impose instead its own modified version of the plaintiffs' limited voting plan."

Judicial Review of Legislative Plans⁸⁶

⁸⁶See *Mauldin v Branch*, NO. 2002-CA-00146-SCT (Miss. Dec. 18, 2003)

The Mississippi Supreme Court reversed and rendered the decision of the chancery court, which had adopted a congressional redistricting plan when the legislature failed to perform its statutorily-mandated duty to do so, holding that the chancery court lacked jurisdiction over this case and that the only state governmental entity authorized to draw new congressional districts is the Legislature.

Mississippi's delegation to the United States House of Representatives was reduced from five to four representatives after the 2000 decennial census, but the legislature failed to act and left the old five-district plan in place.

In an earlier interlocutory appeal, the Court had held that "Any congressional redistricting plan

adopted by the chancery court . . . will remain in effect, subject to any congressional redistricting plan which may be timely adopted by the Legislature.” *In re Mauldin*, No. 2001-M-01891 (Miss. Dec. 31, 2001). Following the chancery court trial, that court adopted "Branch Plan 2A," and held that it constituted the best compromise between the separate plans adopted by the Mississippi House of Representatives and Senate and it best provided parity and competition between the supporters of the two incumbents whose districts were affected by the mandatory redistricting. After that plan was submitted to the Justice Department for preclearance, but before the Justice Department could make a decision regarding preclearance of Branch Plan 2A, a three-judge court in a pending parallel proceeding announced that it had drawn a redistricting plan and intended to implement it absent a timely preclearance of the chancery court plan, *Smith v. Clark*, 189 F. Supp. 2d 512 (S.D. Miss. 2002) (three-judge court), and ordered that the state "shall use the congressional redistricting plan adopted by this court . . ., in all succeeding congressional primary and general elections for the State of Mississippi thereafter, until the State of Mississippi produces a constitutional congressional redistricting plan that is precleared in accordance with the procedures in Section 5 of the Voting Rights Act of 1965." *Smith v. Clark*, 189 F. Supp. 2d 548, 559 (S.D. Miss. 2002) (three-judge court), *aff'd sub. nom. Branch v. Smith*, 538 U.S. 254, 123 S. Ct. 1429, 155 L. Ed.2d 407 (2003).

After the Attorney General requested additional information about the Mississippi Supreme Court's order in *In re Mauldin*, and expressed concern about that plan in the absence of a decision from the Mississippi Supreme Court regarding the chancery court's jurisdiction, the three-judge court enjoined the chancery court plan on the ground that the Mississippi Supreme Court's assertion of chancery jurisdiction in *In re Mauldin* constituted a change in election law requiring § 5 preclearance – which had not been granted, *Smith v. Clark*, 189 F. Supp. 2d 503, 508 (S.D. Miss. 2002) (three-judge court), and held in the alternative that the assertion of state court jurisdiction violated Article I, § 4 of the United States Constitution, reasoning that congressional redistricting is a legislative function and that, without an express delegation of power, state courts cannot adopt a remedial redistricting plan if the legislature defaults. *Smith v. Clark*, 189 F. Supp. 2d at 558. The district court thereafter implemented its own plan, and the 2002 congressional elections were held accordingly. *Id.* at 559. The United States Supreme Court affirmed the federal injunction strictly due to the fact that the chancery court plan had not been precleared. *Branch v. Smith*, 538 U.S. 254, 123 S. Ct. 1429, 1437, 155 L. Ed. 2d 407 (2003). It did not address the issue of whether the chancery court's assumption of jurisdiction was constitutional, and expressly said that its ruling was not "binding upon state and federal officials should Mississippi seek in the future to administer a redistricting plan adopted by the Chancery Court." *Id.*

Addressing the chancery court's assumption of jurisdiction and its adoption of the Branch Plan 2A, the Mississippi Supreme Court found that "Our statutes clearly provide that the *only* governmental entity in this state that is authorized to draw congressional districts is the Legislature," citing Miss. Code Ann. § 5-3-123 (Rev. 2002). The Court also noted that this power "is not granted to any other governmental entity by the Mississippi Constitution, statutes, or case law."

The power to *assist* the Legislature with "professional, technical and other expertise" in redistricting is given to "all political subdivisions, state agencies, and all other creatures of the state of Mississippi." Miss. Code Ann. § 5-3-127 (Rev. 2002). Because the state courts are not mentioned specifically in either § 5-3-123 or § 5-3-127, they must necessarily fall under the category of "all other creatures of the state of Mississippi." Therefore, state courts are *only* authorized to *assist* in redistricting, not to engage in the act of redistricting. The chancery court was clearly erroneous in assuming jurisdiction of this matter in which the parties requested the court to engage in redistricting. Our case law clearly states that chancery courts lack jurisdiction to adjudicate disputes over congressional redistricting. *In re McMillin*, 642 So. 2d 1336, 1339 (Miss. 1994) ("Chancery Courts in this state do not have jurisdiction to enjoin elections or to otherwise interfere with political and electoral matters which are not within the traditional reach of equity jurisdiction.");

Brumfield v. Brock, 169 Miss. 784, 142 So. 745, 746 (1932) ("By a long line of decisions this court has held that courts of equity deal alone with civil and property rights and not with political rights.").

The Court found that no enactment of the Mississippi legislature granted to the chancery court the power to redistrict the State of Mississippi for congressional elections, no case of this Court has ever indicated there is such a statute, and thus the redistricting plan for congressional elections in 2002 produced by the Hinds County Chancery Court transgressed Article I, Section 4 of the United States Constitution, and was unconstitutional, and a nullity. In reaching this ultimate conclusion, the Court reasoned:

[C]ongressional redistricting must be done within the perimeters of the legislative processes, whether the redistricting is done by the legislature itself or pursuant to the valid delegation of legislative power. We have found no cases that support a contrary conclusion. [W]e can find no legislative act upon which to base the chancery court's authority to act in congressional redistricting. While the Mississippi legislature has empowered other state bodies to redistrict a number of *state* electoral districts, it has not authorized any other state body, including the chancery court, to redistrict *congressional* districts, citing *Smith v. Clark*, 189 F. Supp. 2d at 550, 554, 556.

