Mercer Law Review

Volume 49 | Number 3 Article 9

5-1998

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Recommended Citation

White, Jimmy (1998) "*Amchem Products, Inc. v. Windsor*: The Supreme Court Defines the Standard for Settlement Class Action Certification," *Mercer Law Review*: Vol. 49 : No. 3 , Article 9.
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol49/iss3/9

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CASENOTES

Amchem Products, Inc. v. Windsor: The Supreme Court Defines the Standard for Settlement Class Action Certification

In *Amchem Products, Inc. v. Windsor*,[1] a case stemming from the asbestos litigation crisis of the 1970s and 1980s, the United States Supreme Court addressed the certification criteria for settlement-only class actions under rule 23 of the Federal Rules of Civil Procedure ("Rule 23").

I. FACTUAL BACKGROUND

Personal injury and wrongful death suits resulting from asbestos exposure began to appear in the 1960s.[2] Asbestos cases escalated in number throughout the 1970s and 1980s. In 1986 alone the filing rate of new asbestos cases in federal and state courts jumped from five hundred new cases per month to two thousand new cases per month.[3] The enormous number of asbestos cases entering the judicial system resulted in (1) extreme financial burdens that threatened to completely bankrupt manufacturers; (2) excessive expansion of state and federal

1. 117 S. Ct. 2231 (1997).
2. Georgine v. Amchem Prod., Inc., 157 F.R.D. 246, 263 (E.D. Pa. 1994).
3. *Id.*

dockets, which created substantial delays in processing claims; (3) unwieldy transaction costs that made it impractical for plaintiffs to bring suits; and (4) erratic decisions issued by courts in different jurisdictions with similar fact patterns.[4]

Responding to the burden on the state and federal judicial systems, in 1987 the Federal Judicial Center convened a conference of judges and both plaintiff and defense counsel to discuss a means of resolving the asbestos litigation crisis.[5] The report declared that a legislative response to the asbestos problem was necessary, but this prompting from the conference received no response. A second judicial conference was convened in 1990.[6]

As a result of continued efforts by the judiciary to find a global resolution to the crisis, all federal personal injury asbestos litigation pending in 1991 was transferred to the United States District Court for the Eastern District of Pennsylvania for coordinated and consolidated pretrial proceedings.[7] Twenty defendant manufacturers represented by the Center for Claims Resolution ("CCR") entered into extensive negotiations with members of plaintiffs' steering committee.[8] Negotiations focused on the development of a national "alternative resolution mechanism" that would provide a means of handling future asbestos claims against defendants.[9] Once an agreement was reached between CCR and plaintiffs' attorneys, defendants proceeded to settle all pending claims.[10]

On January 15, 1993, a complaint, an answer, and a stipulation for settlement were filed simultaneously by plaintiffs and defendants.[11] On the same day, plaintiffs and defendants filed a joint motion for conditional class certification seeking temporary certification under Rule 23(b)(3) for the limited purpose of seeking approval of the proposed settlement.[12]

The proposed class consisted of all persons who had not filed an asbestos-related lawsuit against any of the named defendants as of the date the class action commenced but "who (1) had been ex-

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4. *Id.* A 1984 Rand Corporation study found that only thirty-seven to thirty-nine percent of money paid by asbestos defendants went to victims, with sixty-one to sixty-three percent going to transaction costs. *Id.*

5. *Id.*

6. *Id.* at 264.

7. *Id.* at 265.

8. *Id.*

9. *Id.* at 266.

10. *Id.*

11. *Id.* at 257.

12. *Id.*

posed—occupationally or through the occupational exposure of a spouse or household member—to asbestos or products containing asbestos attributable to a [named] defendant, or (2) whose spouse or family member had been so exposed."[13] The class would include persons who had already suffered injury as well as those who had been exposed to asbestos but had not yet been diagnosed with an asbestos-related injury.[14] The class would number in the tens of thousands with members being given the option to voluntarily "opt-out" of the suit.[15]

The district court found that the settlement was fair, that the court's jurisdiction was properly invoked, and that representation and notice were adequate.[16] In granting certification, the court noted that Rule 23 requirements for class certification were "often more readily satisfied in the settlement context because the issues for resolution by the court are more limited than in the litigation context."[17]

In reversing the district court, the Third Circuit Court of Appeals held that each of the Rule 23(a) requirements and the appropriate Rule 23(b) requirements must be satisfied "as if the action [was] going to be litigated."[18] The court stated that the settlement agreement should not be taken into account in evaluating a class for certification.[19] Applying this standard, the court ruled that the proposed class did not meet four of the Rule 23 requirements.[20]

The Supreme Court affirmed the decision of the Third Circuit, holding that the proposed class did not meet the predominance or the adequacy of representation requirements of Rule 23.[21] In affirming the Third Circuit, the Supreme Court stated that a settlement must be taken into account when determining the propriety of class certification but that taking the settlement into account does not relieve plaintiffs of their obligation to meet the Rule 23 requirements.[22]

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13. *Amchem*, 117 S. Ct. at 2239.
14. *Id.* at 2240.
15. *Georgine*, 157 F.R.D. at 261.
16. *Id.* at 333-34.
17. *Id.* at 315. *See also* 117 S. Ct. at 2242. The objectors appealed the order of the district court judge enjoining all class members from commencing any asbestos-related actions in any state or federal court. *Id.*
18. Georgine v. Amchem Prod., Inc., 83 F.3d 610, 617 (3d Cir. 1996).
19. *Id.* at 617-18.
20. *Id.* at 617.
21. 117 S. Ct. at 2247-52.
22. *Id.* at 2248.

II. LEGAL BACKGROUND

Rule 23, which governs the treatment of class actions in federal courts, sets out requirements that must be satisfied by parties seeking certification as a class.[23] Rule 23(a) lists four threshold requirements that must be met for a party to be certified as a class:

> (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical . . . of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class").[24]

In order to be certified as a class, a party must meet not only the requirements of Rule 23(a) but also the requirements of one of the categories under Rule 23(b). The Rule 23(b)(3) class action is designed to cover cases in which a class action would achieve economies of time, effort, and expense and promote "'uniformity of decisions as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'"[25] Rule 23(b)(3) creates a class action for plaintiffs seeking damages rather than injunctive or declaratory relief. The Rule 23(b)(3) class action is "designed to secure judgments binding on all class members" except those who voluntarily opt-out.[26]

Rule 23(b)(3) states that a class action may be maintained if the prerequisites of Rule 23(a) are satisfied and if

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.[27]

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23. *In re* A.H. Robins Co., 880 F.2d 709, 727 (4th Cir. 1989).
24. 117 S. Ct. at 2245.
25. *Id.* at 2246 (quoting FED. R. CIV. P. 23(b)(3) advisory committee's note).
26. *Id.* at 2245.
27. FED. R. CIV. P. 23(b)(3).

Among current applications of Rule 23(b)(3), the settlement-only class action has become a "stock device."[28] Unlike the traditional class action in which a party seeks certification so that an issue or claim may be litigated by a class of plaintiffs, a settlement class action is an action in which the plaintiffs and defendants move for class certification solely for the purpose of settlement.[29] No litigation is contemplated.[30] Settlement class actions have become particularly popular in the mass tort arena. This mechanism allows defendant manufacturers to negotiate with selected plaintiffs' attorneys to reach a settlement agreement, and to bring the settlement to the court for approval.[31] In doing so, manufacturers are able to define the persons to whom they will be required to pay future damages.[32] Furthermore, these manufacturers are able to limit future damages by narrowing the scope of causes of action that may be brought and by establishing a preset amount that may be awarded for each particular cause of action.[33]

Rule 23(e) states: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."[34] Typically, application of Rule 23(e) takes place in a "fairness" hearing in which the court considering certification and the settlement will examine evidence provided by the parties and make a determination on the fairness of the settlement agreement.[35] Prior to *Amchem*, the debate in federal courts had been over whether the fairness of the settlement under Rule 23(e) should influence the decision to certify the class and, if so, how much weight the fairness of the settlement should be given.[36]

In re Bendectin[37] represents the first time that a district court granted class certification for settlement purposes in a mass tort action.[38] *In re Bendectin* involved a proposed class of plaintiffs claiming injuries suffered from the use of the pharmaceutical Bendectin, which plaintiffs alleged caused birth defects and stillborn births in

28. 117 S. Ct. at 2247.
29. *Id.*
30. *Id.*
31. *Georgine*, 157 F.R.D. at 330.
32. *Id.* at 264.
33. *Id.* at 294-95.
34. FED. R. CIV. P. 23(e).
35. 157 F.R.D. at 334-35.
36. 117 S. Ct. at 2247.
37. 102 F.R.D. 239 (S.D. Ohio 1984).
38. *Robins*, 880 F.2d at 739.

mothers ingesting the drug.[39] The district court certified the class, stating that the traditional court system was unequipped to handle mass tort litigation "in a conventional manner without materially depleting the judicial resources available for all other litigation."[40] The costs, according to the court, were high, both in terms of delay in the "overburdened" federal system and in expenses to the parties litigating the cases.[41] The court noted that resolution of disputes does not necessarily require trial but that parties might be assisted in reaching a prompt and equitable disposition of the entire problem through a "limited use" of Rule 23.[42]

Even though the Sixth Circuit Court of Appeals overturned the district court decision to certify the class, it pointed out that several cases involving issues other than mass torts had already been certified for settlement only.[43] In finding that the class in *In re Bendectin* had not met all of the Rule 23 requirements to its satisfaction, the court found that it was still "conceivable" that a mass tort case might be certifiable for settlement purposes only.[44]

All courts of appeals have now recognized the utility of Rule 23(b)(3) settlement classes. Prior to the Supreme Court decision in *Amchem*, however, courts were divided on how to apply the Rule 23 requirements.[45] The approach favored in most federal circuits before *Amchem* was to look to the settlement agreement as a basis for meeting Rule 23 requirements. This was conveniently accomplished during the Rule 23(e) fairness inquiry. The Fourth Circuit Court of Appeals in *In re A.H. Robins Co.*[46] noted that Rule 23 was intended to be applied with a high degree of flexibility and that "if not a ground for certification per se, certainly settlement should be a factor, and an important factor, to be considered when determining certification."[47] The Fourth Circuit affirmed the district court decision to certify a class of Dalkon Shield plaintiffs for settlement purposes based on, among other factors, the support of voting members of the class for the settlement agreement.[48]

39. 102 F.R.D. at 240 n.2.
40. *Id.* at 240.
41. *Id.*
42. *Id.*
43. *In re* Bendectin, 749 F.2d 300, 305 n.10 (6th Cir. 1984).
44. *Id.*
45. 117 S. Ct. at 2247.
46. 880 F.2d 709 (4th Cir. 1989).
47. *Id.* at 740.
48. *Id.* at 744.

The Fifth Circuit Court of Appeals went even further when it stated in *In re Asbestos Litigation*[49] that a court must consider the terms of a settlement in determining whether to certify a class because in the settlement class context, common issues among class members arise from the settlement itself.[50] In *In re Asbestos Litigation*, the Fifth Circuit affirmed the district court certification and approval of a settlement for future asbestos victims.[51] The Fifth Circuit stated that it was bound to follow established precedent, which held that "the district court can and should look at the terms of a settlement in front of it as part of its certification inquiry."[52] However, the Fifth Circuit went on to state that it "would adopt this rule even if [it was] not bound by precedent because it enhances the ability of district courts to make informed certification decisions."[53]

Likewise, the Second Circuit[54] and the Eighth Circuit[55] have found the settlement agreement itself to be a basis for satisfying Rule 23 requirements. Only the Third Circuit, prior to the Supreme Court decision in *Amchem*, had refused to consider the terms of the settlement in determining the propriety of class certification.[56]

In *In re General Motors Corp.*,[57] the Third Circuit held that even though settlement classes are cognizable under Rule 23, they must meet the same requirements as those intended for litigation.[58] In this multidistrict products liability action against a manufacturer of pick-up trucks based on alleged defects in the fuel tanks, the court refused to concede that a lower standard may be applied in the settlement class action context.[59] The court set aside the district court certification

49. 90 F.3d 963 (5th Cir. 1996).