The Court, in light of its interpretation of statutory law and upon reconsideration of its previous ruling, reversed its prior order and held that "no Mississippi court has jurisdiction to draw plans for congressional redistricting," and that the chancery court erred in assuming jurisdiction over this matter.

Citing Miss. Code Ann. § 23-15-1039 (Rev. 2001), which provides for at-large elections when the Legislature fails in its duty to provide new congressional districts, the Court further observed that the State has a statutorily-mandated and federally-approved default procedure⁷ which comes into play when the Legislature fails to act., and that "even though an at-large election is an unpopular option, it is the law of this State."

The Court stated that while it "cannot ignore the will of the people of this State as encapsulated in § 23-15-1039 and that "to do so would undermine all enforcement of state law," an at-large election could not be held at present, since, as a result of the Legislature's failure to act, the State was currently under a federal court injunction ordering that the State use the congressional districts drawn by the three-judge court, and that this injunction would remain in place until the three-judge court vacated it or the Legislature enacted a plan that was federally precleared under § 5. Therefore, at-large elections cannot be held until the injunction is vacated. The Court ended its opinion with this verbal kick in the Mississippi Legislature's hindquarters, taking aim at the arm of state government that had abdicated its responsibility in this case in this first instance:

Mississippi too often defaults in meeting its responsibilities as a state. We wait for the federal government and the federal courts to intervene for us and then we complain about the loss of our state's rights. And history has shown the federal government will intervene when the state fails to act to protect its citizens. In this case, we, as a Court, are confronted with a situation where our Legislature defaulted on its constitutional and statutory obligations to the citizens of the state and failed to protect our state's right to govern itself in the election of our congressional representatives. This default is nothing less than a declaration by the Legislature that Mississippi does not think it is necessary to exercise its authority as one of the fifty states to determine its own congressional districts. It denies our peoples' representatives of any influence over the makeup of our congressional representatives. The slate is clean now, and the way is clear for our Legislature to reassert its authority to represent the people of this state in the adoption of the congressional districts to be used in the next election in 2004. Mississippi, and more specifically the Legislature, should seize this opportunity now to use its constitutional powers and rectify this problem by approving constitutionally acceptable election districts which reflect the voice of the state's elected legislators and then obtaining federal preclearance of those districts. The chancery court's judgment is reversed, and this

In addressing this issue, the Court summarized the controlling principles respecting judicial review of legislative plans submitted, in obedience to court decrees, to remedy judicially established violations of § 2 of the Voting Rights Act:

Where, as here, a court has properly given the appropriate legislative body the first opportunity to devise an acceptable remedial plan, see *White v. Weiser*, 412 U.S. 783, 794-95, 37 L. Ed. 2d 335, 93 S. Ct. 2348 (1973), the court's ensuing review and remedial powers are largely dictated by the legislative body's response. If the legislative body fails to respond or responds with a legally unacceptable remedy, "the responsibility falls on the District Court," *Chapman v. Meier*, 420 U.S. 1, 27, 42 L. Ed. 2d 766, 95 S. Ct. 751 (1975) (reapportionment case) to exercise its discretion in fashioning a "near optimal" plan. *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985) (same). Where, however, the legislative body does respond with a proposed remedy, a court may not thereupon simply substitute its judgment of a more equitable remedy for that of the legislative body; it may only consider whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights - that is, whether it fails to meet the same standards applicable to an original challenge of a legislative plan in place. *Upham v. Seamon*, 456 U.S. 37, 42, 71 L. Ed. 2d 725, 102 S. Ct. 1518 (1982). If the remedial plan meets those standards, a reviewing court must then accord great deference to legislative judgments about the exact nature and scope of the proposed remedy, reflecting as it will a variety of political judgments about the dynamics of an overall electoral process that rightly pertain to the legislative prerogative of the state and its subdivisions. See *Weiser*, 412 U.S. at 795; *Cook v. Luckett*, 735 F.2d 912, 920-21 (5th Cir. 1984) (district court's rejection of legislative proposal in §2 case reversed).

Congressional Intent in Adopting the Dole Compromise

The Fourth Circuit concluded that the County's remedial plan met the relevant standards and that the district court erroneously declined to accept it as a "complete" remedy for the specific violation of §2 voting rights that had been alleged and established. Its reasoning was based upon a principled reading of the Dole Compromise, Section 2's express disclaimer against a judicially enforceable federal "right" to proportional representation:

We are satisfied that to adopt the plaintiffs' position and affirm the district court's reasoning and judgment would simply negate the proviso, and defeat Congress' intention in adopting this disclaimer as the ultimate back-stopping principle of this "compromise" legislation. See *Id.* The practical consequence of uncoupling violation from remedy in this way would necessarily be to allow proportional representation to become in practical effect the "right" protected by § 2. *Ubi jus, ibi remedium*, and vice versa. Certainly implicit in the *Gingles* Court's analysis of the nature of §2 vote dilution claims is the notion that, so far as those claims are concerned, right

action is dismissed without prejudice for lack of jurisdiction.

and remedy are inextricably bound together, for to prove vote dilution by districting one must prove the specific way in which dilution may be remedied by redistricting. See *McNeil*, 851 F.2d at 942 ("Court's approach... focusing up front on whether there is an effective remedy for the claimed injury... reins in the almost unbridled discretion that section 2 gives courts"). Whatever its other effects, we therefore believe that the §2 proviso prevents a court from rejecting a remedial legislative districting plan which provides the maximum opportunity for representation possible by that means for the sole reason that the representation possible does not sufficiently approximate proportionality. (Emphasis added.)