50. *Id.* at 975.

51. *Id.* at 993.

52. *Id.* at 975.

53. *Id. See also In re* Beef Indus. Antitrust Litig., 607 F.2d 167, 176 (5th Cir. 1979) (certifying for settlement only a class that it had previously refused to certify for trial, thus implying that the standards for certifying a class for settlement only are different from those certifying a class for litigation).

54. Malchman v. Davis, 761 F.2d 893, 898-99 (2d Cir. 1985) (finding that a settlement agreement provided the basis for satisfaction of Rule 23(a)(4)'s adequacy of representation standard because it demonstrated that the interests of the parties were not antagonistic).

55. White v. National Football League, 41 F.3d 402, 408 (8th Cir. 1994) (holding that the adequacy of representation requirement was satisfied because significant benefits were received by members of the class under the settlement).

56. *In re* Asbestos Litigation, 90 F.3d at 975.

57. 55 F.3d 768 (3d Cir. 1995).

58. *Id.* at 799.

59. *Id.* at 800.

order and settlement approval because the district court failed to make findings that the class complied with Rule 23.[60]

III. THE SUPREME COURT'S ANALYSIS

In *Amchem* the Supreme Court, while affirming the judgment of the Third Circuit, stated that a settlement is relevant to class certification.[61] When a settlement-only class certification is sought, however, the court must still apply the standards set out under Rule 23(a) and (b) as if the suit was going to be litigated.[62] In applying this trial-ready standard, the Court found that the proposed class failed to satisfy the predominance standard of Rule 23(b)(3) and the adequacy of representation standard of Rule 23(a)(4).[63]

In explaining why Rule 23(e) was not the appropriate standard for evaluating a proposed class for certification, the Court began with an analysis of the intent behind the rule. The Court described Rule 23(e) as one that only prevents a class action from being dismissed or compromised without the approval of the court and without notice of the proposed dismissal or compromise to class members.[64] This fairness standard was intended, according to the Court, as an additional requirement, referring to classes that were already qualified for certification.[65] It was never intended by the drafters as a superseding direction.[66]

The Supreme Court held that the safeguards provided by Rule 23(a) and (b) are necessary in the settlement context as well as the litigation context.[67] First, Rule 23(a) and (b) requirements protect absent class members by preventing class certification dependent on the court's overall impression of the fairness of the settlement.[68] Second, if a Rule 23(e) fairness inquiry was the controlling standard for class certification despite the impossibility of litigation, the Court reasoned, both class counsel and the court would be disadvantaged.[69] Counsel would be unable to press for a better offer by threatening litigation, and the court

60. *Id.*
61. 117 S. Ct. at 2248.
62. *Id.* (noting that of Rule 23's requirements, only trial management concerns may be set aside in deciding on the propriety of class certification).
63. *Id.* at 2248-52.
64. *Id.* at 2248.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

would have to evaluate bargains without the benefit of adversarial litigation.[70]

In applying the Rule 23(a) and (b) requirements to *Amchem* as if the case was going to be litigated, the Court found the class did not meet the Rule 23(b)(3) predominance standard.[71] According to the Court, this standard could not be satisfied by pointing to the shared experience of asbestos exposure, a common interest in receiving prompt and fair compensation, or a common interest in fair settlement.[72] The Rule 23(b)(3) inquiry should focus instead, noted the Court, on the legal or factual questions that qualify each individual member's case as a genuine controversy.[73] Such questions pre-exist settlement.[74]

In explaining its reasoning, the Court pointed out that while Rule 23(e) is designed to protect unnamed class members from unjust or unfair settlement resulting when class representatives grow faint-hearted or choose to compromise to their own benefit, Rule 23(b)(3)'s predominance requirement tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.[75] The Court found that the number of individual questions among class members and the significance of those questions prevented any overarching questions related to the settlement from satisfying the predominance standard.[76]

The Court also found that the *Amchem* class failed to satisfy the adequacy of representation requirement enunciated in Rule 23(a)(4).[77] The purpose of the adequacy of representation standard is to "uncover conflicts of interest between named party representatives and the class they seek to represent."[78] The Court noted that when, as in *Amchem*, differences within a class justify the creation of subclasses, representatives must understand their obligations to the specific subgroup they

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70. *Id.*
71. *Id.* at 2250.
72. *Id.*
73. *Id.* at 2235.
74. *Id.* at 2250.
75. *Id.* at 2249.
76. *Id.* The Court cited the findings of the court of appeals that

> [c]lass members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma . . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.

Id. at 2250 (quoting *Georgine*, 83 F.3d at 626).

77. *Id.*
78. *Id.*

represent.[79] The Court held that the interests of the members of the *Amchem* class were not adequately aligned to justify inclusion in a single class.[80] In particular, the interest of members with current asbestos-related illnesses in need of immediate financial remedy would be very different from the interest of "exposure-only" members looking to establish a reserve from which future claims could be made.[81] These differences would necessarily place very different pressures on the named plaintiffs, and the Court did not believe the named plaintiffs were aware of their responsibilities to the class members.[82]

The Court closed its analysis by briefly addressing its concern over settlement notice. Because the predominance and the adequacy of representation issues were dispositive, the Court did not rule on whether notice of the settlement to class members was sufficient.[83] Like the Third Circuit, however, the Court expressed concern over whether "class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous."[84]

In dissenting, Justice Breyer outlined five areas in which he thought the majority had erred.[85] First, Justice Breyer noted that the need for settlement in *Amchem*, which involved hundreds of thousands of lawsuits, was greater than the Court opinion suggested.[86] Second, according to Justice Breyer, more weight should be given to settlement-related issues in determining whether common issues predominated.[87] Third, the Justice questioned whether the Court was correct in second-guessing the district court on the adequacy of representation determination without first having the court of appeals consider it under the enunciated standard.[88] Fourth, Justice Breyer expressed uncertainty about "the tenor of an opinion that seems to suggest the settlement is unfair," which the Justice claimed was expressly a district court duty.[89] Finally, Justice Breyer disagreed with the majority's suggestions that "notice" was inadequate in the absence of further review by the court of appeals.[90]

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79. *Id.* at 2251.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 2252.
84. *Id.*
85. *Id.* (Breyer, J., dissenting).
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

The settlement was relevant, Justice Breyer noted, because common features and interests among class members, such as exposure to asbestos and an interest in prompt and fair compensation, were likely to be important in the proceeding that would ensue.[91] A proceeding would not be a trial but would instead focus primarily upon whether or not the proposed settlement fairly and properly satisfied the interests of the class members.[92] Because he thought that the Third Circuit had not reviewed the district court decision with the settlement in mind, Justice Breyer stated that the case should have been sent back to the court of appeals for review under the correct standard.[93]

IV. IMPLICATIONS

The Supreme Court decision in *Amchem* should result at a minimum in a decrease in forum-shopping among defendants in mass tort actions. Prior to the decision in *Amchem*, parties could choose a forum in which to seek class certification based on the particular standard applied in the jurisdiction. Now, however, there is a uniform standard by which each proposed class must be evaluated and "undiluted, even heightened attention" must be given to class action proposals in the settlement-only context.[94] This standard should manifest itself in a much closer examination of the factors that qualify a class for adjudication by representation. When individual issues that would necessarily be examined by the courts in a trial predominate, the class will no longer be certified.

It is just as likely that there will be a reduction in the number of class actions certified for settlement only. Without a relaxed standard, as applied in *In re Bendectin*,[95] or the flexibility to mold certification criteria to the circumstances of the individual case, as described in *In re A.H. Robins Co.*,[96] courts may find themselves without the tools necessary to justify class certification, particularly in the mass tort, settlement-only context. In this more stringent context, individual differences among class members make it extremely difficult to satisfy the Rule 23(b)(3) predominance standard as well as the Rule 23(a)(4) adequacy of representation standard.[97]

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91. *Id.* at 2255.
92. *Id.*
93. *Id.*
94. *Id.* at 2248.
95. 102 F.R.D. at 240.
96. 880 F.2d at 740.
97. *In re* General Motors Corp., 55 F.3d at 814.

In addition, classes that are certified by the courts under the *Amchem* standard will be more narrowly defined than those certified prior to the Supreme Court decision. Under the predominance standard as applied by the Supreme Court, classes will be required to show that common issues are sufficient to warrant adjudication by representation just as if the case were going to trial.[98] Likewise, named plaintiffs will be required to demonstrate that they are aware of their responsibilities to members of the subgroups to which they belong and that the differences among members of the proposed class do not create conflicts of interest that would prevent the named plaintiffs from representing all members of their class.[99] When there are individual issues related to proof of injury, proof of causation, and degree of injury, and when these individual issues are complicated by variations in the pertinent laws from state to state, it will be extremely difficult to meet Rule 23(a) and (b) requirements unless the class is narrowly defined.[100]

Legislative action designed to encourage settlement classes is a possible alternative to anticipated reductions in class certifications. As the court in *In re General Motors* indicated, a statutory scheme with stated principles and procedures to guide the trial court in certifying classes specifically for settlement may replace the current rules, allowing for more ready settlement.[101]

There currently exists a proposed amendment to Rule 23 that "would expressly authorize settlement class certification, in conjunction with a motion by the settling parties for Rule 23(b)(3) certification, 'even though the requirements of subdivision (b)(3) might not be met for purposes of trial.'"[102] Until action is taken on the amendment, however, courts must operate under the current rule, which requires parties to satisfy the Rule 23 standards as if the case were going to trial.[103]

JIMMY WHITE

98. 117 S. Ct. at 2249.

99. *Id.*

100. *Id.*

101. 55 F.3d at 814.

102. 117 S. Ct. at 2247 (quoting proposed amendment to FED. R. CIV. P. 23(b)). *See also Judicial Conference Approves Single Change To Federal Rule Governing Class Action Suits*, 66 U.S.L.W. 2182 (Sept. 30, 1997) (discussing a proposal that would "allow a trial court to certify a class for settlement purposes only" in conformance with *Amchem*).

103. 117 S. Ct. at 2247.

Board of the County Commissioners v. Brown: Nepotism, Skepticism, and Causation Under 42 U.S.C. § 1983

In *Board of the County Commissioners v. Brown*,[1] the Supreme Court held that a municipality incurs liability under 42 U.S.C. § 1983 ("Section 1983")[2] for failing to screen the background of a job applicant only when the "plainly obvious consequence of the [hiring] decision" is that the employee is likely to deprive citizens of specific federal rights.[3]

I. FACTUAL BACKGROUND

In May 1991 Jill Brown and her husband were driving from Texas to their home in Bryan County, Oklahoma. Just after crossing over into Oklahoma, the Browns encountered a police checkpoint. Mr. Brown, the driver, decided to avoid the checkpoint and return to Texas.[4] Two Bryan County sheriff's deputies observed the Browns' car turn around and subsequently gave chase. After a short pursuit, the deputies stopped the car and ordered the Browns to exit at gunpoint. Apparently believing the Browns were not moving quickly enough, Reserve Deputy Stacey Burns began to pull Jill Brown from the car using an "arm bar"

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1. 117 S. Ct. 1382 (1997).

2. 42 U.S.C. § 1983 (Supp. 1997). This frequently litigated code section provides in part:

> 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.

Id.

3. 117 S. Ct. at 1392. Municipality is used to refer to any governmental entity below the state level.