In *Hines v. Mayor and Town Council of Ahoskie, N.C.* 998 F.2d 1266 (4th Cir. 1993), black citizens of the Town of Ahoskie filed a Section 2 claim in which they alleged that the Town's at-large system for electing the five Town Council members impermissibly diluted black voting strength and denied members of the black community an equal opportunity to elect representatives of their choice in violation of § 2 of the Act. Their claim was predicated on the fact that only two black individuals had ever been elected to the Town Council. The Town stipulated that its existing electoral system diluted black voting strength in violation of § 2 of the Act, and as a proposed remedy it devised an election plan in which the Town would be divided into two districts, one majority black and the other majority white, with two Town Council members to be elected from each district by a plurality vote within the district, and with the provision for the fifth Town Council member to be elected at-large from the entire town population. The Town's expert, Dr. Theodore Arrington, testified that the ideal electoral plan for the Town Council would be a 2-2-1 plan and would include two black seats, two white seats, and then a swing district for the fifth seat; however, Arrington added that "a true swing district would not be possible in a town of this size because such a district would have only 900 people, and a small movement of twenty people would alter the racial balance such that the district would not remain a true swing district." Arrington also noted that the Plaintiffs' proposed swing district, with a fifty-five percent black voting age population, would actually be a "safe black district guaranteeing blacks three of the five seats on the Town Council." The Town's proposed election plan for the five members of its Town Council was held violative of § 2 of the Voting Rights Act of 1965, based on the district court's reasoning that in light of the Town's historical voting patterns, the at-large election "effectively provided [whites] with three 'safe' seats," and thus did not provide the complete remedy required by the Voting Rights Act. The district court thereupon ordered that the size of the Town Council be reduced to four members, based on its reasoning that the proposed swing district was "truly a swing district and not a 'safe' minority district," and that in order to provide the maximum relief possible, the two districts proposed by the Town would be retained, but the fifth Town Council position would be eliminated. The Town appealed, and the Plaintiffs, Black citizens of the Town, cross appealed the district court's refusal to implement an election plan providing three out of five single-member districts with a majority black population.

The Fourth Circuit held that while the district court properly rejected the black citizens' proposed election plan, it should have implemented the Town's plan in full rather than eliminating the fifth Town Council member position and held that the district court erred by refusing to implement the Town's proposed plan, and reversed and remanded with instructions for the district court to order the Town's election plan implemented.

Judicial Deference to Legislative Choices

The Fourth Circuit in *Ahoskie* noted that when a court is called upon to analyze a §2 challenge to an election plan proposed by a legislature as a remedy for a prior vote dilution,

this court accords great deference to legislative choices. *McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988). Under this deferential approach, "where ...the legislative body...responds with a proposed remedial electoral plan, a court may not thereupon simply substitute its judgment of a more equitable remedy for that of the legislative body; it may only consider whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights." *Id.* Accordingly, "actionable vote dilution must be measured against the number of positions in the existing governmental body rather than some hypothetical model based upon whatever size is necessary to accomplish proportional representation." *Overton v. City of Austin*, 871 F.2d 529, 543 (5th Cir. 1989) (Jones, J., Concurring). Moreover, in fashioning an appropriate remedy, legislatures are not limited to single-member district plans. *James v. City of Sarasota*, 611 F. Supp. 25, 27 (D.C. Fla. 1985), citing *Wise v. Lipscomb*, 437 U.S. 535, 57 L. Ed. 2d 411, 98 S. Ct. 2493 (1978).

This deference by federal courts also extends to legislative choices in selecting the appropriate size of the legislature. See, e.g., *Sixty Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 200, 32 L. Ed. 2d 1, 92 S. Ct. 1477 (1972) ("Size is for the state to determine in the exercise of its wisdom and in the light of its awareness of the needs and desires of its people."); *Clark v. Roemer*, 777 F. Supp. 445, 453 (M.D. La. 1990) ("As far as this court is concerned, the proper body to determine the optimum number of [members on the governmental body in question] is the... legislature."). Only when the evidence suggests that the legislature has chosen its size "solely in order to diffuse minority voting strength," should a federal court not afford such deference. *McNeil*, 851 F.2d at 946, (citing Carrollton Branch of *NAACP v. Stallings*, 829 F.2d 1547, 1551 (11th Cir.), cert. denied sub nom. *Duncan v. Carrollton*, 485 U.S. 936, 99 L. Ed. 2d 272, 108 S. Ct. 1111 (1988)).

Applying these principles of judicial deference to the case before it, the Fourth Circuit found that the district court's decision to reduce the size of the Town Council from five members to four was flawed, since the district court should have deferred to the Town's chosen size for its Town Council because the record contains no evidence that the Town created a five-member Town Council "solely in order to diffuse black voting strength," and since the district court in finding that the Town's plan continued to dilute minority voting strength, failed to focus on a potential districting plan for the five-member Town Council. Instead, the district court erroneously compared the plan to a "hypothetical model based on [the] size necessary to accomplish proportional representation." *Overton*, 871 F.2d at 543 (Jones, J., Concurring), and found the 2-2-1 plan "inadequate because of the at-large fifth seat," and that a "two-district, four member town council fully complies with Section 2."

Violation Anew of Constitutional or Statutory Voting Rights

The Fourth Circuit concluded that its inquiry did not end merely because the district court erred in reducing the size of the Town Council, and the obligation rested with the court to determine whether the Town's

remedial plan "violates anew constitutional or statutory voting rights." In making this inquiry, moreover, the Fourth Circuit recognized that "we may not use proportional representation as the ultimate standard for assessing the legal adequacy of a remedial legislative redistricting plan," but its analysis "must consider whether the protected voting group has a voting opportunity that relates favorably to the group's population in the jurisdiction for which the election is held," citing *Smith v. Brunswick County, Va. Bd. of Sup'rs.*, 984 F.2d 1393, 1400 (4th Cir. 1993).

Size Element of the Dilution Concept

Reasoning that the maximum extent to which a particular dilution may be remedied is constrained by the size element of the dilution concept, and based on the inability to create a truly swing district, the Fourth Circuit concluded that the Town's proposal provided the maximum opportunity for both racial groups to elect representatives of their choice, stating:

In reaching this Conclusion, we recognize the history of racially polarized voting and the majority white voting age population in Ahoskie create a strong chance that the candidate preferred by the whites may prevail in future at-large elections. However, this fact, by itself, does not invalidate Ahoskie's proposal. It is well established that the Act only guarantees "the right to have free and equal access to the ballot box and to have the vote that is cast count the same as any other person's [but] does not endow the voter with the right to have his or her vote cast for the winner." *Brunswick County*, 984 F.2d at 1398. Moreover, because our analysis of Ahoskie's at-large plan "focuses up front on whether there is an effective remedy for the claimed injury," *McNeil*, 851 F.2d at 942, and, under the §2 inquiry that we are required to undertake, there is no other apparent remedy feasible to provide blacks with more equal opportunities, we think the blacks' potential inability to elect a candidate of their choice to the fifth Town Council member position does not render Ahoskie's proposal legally insufficient. As the Seventh Circuit noted, "[The Supreme Court's opinion in] *Gingles* precludes some small and unconcentrated minority groups from attempting to rectify vote dilution even though they have 'less opportunity than other members of the electorate . . . to elect representatives of their choice.'"(emphasis added)

In *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), the Court applied the doctrine of laches as the basis for dismissing a dilatory claim under the Voting Rights Act, stating:

We find that the plaintiffs' delay was inexcusable and unreasonable. The Board adopted the current districting plan in 1971, based on the 1970 census figures; after looking at the 1980 census results, the Board decided in 1981 to continue the 1971 plan with no changes whatsoever. However, the plaintiffs voiced no objection either to the 1971 redistricting or to the 1981 decision not to redistrict, and waited until September 1988 to file this action, seventeen years after the 1971 plan was adopted and months after the last election under the 1981 plan took place.")

Current splits in the circuits and other legal issues in VRA litigation

White v. White elections

In *Ruiz v. City of Santa Maria*, 160 F. 3d 543, 553-54 (9th Cir. 1998), the Ninth Circuit held that more probative weight must be given a minority vs. non-minority contest than non-minority vs. non-minority contests in proving the third *Gingles* precondition. "In a multi-seat/multi-vote election, the ability of the minority to elect a non-minority candidate is not as probative in a *Gingles* prong three analysis as the inability of the minority to elect a minority candidate. To hold otherwise would doom any §2 claim in which white candidates, acceptable to minorities and non-minorities alike, are regularly elected but in which minority candidates, preferred by minorities but unfavored by whites, are consistently defeated. Our rule furthers the Voting Rights Act's goal of protecting the minority's equal opportunity to "elect its candidate of choice on an equal basis with other voters." ...The Act means more than securing minority voters' opportunity to elect whites. Accord, *Old Person v. Cooney*, 230 F.3d 1113, 230 F.3d 1113 (9th Cir. 2000)("Elections between white and minority candidates are the most probative in determining the existence of legally significant white bloc voting."); *Nipper v. Smith*, 39 F.3d 1494, 1539 (11th Cir. 1994). *But cf. Lewis v. Alamance County*, N. C., *supra*.

Causation Evidence and Proof of Racial Animus in the Electoral System

The Fifth Circuit addressed the probative value of proof of causation in the context of determining whether plaintiffs in vote dilution litigation could establish legally significant white racial bloc voting, where the defense asserted that any racially divergent voting was not "on account of" race but was primarily caused by partisan politics. In *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993)(en banc), cert. denied, 114 S.Ct. 878 (1994), the Fifth Circuit addressed this problem of the entanglement of race and politics. Writing for a majority of the Fifth Circuit, Judge Patrick Higginbotham said that in establishing racial bloc voting and racial polarization, a Section 2 plaintiff must show at a minimum that racially divergent voting was not primarily caused by or the result of partisan politics:

On appeal, defendants contend that the district court erred in refusing to consider the non-racial causes of voting preferences they offered at trial. Unless the tendency among minorities and whites to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race, defendants argue, plaintiffs' attempt to establish legally significant white bloc voting, and thus their vote dilution claim under Section 2, must fail. When the record indisputable proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens in the contested counties, defendants conclude, the district court's judgment must be reversed.

We agree. The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of Section 2 suggests, extend only to defeats experienced by voters "on account of race or color." Without an inquiry into the circumstances underlying unfavorable election returns, courts lack the tools to discern results that are in any sense "discriminatory," and any distinction between deprivation and mere losses at the polls becomes untenable. In holding that the failure of minority-preferred candidates to receive support from a majority of

whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the district court loosed Section 2 from its racial tether and fused illegal vote dilution and political defeat.