4. *Id.* at 1386. The opinion does not mention why the Browns decided to turn around. In her brief, Jill Brown indicated they were familiar with the checkpoint and had been delayed and harassed there before. Seeking to avoid a repeat of that situation, they turned around and returned to Texas. *See* Brief for Respondent at 6 n.6, 117 S. Ct. 1382 (1997) (No. 95-1100).

restraining technique. Mrs. Brown fell to the ground and severely injured her knees. She underwent corrective surgery for her injury and ultimately may need knee replacements.[5]

Mrs. Brown brought suit against Deputy Burns in federal court under Section 1983 alleging that his use of excessive force deprived her of her constitutional rights under the Fourth Amendment.[6] She also sued Bryan County and its sheriff, B.J. Moore, for his decision to hire Burns as his deputy and for providing Burns with inadequate training.[7] Bryan County stipulated that all hiring decisions made by the sheriff's department were made by Sheriff Moore and that he was empowered to make policy for the county regarding the sheriff's department.[8]

At trial it was revealed that Burns was the son of Sheriff Moore's nephew. Sheriff Moore testified that before he hired Burns, he received a copy of his criminal and driving records. Burns had previously pleaded guilty to assault and battery, public drunkenness, resisting arrest, and numerous driving offenses. Despite Burns's criminal record, Sheriff Moore decided to hire him as a deputy sheriff. The sheriff testified that he had not examined the criminal history very closely but was aware that his relative had been arrested before. The jury found Burns liable for using excessive force against Mrs. Brown. It also found Bryan County and its sheriff liable for the decision to hire Burns and for failing to provide him with adequate training in the use of force.[9]

The County appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the jury verdict against Burns and upheld liability against the County for both inadequate training and the decision to hire Burns despite his criminal record.[10] The United

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5. *Id.* at 1386-87.

6. *Id.* at 1387. The use of excessive force by police officers presents a deprivation of Fourth Amendment rights actionable under Section 1983. *See* Oklahoma City v. Tuttle, 471 U.S. 808, 816-17 (1985). Both the individual officer who uses excessive force and the municipality that oversees the officer may be held liable. The municipality is only liable in these situations, however, if it maintains a policy or custom of using excessive force. *See* Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978).

7. 117 S. Ct. at 1387. Inadequate training of police officers creates Section 1983 liability if the dearth of training shows a deliberate indifference to the federal rights of those with whom police are likely to come into contact. *See* City of Canton v. Harris, 489 U.S. 378, 388 (1989).

8. 117 S. Ct. at 1387. A claim against an official municipal policymaker is tantamount to a claim against the municipality itself. Because Sheriff Moore was empowered by the county to make decisions relating to the sheriff's department, Bryan County could properly be held liable for Moore's conduct while acting in his official capacity. *See* Kentucky v. Graham, 473 U.S. 159, 165 (1985).

9. 117 S. Ct. at 1387.

10. *Id.*

States Supreme Court granted certiorari solely to determine whether a municipality can be held liable under Section 1983 for failing to screen the background of an employee who later commits a constitutional tort.[11] The Supreme Court reversed the Fifth Circuit decision and held that Section 1983 liability theoretically could be premised on a negligent hiring decision but that Burns's history did not provide sufficient warning that he was likely to use excessive force after he was hired.[12] Consequently, the County could not be held liable for Burns's use of excessive force against Mrs. Brown.[13]

II. LEGAL BACKGROUND

In *Monroe v. Pape*,[14] the Supreme Court held that a municipality was not a "person" for purposes of Section 1983 litigation and thus was not subject to liability under that statute.[15] The Court noted Congress had specifically rejected an amendment to the statute that clearly included municipalities within its purview.[16] The Court concluded that Congress must have doubted its constitutional power to "impose civil liability on municipalities" and therefore never intended Section 1983 to cover those entities.[17]

That interpretation of Section 1983 proved to be short lived. In *Monell v. Department of Social Services*,[18] the Court overruled the portion of *Monroe* that foreclosed municipal liability.[19] *Monell* concerned a Section 1983 claim against New York City by pregnant city employees who were forced to take maternity leave before it was medically necessary. The City argued that it could not be held liable under the holding in *Monroe*.[20] Reversing *Monroe*, the Court determined that Congress intended to include local governmental bodies within the ambit of Section 1983 but only for those actions directly traceable to a

11. *Id.* The Court declined to review the inadequate training ground, agreeing with the Fifth Circuit that it did not merit review. *Id.* The term "constitutional tort" is used to refer to both a deprivation of constitutionally secured rights and those rights afforded by federal statutory law. Both types of deprivation are actionable under Section 1983. *See* 42 U.S.C. § 1983 (Supp. 1997).

12. 117 S. Ct. at 1387.

13. *Id.* at 1394.

14. 365 U.S. 167 (1961), *overruled in part by* Monell v. Department of Social Servs., 436 U.S. 658 (1978).

15. 365 U.S. at 187.

16. *Id.* at 190-91.

17. *Id.* at 190.

18. 436 U.S. 658 (1978).

19. *Id.* at 663.

20. *Id.* at 660-62.

municipal decision.[21] Justice Brennan, writing for the majority, concluded the issue was one of causation.[22] The text of Section 1983, Brennan noted, speaks of one who "subjects, or causes to be subjected" a third party to a deprivation of federal rights.[23] If a municipality causes a constitutional violation, then it may properly be held liable. However, a municipality is not liable simply because it hires or employs a tortfeasor. Ultimately, Brennan concluded, the theory of respondeat superior could not be used to subject a municipality to liability for the constitutional torts of those under its charge; the causation nexus was too tenuous.[24] Liability must be predicated on more than a simple employer-employee relationship. It must be traceable to a decision attributable to the governmental body. The decision of the municipality or its duly authorized agent must be the "moving force" behind the deprivation of federal rights.[25] A policy or custom promulgated by an official policymaker served that end.[26] With that, the enigmatic "policy" requirement was born.

The issue of causation continued to dominate questions of municipal liability. The Court confronted a relatively easy causation question in *Owen v. City of Independence*.[27] In *Owen* the city council voted to release damaging reports about a city employee to the news media, and the next day the city manager fired the employee without a pretermination hearing.[28] The Court concluded that those actions satisfied the *Monell* causation requirement because the constitutional deprivation was visited on the employee directly by the entity itself.[29] The city council's action clearly showed an official "policy" that caused the employee's constitutional deprivation.

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21. *Id.* at 690.

22. *Id.* at 692.

23. *Id.* at 691 (quoting 42 U.S.C. § 1983).

24. *Id.* Justice Brennan's conclusion rested on the statutory language of Section 1983 but also derived from a concern that federalism barriers would be implicated by the imposition of respondeat superior liability on municipalities. *See id.* at 692-93.

25. *Id.* at 694.

26. *Id.* To implicate a municipality, a decision that results in a Section 1983 violation must be made by a policymaker authorized to make those decisions. The issue of authorization is governed by state law. *See* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989).

27. 445 U.S. 622 (1980). *See also* City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). In *Newport* the city council voted to cancel a concert because it did not like the band scheduled to perform. The concert promoter brought a Section 1983 action against the municipality. The Court upheld a jury verdict in favor of the promoter and found no difficult causation issues were implicated. *Id.* at 253 n.7.

28. 445 U.S. at 633-34 n.13.

29. *Id.*

In *Pembaur v. City of Cincinnati*,[30] a majority of the Court determined that a single decision properly attributable to a municipality could constitute a "policy" giving rise to municipal liability.[31] The Court fractured, however, on when the decision was properly attributable to the entity.[32] That question was easily answered when an officially pronounced rule was put forth by the entity, the situation in *Monell*. Similarly, facially unconstitutional actions taken by an entity's governing body were properly attributable to the entity itself, which was the case in *Owen*. However, in *Pembaur* the conflict was less clear. An assistant county prosecutor authorized the police to conduct an unconstitutional search of a local doctor's office.[33] Seeking to avoid the respondeat superior liability that the decision in *Monell* eschewed, the plurality grappled with whether this decision, made by a county employee, could be said to represent municipal policy.[34] Finding the answer in state law, the Court determined that a state statute specifically authorized a local prosecutor to establish policy in certain law enforcement areas.[35] Therefore, a majority of the Court concluded that the prosecutor's decision could indeed bind the county and allowed the action against the government to proceed.[36] Once that was determined, the Court was convinced that the case presented no difficult causation questions. The Court concluded that the prosecutor's decision to authorize the police to search "directly caused the violation of petitioner's Fourth Amendment rights." [37]

After *Monell* the most difficult causation issue the Court confronted emerged in *City of Canton v. Harris*.[38] Mrs. Harris was arrested by the Canton Police Department and taken to the local police station. When she arrived, she began to experience medical problems. Her speech was slurred, and she fell down several times in the presence of city police officers. The police determined that she did not need medical attention, and she was left lying on the floor of the station. After she was released from police custody, she was transported by ambulance to a hospital where she remained for a week. She brought suit against the City and its police department alleging that police officers were inadequately

30. 475 U.S. 469 (1986).

31. *Id.* at 480. Although *Pembaur* was a plurality decision, this recognition was made in a section of the opinion in which a majority of the Court joined.

32. *Id.* at 481-82.

33. *Id.* at 473.

34. *Id.* at 482-83.

35. *Id.* at 484-85.

36. *Id.* at 485.

37. *Id.* at 484.

38. 489 U.S. 378 (1989).

trained in determining whether detainees needed medical attention. A jury found the City liable for inadequate training.[39]

The Supreme Court determined that a city could be held liable for inadequate training if its training policy, or omission thereof, constituted "deliberate indifference" to the federal rights of citizens with whom the police would likely interact.[40] The Court held that "deliberate indifference" was a "policy" of inaction.[41] Accordingly, the policy hurdle was cleared if a municipality did nothing in the face of an obvious recurring need for more training.[42] A "policy" of inadequately training officers could be viewed as the cause of a constitutional deprivation.[43] For the first time, a majority of the Court held that a "policy" need not be unconstitutional on its face.[44] The City of Canton's training program, if viewed in a vacuum, was certainly constitutional.[45] But as applied, it could be viewed as the moving force behind the deprivation of Mrs. Harris's federal rights.[46] The Court remanded the case to allow Mrs. Harris the chance to establish the "deliberate indifference" standard at trial.[47]

After *Harris* the contours of municipal liability under Section 1983 were reasonably well established. A "policy or custom" clearly attributable to a municipality was required, and respondeat superior liability was forbidden.[48] A single decision could suffice as a "policy,"[49] and whether an employee was empowered to render policy was a question of state law.[50] Municipal inaction in the face of obvious need could be construed as a policy choice giving rise to liability, and the policy need not be unconstitutional on its face.[51] Ultimately, a municipality was liable for only those violations that it caused, and causation was

39. *Id.* at 381-82.
40. *Id.* at 388.
41. *Id.* at 389.
42. *Id.* at 390.
43. *Id.* The Court noted that if a municipality is to be held liable, the causal link must be established by the evidence, and the constitutional violation must derive from inadequate training and not from the shortcomings of an individual officer. *Id.* at 390-91.
44. *Id.* at 387.
45. *Id.* at 386.
46. *Id.* at 390.
47. *Id.* at 392-93. The Court indicated that under the facts of the case, it was unlikely she could do so. *Id.* at 392.
48. *Monell*, 436 U.S. at 694, 691.
49. *Pembaur*, 475 U.S. at 480.
50. *Id.* at 484-85. *See also Jett*, 491 U.S. at 737.
51. *Harris*, 489 U.S. at 387.

generally a jury question.[52] Onto this legal landscape entered the decision in *Brown*.

III. THE RATIONALE OF THE COURT

Writing for a five to four majority, Justice O'Connor delivered the opinion in *Brown*.[53] She began by reviewing the legacy of Section 1983 decisions pertaining to governmental liability rendered by the Court since the seminal decision in *Monell*.[54] What was crucial in those cases, Justice O'Connor wrote, was the distinction between cases in which fault was easily attributable to a municipality and those in which it was not.[55] Reiterating *Monell's* "policy" argument, the majority opinion emphasized that anything less than the application of rigorous standards of culpability and causation would result in respondeat superior liability.[56]

The Court characterized the prior line of cases as falling into three distinct categories. Comprising the first are cases like *Owen*, in which a governmental body causes a constitutional violation by passing a facially illegal act.[57] Causation and fault are clear in those situations, and a municipality is plainly not subjected to vicarious liability.[58] The second class includes those situations in which an employee authorized by state law to act for the entity performs some facially illegal act. Provided that the employee is indeed authorized to act for the municipality, those situations do not give rise to complex fault questions.[59] The policymaker becomes the entity because the entity has authorized another to bind it. In this type of situation, it is proper to hold the government liable for the actions of those who operate it, and once again causation and fault are easily determined.[60] The final class, Justice

52. *Id.* at 391.

53. *Brown*, 117 S. Ct. at 1385.

54. *Id.* at 1387-89.

55. *Id.* at 1389.