Further in its opinion, the Fifth Circuit in *LULAC* addressed the concern that it was erecting some type of new requirement for Section 2 plaintiffs to prove minority electoral failure resulting from racial motivation:

We need not hold that plaintiffs must supply conclusive proof that a minority group's failure to elect representatives of its choice is caused by racial animus in the white electorate in order to decide that the district court's judgment must be reversed. It is true that such a requirement could be inferred from the text of Section 2...; the caselaw Congress intended to codify in amending the provision, ...; the Senate Report, ...; the testimony of prominent supporters of the Act, ...; and the controlling opinions of the Supreme Court.... There is also a powerful argument supporting a rule that plaintiffs, who established legally significant racial bloc voting, must prove that their failure to elect representatives of their choice cannot be characterized as a "mere euphemism for political defeat at the polls," ...or the "result" of "partisan politics."...

Describing plaintiffs' burden in terms of negating "partisan politics" rather than affirmatively proving "racial animus" would not be simply a matter of nomenclature.... [T]here are many other possible non-racial causes of voter behavior beyond partisan affiliation. A rule conditioning relief under Section 2 upon proof of the existence of racial animus in the electorate would require plaintiffs to establish the absence of not only partisan voting, but also all other potentially innocent explanations for white voters' rejection of minority-preferred candidates. Factors that might legitimately leave white voters to withhold support from particular minority candidates include, for example, limited campaign funds, inexperience, for a reputation besmirched by scandal. Because these additional factors map only imperfectly into partisan affiliation, detailed multivariate analysis might then be the evidence of choice. The argument would then be that without this additional inquiry, courts that confine their scrutiny to partisan voting might well find racial bloc voting in circumstances where the losses of minority-preferred candidates were actually attributable to causes other than race. This result, it is urged, might unfairly tip the scales in favor of liability.

This argument possesses considerable force. Certainly, the allocation of proof in Section 2 cases must reflect the central purpose of the Voting Rights Act and its intended liberality as well as the practical difficulties of proof in the real world of trial. In countless areas of the law, weighty legal conclusions frequently rest on methodologies that would make scientists blush.... Requiring plaintiffs affirmatively to establish that white voters' rejection of minority-preferred candidates was motivated by racial animus would make racial bloc voting both difficult and, considering the additional analysis that would be needed, expensive to establish.... Moreover, it would facilitate the use of thinly-veiled proxies by permitting, for example, evidence that a minority candidate was regarded as "unqualified" or "corrupt" to defeat a claim that white voters' refusal to support him was based on race or ethnicity. The argument continues that an inquiry into causation beyond partisan affiliation seems inconsistent with the fundamental division

between "partisan politics" and "racial vote dilution."Having said this, we need not resolve the debate today. Whether or not the burden of the plaintiffs to prove bloc voting includes the burden to explain partisan influence, the result is the same. This is so even if the partisan voting is viewed as a defensive parr.

Finally, we recognize that even partisan affiliation may serve as a proxy for illegitimate racial considerations. Minority voters, at least those residing in the contested counties in this case, have tended uniformly to support the Democratic Party. At the same time, a majority of white voters in most counties have consistently voted for district court candidates fielded by the Republican Party. Noting this persistent, albeit imperfect correlation between party and race, plaintiffs assert that a determination that partisan affiliation best explains voting patterns should not foreclose Section 2 liability in this case because the Republican and Democratic parties are proxies for racial and ethnic groups in Texas. Whitcomb's distinction between "racial vote dilution" and "political defeat at the polls" should not control, they contend, for "partisan politics" is "racial politics."

In *Goosby v. Town Board of the Town of Hempstead, New York, 1999 WL 427446* (2nd Cir. 1999), the Second Circuit distinguished *LULAC v. Clements* as being in sharp contrast to the factual situation in the case before it, noting that "[u]ltimately, both sides agree that there is polarized voting but dispute its cause." In *Goosby*, the Court noted that where blacks were "without access to the Republic slating process, [blacks in the Town of Hempstead] simply are unable to have any preferred candidate elected to the Town Board, given the historical success of the Republican Party in all Town Board elections." The Second Circuit also noted that in *LULAC*, because white voters, Democrat and Republican, supported minority candidates who were elected by their parties at levels that were equal to or greater than those of white candidates, it was proper there to conclude that the divergent voting patterns among white and minority voters were best explained by partisan affiliation. *LULAC*, 999 F.2d at 861.

Cf. McGhee v. Granville County, 860 F.2d 110, 117 (4th Cir. 1988)("The adverse 'result' for which [Section 2] seeks a remedy must be traceable ultimately to the impact of 'a certain electoral law, practice, or structure interacting with social and historical conditions.'")

Expert Witnesses and Lay Witnesses

It should be emphasized, particularly in this discussion that centers on whether electoral results are "on account of" race or attributable to a nonracial reason, that such proof will more often than not depend in large part upon statistics. Indeed, a welter of statistical evidence awaits the trial court in most vote dilution cases. The evidentiary standards for selecting the most useful or helpful electoral data call for a high degree of discernment as to which endogenous or exogenous elections shed the most light on the issues, which results are too remote or aberrational, which elections are the product of special circumstances, and which elections reveal significant patterns of crossover voting, minority electoral success or non-racial causes of minority electoral failure. If a litigator chooses to wade into this kind of evidence with an opposing expert, he or she should be armed with at least a rudimentary grasp of regression analysis, correlation coefficients, the least squares principle, independent and dependent variables, autocorrelation and multicollinearity.