56. *Id.* Before turning to the applicable legal standards applied in a negligent hiring case, the Court disposed of the issue that had generated so much debate in *Pembaur*. Bryan County stipulated that the sheriff was authorized to make policy for the county for the sheriff's department. Thus, the difficult question of whether the decision of an employee could bind the entity was dispensed with. For purposes of the suit, the Court concluded Sheriff Moore *was* Bryan County. Any decision he made could be construed as county policy and would be fully capable of binding the municipality. *Id.* at 1390 (citing *Jett*, 491 U.S. at 701).

57. *Id.* at 1389 (citing *Owen*, 445 U.S. 622; *Newport*, 453 U.S. 247).

58. *Id.*

59. *Id.* (citing *Pembaur*, 475 U.S. at 481).

60. *Id.*

O'Connor wrote, includes those situations in which a policymaker performs an act that is not itself unlawful but still results in a constitutional violation.[61] It was in this third class of cases that Sheriff Moore's decision to hire Deputy Burns must fall. Because causation and fault are more tenuous, those situations must be rigorously examined to ensure a municipality is not held liable for acts beyond its control.[62]

Although it might appear that the holding in *Harris* should dictate the outcome in *Brown*, Justice O'Connor concluded that the analogy between the two cases was inappropriate.[63] In *Harris* the Court determined that the failure to train police could give rise to liability because the "deliberate indifference" to training needs could be expected to have obvious consequences, namely the deprivation of the federal rights of citizens at the hands of inadequately trained police.[64] Precisely because the result of failing to train officers was predictable, it was proper to hold the municipality liable for its omissions.[65] But the failure to adequately screen the background of an employee had much less predictable consequences. Accordingly, Justice O'Connor noted, failure to screen cases and failure to train cases were simply not the same, and the application of the *Harris* approach in *Brown* was improper.[66] Otherwise, stringent standards of causation and fault would be impermissibly relaxed.

Because failure to screen cases presented the greatest likelihood that a municipality would be held liable for acts that it did not commit, the Court held that entity liability could attach only in very limited circumstances.[67] The plainly obvious consequence of a decision to hire must be that the hired employee would commit a specific constitutional violation. The applicant's background must demonstrate a specific tendency to deprive citizens of federally secured rights in a predictable way.[68] Indeed, the applicant's past must suggest that if hired he is "highly likely to inflict the *particular* injury suffered by the plaintiff."[69] Although Deputy Burns's criminal record indicated that he might not be the best choice for the position of deputy sheriff, it did not suggest that

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61. *Id.* at 1389-90 (citing *Harris*, 489 U.S. 378).
62. *Id.* at 1390.
63. *Id.* at 1391 (citing *Harris*, 489 U.S. 378).
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 1393-94.
68. *Id.* at 1391-92.
69. *Id.* at 1392.

the plainly obvious consequence of a decision to employ him would be that he would use excessive force on citizens.[70]

The Court further noted that a complete failure to review the background of an applicant could not alone establish the requisite level of municipal culpability.[71] This would merely show indifference to the employee's background, not the requisite indifference to the rights of citizens whom the employee was likely to encounter.[72] Only by reviewing the applicant's history, observing a specific tendency to violate citizens' rights, and still hiring the applicant can the municipality be the moving force behind the constitutional violation.[73]

The Court concluded that a review of Deputy Burns's background did not establish that the plainly obvious consequence of Sheriff Moore's decision to employ him would be a high risk that Burns would use excessive force on citizens.[74] Consequently, the trial court improperly allowed the failure to screen claim to go to the jury, and the Court remanded the case in light of that determination.[75]

Justice Souter, in a dissent joined by Justices Stevens and Breyer, noted that the Court had held as a matter of law that Burns's record of violent misdemeanors was insufficient to establish that he would use excessive force on civilians.[76] Disagreeing with the majority, Justice Souter argued that excessive force was precisely the type of conduct that Burns's history predicted.[77] He concluded that the Court articulated a new standard more stringent than the *Harris* "deliberate indifference" test and that it applied the standard with such a high level of skepticism that it was tantamount to a complete bar on municipal liability for failing to screen an applicant's history.[78] There was ample evidence in the record for a jury to conclude that Sheriff Moore had read Burns's entire history and hired him anyway.[79] Further, there was ample evidence in the record for a jury to conclude that even under the Court's new articulation, Burns's history predicted precisely the conduct that he was accused of committing.[80] Justice Souter concluded that the Court's skepticism, its abrogation of the role of the jury, and its articulation of

70. *Id.* at 1393.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 1394.
75. *Id.* at 1393-94.
76. *Id.* at 1394 (Souter, J., dissenting).
77. *Id.* at 1397 n.3.
78. *Id.* at 1396-97 (citing *Harris*, 489 U.S. at 390 n.10).
79. *Id.* at 1399.
80. *Id.* at 1398-99.

a standard of fault that seemed impossible to meet in practice compelled his dissent.[81]

Writing for Justices Ginsberg and Stevens, Justice Breyer's dissent called for the Court to reexamine the holding in *Monell* that disallowed respondeat superior liability.[82] The Court, Justice Breyer noted, had created so many fine distinctions between the "policy" requirement and vicarious liability that the law had become impossible to apply.[83] The decison in *Brown* was exactly the type of overly complicated analysis that resulted from that legacy.[84] Justice Breyer concluded that in addition to being too complicated, the decision in *Monell* was also probably wrong.[85] The disallowance of respondeat superior liability on municipalities was neither required by the text of Section 1983 nor mandated by constitutional principles of federalism.[86] Accordingly, Justice Breyer suggested the Court should revisit *Monell* and rethink its premises.[87]

IV. IMPLICATIONS

The principle legacy of the decision in *Brown* is likely to be a profound sense of skepticism by trial courts that a municipality can be held liable for acts that are not unconstitutional on their face. This is the result that Justice Souter warned about in his dissent where he described the majority opinion as "skepticism gone too far."[88]

Additionally, *Brown* has created some confusion about whether it is possible for a single decision made by an official policymaker to constitute a policy under *Monell*.[89] This is important because it implicates a central premise behind *Harris* that a single act can trigger municipal liability if the single act constitutes "deliberate indifference" to the rights of citizens.