Amended Rule 701: Lay Opinion

On the other side of the statistical evidence equation lies another fertile area of factual development--anecdotal evidence, or lay testimony, indicative of minority access and participation, biracial coalitions, and causation evidence pointing to nonracial reasons for voting patterns and the lack of racial animus in the challenged electoral system. See generally *Lewis v. Alamance County, N.C.*, 99 F.3d 600, 616 n.12 (4th Cir. 1996)(causation relevant in the totality of circumstances inquiry); *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997); *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995); and *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994). In this connection, although beyond the scope of this presentation, it should be noted that the rule governing lay opinion testimony, Rule 701 of the Federal Rules of Evidence, was amended effective December 1, 2000, to make it clear that an undisclosed expert cannot sneak in under the radar as a lay witness, particularly where the proffered testimony is actually within the realm of expert testimony, i.e., requiring specialized knowledge, training or expertise. While amended Rule 701 may have been intended by its draftsmen to prevent parties from circumventing the Rule 26 expert disclosure requirements and the discovery process, it may have broader impact than anticipated. As amended, Rule 701 now provides that any part of a witness' testimony that is based on scientific, technical or other specialized knowledge must comply with the expert witness standards of Rule 702 and the expert disclosure requirements. Now, in order for lay testimony to be admissible under Rule 701, testimony expressed as opinions or inferences "must not [be] based upon scientific, technical or specialized knowledge within the scope of Rule 702." In other words, if the testimony could qualify under Rule 702, it cannot qualify under Rule 701. The subject matter of the testimony, rather than whether the witness is a layman or expert, is now the focus of this amended rule of evidence. One of the consequences of the amendment to Rule 701 is that any witness who conveys scientific, technical or other specialized knowledge will have to be designated as an expert and comply with the expert disclosure requirements of Rule 26 (a)(2); moreover, the expert will have to meet Rule 702's new reliability requirements, which became effective December 1, 2000, by which that rule now contains a codification of *Daubert*, to which we now turn.

Daubert applicability to Voting Rights litigation

In the broad field of voting rights litigation, there are many experts available to testify about statistical analysis, demographics, evaluation of exogenous and endogenous electoral evidence, racial bloc voting analysis, causation, race-predominance analysis and many other discrete evidentiary subcategories, and some of them are exceptionally qualified. Others are not. The rigorous *Daubert* standard for determining the reliability of expert testimony applies to experts in redistricting litigation and should be considered at the earliest stages when experts are used during the decisionmaking process, which is in essence a legislative process. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The application of *Daubert* need not be deferred until an expert seeks to testify at deposition or trial, but should be considered at the time the governmental entity is deciding whether to retain the expert, thereby assisting it in making a meaningful preliminary assessment of the expert's reasoning, methodology and credibility. An early *Daubert* assessment of an expert whose reports, findings and conclusions may be central to any viable redistricting plan or to the successful defense of a vote dilution claim, may indeed provide valuable evidentiary support at a trial years later. The Supreme Court has given trial courts discretion to prevent unreliable expert witnesses from testifying, and has extended that discretion to "non-scientific" experts. See *Kumho Tire Co. v. Carmichael*, 526 U.S.

137 *Daubert* 1999). The rigorous standards set out in *Daubert* have been recognized in and appear to be applicable to vote dilution litigation under the Voting Rights Act. For example, *Daubert* was cited in *Reno v. Bossier Parish School Board (I)*, 117 S.Ct. 1491, 1502 (1997)("To be sure, the link between dilutive impact and intent to retrogress is far from direct, but 'the basic standard of relevance...is a liberal one,' *Daubert v. Merrell Dow Pharmaceuticals, Inc.*...., and one we think is met here."). Moreover, in *Johnson v. Desoto County Board of Commissioners*, 204 F.3d 1335, 1341 (11th Cir. 2000), a §2 challenge by black voters to a County's at large method of electing its school Board and County commission, the Eleventh Circuit found that voter registration evidence could be credible and reliable data, although less probative than pure population data in voting cases, and that "like most evidence presented by expert testimony, we think its admissibility has to be determined on a case-by-case basis by the district court. See generally *Daubert v. Merrell Dow Pharmaceuticals, Inc.*...."). *Daubert* should be applied when the trial judge is deciding whether proffered expert testimony will be both relevant and reliable under Rule 702 of the Federal Rules of Evidence. *Daubert* authorizes courts to undertake a "preliminary assessment of whether that reasoning or methodology underlying the testimony is scientifically valid or whether that reasoning or methodology properly can be applied to the facts at issue." The Court held in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) that a trial court's decision to admit or exclude expert scientific evidence would be reviewable only for an abuse of discretion, and that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." In 1999 the Supreme Court held that the trial judge's general "gatekeeping" obligation under *Daubert* also applies to testimony that is based on technical and other specialized knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Responsiveness Evidence

In *National Association for Advancement of Colored People v. City of Niagara Falls*, 65 F.3d 1002 (2d Cir. 1995), the Second Circuit in a well-reasoned opinion by Judge Cabranes, rejected the argument that evidence of responsiveness was relevant only if the plaintiff in a Section 2 case chose to make it so:

As for the remaining two factors -elected officials' responsiveness to the particularized needs of the minority group and whether the contested practice or structure is tenuous -the district court's findings support its ultimate conclusion. First, we cannot accept the plaintiffs' argument that responsiveness is relevant only if they choose to make it so. In any event, the district court cited numerous efforts made by the City to address the needs of members of the minority community. The Niagara Human Rights Commission (established in the 1960's) began an Affirmative Action Task Force to increase the number of minority residents who apply for and qualify for positions in the Niagara Falls police and fire departments. The City has sought grants for increased "community policing" in certain black neighborhoods. In 1970 the Niagara Falls Board of Education established a school integration program that has achieved substantial success. In 1978 the City Council adopted a Fair Housing Law. In 1992 the Council established a Minority Business Loan fund to provide loans to black business owners. Although these efforts have not all been wholly successful, The Human Rights Commission, for example, has been criticized as ineffective. They lend support to the district court's conclusion that elected officials in Niagara Falls have been responsive to some of the minority community's