81. *Id.* at 1396, 1398.

82. *Id.* at 1401 (Breyer, J., dissenting). Justice Stevens has consistently supported the view that *Monell* was wrongly decided and the imposition of respondeat superior liability on municipalities would further the purpose of Section 1983. He has been the lone voice in a series of opinions calling for a reexamination of the essential holding of *Monell*. He now appears to have some company. *See* City of St. Louis v. Praprotnik, 485 U.S. 112, 148 n.1 (1988) (Stevens, J., dissenting); *Pembaur*, 475 U.S. at 489 (Stevens, J., concurring); *Tuttle*, 471 U.S. at 843 (Stevens, J., dissenting).

83. *Brown*, 117 S. Ct. at 1401.

84. *Id.*

85. *Id.*

86. *Id.* at 1401-02.

87. *Id.* at 1401.

88. *Id.* at 1398 (Souter, J., dissenting).

89. *See* Scala v. City of Winter Park, 116 F.3d 1396, 1399 n.2 (11th Cir. 1997).

Further, although *Harris* seemingly put to rest the issue of whether acts that were not unlawful when authorized could constitute the basis of Section 1983 liability, *Brown* has unsettled that aspect of the holding in *Harris*.[90] While the Court concluded in *Brown* that facially lawful acts by municipal policymakers could, in theory, result in liability, the required factual predicate is unlikely to emerge outside the theoretical.[91] This is particularly true in the area of inadequate screening cases. While a municipality might hire a police officer with a "Dirty Harry" past who promptly engages in the use of excessive force and subjects the entity to liability under *Brown*, it is unlikely. Much more likely is that which was deemed insufficient under the facts of *Brown*: no one screens the applicant at all, or if they do, the applicant's background shows a generalized history of lawlessness. The Court in *Brown* specifically rejected those scenarios as the basis for Section 1983 liability and concluded that respondent failed to show the likely consequence of the decision to hire would be a specific constitutional violation.[92] Most non-Supreme Court members of the population, however, would probably conclude that given Deputy Burns's past, it was just a matter of time before he deprived a citizen of his constitutional rights. If the facts of *Brown* will not support a jury finding of liability for a failure to screen claim, what will? Realizing the answer to that question is "not much," most trial courts are likely to view failure to screen cases with a skepticism that is both in theory, and in practice, fatal.

Moreover, the standard of culpability for an omission claim articulated by the Court in *Brown* certainly seems to be a new and more stringent standard than the test described in *Harris*.[93] The seeds of the *Brown* test were sown in Justice O'Conner's concurring opinion in *Harris*.[94] That concurrence appears now to command a majority of the Court. The risks from municipal omissions must now be both "plainly obvious" and result in specific violations of the Constitution.[95] As Justice Souter noted, the specificity requirement in *Brown* is distinct from the standard described in the majority opinion in *Harris*.[96] The decision in *Harris*

90. *Brown*, 117 S. Ct. at 1396 (Souter, J., dissenting).

91. *Id.* at 1391.

92. *Id.* at 1392-93.

93. *See* West v. Waymire, 114 F.3d 646, 651 (7th Cir.), *cert. denied*, 118 S. Ct. 337 (1997) (comparing the standard in *Brown* and the standard in *Harris*).

94. *Harris*, 489 U.S. at 395-96 (O'Connor, J., concurring in part, dissenting in part).

95. *Brown*, 117 S. Ct. at 1392.

96. *Id.* at 1397 (Souter, J., dissenting).

spoke of general violations of the Constitution and not the particularized violations that emerged in *Brown*.[97]

The specificity requirement also suggests that another aspect of Justice O'Connor's concurrence in *Harris* may now be important. Predicting specific violations of the Constitution would seem to require that the underlying constitutional right must have been clearly defined by prior case authority.[98] This requirement, suggested by Justice O'Connor in *Harris*,[99] is similar to the clearly established analysis available to individuals under the qualified immunity inquiry.[100] Of course, because entities are not entitled to qualified immunity, the *Brown* specificity test has created some tension between the Court's disallowance of qualified immunity for entities and a requirement that specific violations be predictable from municipal omissions.[101]

The Court's skepticism in *Brown* represents a trend evident in most post-*Monell* decisions implicating entity liability. The Court continues to reduce Section 1983 claims that are appropriate for a jury's consideration.[102] The role of deciding an entity's exposure to Section 1983 liability has become almost exclusively a vehicle for summary adjudication.[103] As a result, not only are entities free from vicarious liability, but a "policy" that can withstand the Court's causation demands is becoming exceedingly difficult to find. If that trend continues, the bar that *Monroe* erected to municipal liability and that *Monell* purported to tear down will rise again in a different form.

A final implication, born of the Court's love for fine distinctions in municipal liability under Section 1983, is a willingness by at least three, and possibly four, members of the Court to abandon *Monell*'s policy requirement as unworkable.[104] This group is apparently swayed by the argument that anything this difficult to apply must have been wrong from the outset.[105] It remains to be seen whether a majority of the Court will be willing to abandon *Monell*. Of course, that result would represent a dramatic departure from the essence of *Brown*. The case

97. *Harris*, 489 U.S. at 388; *Brown*, 117 S. Ct. at 1393 n.1.

98. *See* HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW 101-04 (1997).

99. *Harris*, 489 U.S. at 396-97 (O'Connor, J., concurring in part, dissenting in part).

100. *See* Anderson v. Creighton, 483 U.S. 635, 639-40 (1987).

101. *See Owen*, 445 U.S. at 657.

102. *See, e.g.*, Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755 (1992).

103. *Id.* at 805.

104. *Brown*, 117 S. Ct. at 1400 (Souter, J., dissenting), 1401 (Breyer, J., dissenting).

105. The lower courts have tended to view the standards as extremely difficult to apply. *See* Auriemma v. Rice, 957 F.2d 397 (7th Cir. 1992).

represents a willingness by the Court to hold a municipality liable under Section 1983 only under rigorous standards of causation and fault. It would be ironic indeed if *Brown* signaled the beginning of a move to impose vicarious liability on municipalities for the constitutional torts of their employees, precisely the liability that the *Brown* majority sought so desperately to avoid.

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