needs. *fn24 Decision and Order at 67. Finally, the plaintiffs do not challenge the district court's conclusion that the seven-member at-large system is not a "tenuous" policy. Decision and Order at 69. Rather they only point out that, according to the Senate Report, they are not required to prove otherwise to show vote dilution. S. Rep. at 29 n.117, 1982 U.S.C.C.A.N. at 207 n.117. We pursue this inquiry with some reluctance, as it entails our deciphering what policy steps qualify as responses to the "needs of members of the minority community." S. Rep. at 29, 1982 U.S.C.C.A.N. at 207. As the Senate Report itself recognizes, this factor is less "objective" than other factors that the Report sets forth. *Id.* at 29 n.116, 207 n.116. Nevertheless, we are somewhat more comfortable engaging in this inquiry, which the Report and *Gingles* direct us to undertake, than with the prospect of looking at anecdotal evidence to determine whether a particular candidate is "minority preferred." See *supra* part III. The "responsiveness" inquiry here involves review of tangible efforts of elected officials and the impact of these efforts on particular members of the community. In contrast, a review of anecdotal evidence to determine who in a campaign is minority preferred would more likely involve the proffer of testimony by individuals in the community purportedly representing the minority's "voice" with regard to whom the minority community "really" prefers.

See also *N.A.A.C.P., Inc. v. City of Columbia, S.C.*, 850 F. Supp. 404, 425 (D. S.C. 1993) ("These two additional factors [responsiveness and tenuousness of policy] were the subject of heated debate at trial. The plaintiffs maintained that no evidence should be received regarding these factors because the plaintiffs chose not to put them in issue. Although the court recognizes that the plain language of the statute indicates that these two additional factors may "in some cases" have probative value "as part of plaintiffs' evidence to establish a violation", *Id.* at 37, 106 S.Ct. at 2922 (emphasis added), the *Gingles* Court emphasized that the list of relevant factors enumerated in that decision, and gleaned from the Senate Report, were "not exclusive." In addition, the court is mindful of its obligation to view the totality of the circumstances, including not only the Senate Report factors, but any other relevant evidence. Accordingly, the court received evidence on these factors and herewith makes the following findings of fact with regard to them.")(emphasis added); *Askew v. City of Rome*, 127 F.3d 1355 (11th Cir. 1997)("Plaintiffs, moreover, have made no attempt to prove that there is a "significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the black community." *Id.* Once again, just the opposite is true. Both voting statistics and testimonial evidence conclusively reveal that Rome's black community has political influence. This political influence naturally translates into political responsiveness.")

Minority Influence Districts

The courts have thus far avoided deciding the issue of whether a minority influence district can satisfy the requirement of geographical compactness under *Gingles*. For example, in *Gause v. Brunswick County*, 92 F.3d 1178 (4th Cir. 1996), the Fourth Circuit dodged the issue because the plaintiffs raised it initially on appeal: "At oral argument the plaintiffs suggested (for the first time) that even if the African-American population is insufficiently compact to support creation of a majority African-American district, the population is sufficiently compact to allow creation of an African-American influence district, in other words, a district with a significant (although minority) African-American presence. Because the plaintiffs did not raise this argument below, we decline to consider it. See *Grove*, 113 S. Ct. at 1084 n.5"

The Supreme Court in *Johnson v. De Grandy*, 114 S.Ct. 2647, 2656 (1994) studiously avoided the issue of whether minority influence districts can satisfy *Gingles*' compactness precondition, stating: "We can leave this dispute without a winner. The parties' ostensibly factual disagreement raises an issue of law about which characteristic of minority populations (e.g., age, citizenship) ought to be the touchstone for proving a dilution claim and devising a sound remedy. These cases may be resolved, however, without reaching this issue or the related question whether the first *Gingles* condition can be satisfied by proof that a so-called influence district may be created (that is, by proof that plaintiffs can devise an additional district in which members of a minority group are a minority of the voters, but a potentially influential one). As in the past, we will assume without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied in these cases. See *Voinovich*, *supra*, at 154, 113 S.Ct., at 1155-1156; see also *Grove*, *supra*, at 41-42, n. 5, 113 S.Ct., at 1084, n. 5 (declining to reach the issue); *Gingles*, *supra*, 478 U.S., at 46-47, n. 12, 106 S.Ct., at 2764, n. 12 (same)."

No Discriminatory Intent or Purposeful Discrimination

In *Askew v. City of Rome*, 127 F.3d 1355 (11th Cir.1997), the Eleventh Circuit upheld the District Court's dismissal of a §2 challenge to the City of Rome's at-large method of electing its City Commission and Board of Education. The Eighth Circuit affirmed the district court's judgment including findings of fact and conclusions of law. In this hotly contested case that turned on expert and lay testimony favoring the City, the district court concluded that the plaintiffs had failed to prove discriminatory intent under the 14th and 15th Amendments and rejected their purposeful discrimination claim under §2 of the Voting Rights Act. It also found that the plaintiffs had failed to show that the white majority voters in the City of Rome voted sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate.

Practical Suggestions for Attorneys Representing Governmental Entities

The litigation that resulted from redistricting following the Census 2000 demonstrated why they call this area of the law a "political thicket." Now that the dust has settled on most of the cases, a few practical suggestions are in order for Board Attorneys who may face redistricting in less than seven years, bearing in mind that the Voting Rights Act of 1965 comes up for renewal and extension in 2007.

1. Public or private statements, speeches, e-mail communications, etc. are fair game in the evidence-gathering process. "Smoking gun e-mails" during the *Hunt v. Cromartie* trial played a major role in the Court's assessment of how much race predominated in the line-drawing process. Loose lips sink ships. This is discussed more fully in paragraph 5 below.
2. Be circumspect in bringing key players into the legislative decision-making process. Each of those key players may be a potential witness on the issue of motive and purpose.
3. As early in the redistricting process as possible, the Board should identify and articulate clearly the relevant and applicable traditional districting criteria, and then apply those criteria consistently throughout the process.

4. Understand and adhere to clear legal guidelines for avoiding violation of the race-predominant standard. Deviation from a consistent race-neutral methodology or over-emphasis upon race to the point that race-consciousness may be characterized as race-predominance, may lead to a successful constitutional challenge, strict scrutiny analysis and invalidation of racially gerrymandered districts.

5. Make sure the Board understands the ingredients of legislative history. The redistricting process is a legislative function of the County Board and should be conducted with a constant awareness of the fact that the entire legislative history will likely be the focus of pretrial discovery in the event a subsequent racial gerrymandering challenge or an action under §2 or §5 of the Voting Rights Act is mounted, a fact brought home in the Fifth Circuit's recent decision in *Prejean v. Foster*. In this regard, relevant evidence of legislative history may include the following:

(a) Any narrative statements, exhibits or evidentiary materials submitted to the Section 5 Unit of the Civil Rights Division of the Justice Department, for covered jurisdictions, over past decade;

(b) As alluded to in item 1 above, correspondence, e-mail, faxes and communications of any kind, nature and description to and from the County and its representatives, on the one hand, and the Attorney General of the United States and the Civil Rights Division's Voting Section attorneys, on the other, during that same relevant time period, including informal telephone memoranda and summaries of contacts;

(c) Clear, consistent and unambiguous reference to traditional race-neutral criteria and standards such as compactness, contiguity, incumbency protection, partisan political interests, respect for political subdivision boundaries and preservation of non-racial communities of interest in the redistricting process;

(d) Relevant newspaper articles, television interviews and other forms of recorded media coverage, whether on the state or local level, that identify or describe the principal goals and objectives of the redistricting process, the balanced use of race along with other non-racial factors in making boundary line changes, and other public expressions of legislative purpose bearing on the issue of whether and to what extent race predominated or was merely one of many factors in the drawing of boundaries of a given district.

6. Develop a detailed understanding of the electoral history of all potentially relevant elections in the County for at least the past decade. Given the crucial role that minority electoral outcomes play in §2 litigation, including bloc voting, racial polarization and special circumstances, the County Board or its representative should consider preparing and maintaining for each election, endogenous and exogenous, an individual file containing at a minimum the following facts and circumstances, together with a certified copy of the election return:

(a) Candidate by name and race;

(b) Office or position;

(c) Date of election;

- (d) Type of election, i.e., primary, runoff, general, special;
- (e) Relative qualifications of each candidate;
- (f) Newspaper articles pertaining to the pre-election activities, platform announcements, speeches, debates, and issues analysis;
- (g) Policies and written platforms of each candidate;
- (h) Experience of each candidate;
- (i) Abilities of each candidate as a speaker and public figure;
- (j) Track records of each candidate in their respective communities;
- (k) Name recognition of each candidate;
- (l) Financial support of or received by each candidate, including identification of any discrete groups or organizations providing financial support or in-kind support;
- (m) Personalities of each candidate;
- (n) Identity of supporters and attractors of each candidate;
- (o) Financial report forms, campaign contribution reports and similar public documents.

Some of these factors were first suggested by Chief Judge Eisle in his dissenting opinion in *Jeffers v. Clinton*, 730 F. Supp. 196, 246 (E.D. Ark. 1989), although in the limited context of facts and circumstances relevant to proof of bloc voting.

Research: Secondary Authorities

The following is not intended as an exhaustive list of literature on the subject of voting rights, but is a representative sampling of the more current and thorough legal articles in this field of law.

A. **Tribute to Judge William C. Keady: Race, Redistricting and Retrogression in Mississippi Afer the 2000 Census**, 68 Miss. L. J. 81 (1998).

B. **Inequalities in Population of Election Districts or Voting Units, Other Than Districts or Units for Election to Congress or State or Territorial Offices, as Rendering Apportionment Violative of Federal Constitution -- Post-Baker Cases**, 143 A.L.R. Fed. 631 (1998).

C. **What Changes in Voting Practices or Procedures Must be Precleared Under Section 5**

of Voting Rights Act of 1965, 146 A.L.R. Fed. 619 (1998).

D. **Standing and Misunderstanding in Voting Rights Law**, 111 Harv.L.Rev. 2276 (1998).

E. ***United States v. Hays: An Essay on Standing to Challenge Majority-Minority Districts***, 65 U.Cin.L.Rev. 341 (1997).

F. **Standing to Challenge Pro-Minority Gerrymanders**, 111 Harv.L.Rev. 576(1997).

G. **Still Hazy After All These Years: Voting Rights in the Post-Shaw Era**, 26 Cumb.L.Rev. 287 (1995-96).

H. **Standing to Challenge Pro-Minority Gerrymanders**, 111 Harv.L.Rev. 576 (1997).

I. **Redistricting in the Post-2000 Era**, 8 Geo. Mason L. Rev. 431 (2000).

J. **Lowering the Preclearance Hurdle: *Reno v. Bossier Parish School Board***, 5 Mich. J. Race & L 695 (2000).

K. **Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After *Adarand* and *Shaw***, 149 U. Pa. L. Rev. 1 (2000).

L. **Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote**, 4 Mich.J. Race & L. 389 (1999).

M. **Redistricting Litigation in the Next Millennium**, 49 Catholic Univ. L. Rev. 31 (Fall 1999).

N. **Census 2000: Strategies and Considerations for State and Local Government** (American Bar Association Publishing, April 2000).

O. **Implementing the Race-Predominant Standard for State and Local Government Redistricting Plans**, Voting Rights Symposium, 27 Stetson L. Rev. 835 (Winter 1998).