The Burger Court Opinion Writing Database

Pembaur v. Cincinnati

475 U.S. 469 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Sal. + Mike Note

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 20, 1985

RE: No. 84-1160 - Pembaur v. Cincinnati

Dear Lewis:

Would you be willing to take on the dissent in this case?

Regards,

Justice Powell

Copy to Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 28, 1986

Re: No. 84-1160 - Bertold J. Pembaur v. City of Cincinnati

Dear Lewis:

Please join me in the third draft of your dissent.

Regards,

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 6, 1985

No. 84-1160 Pembaur v. Cincinnati

No. 84-1493) NLRB v. Financial Inst.
)
) Seattle-First National
No. 84-1509) Bank v. Financial Inst.

Dear Chief,

I will undertake to circulate opinions for the Court in the above cases.

Sincerely,

Bill

The Chief Justice

Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

JAN 9 1986

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

Monell v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), held that municipal liability under 42 U. S. C. §1983 is limited to deprivations of federally protected rights caused by action taken "pursuant to official municipal policy of some nature . . . ." *Id.*, at 691. The question presented is whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy this requirement.

I

Bertold Pembaur is a licensed Ohio physician and the sole proprietor of the Rockdale Medical Center, located in the city of Cincinnati in Hamilton County. Most of Pembaur's patients are welfare recipients who rely on government assistance to pay for medical care. During the spring of 1977, Simon Leis, the Hamilton County Prosecutor, began investigating charges that Pembaur fraudulently had accepted payments from state welfare agencies for services not actually provided to patients. A grand jury was convened, and the case was assigned to Assistant Prosecutor William Whalen. In April, the grand jury charged Pembaur in a six-count indictment.

During the investigation, the grand jury issued subpoenas for the appearance of two of Pembaur's employees. When

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.

From: **Justice Brennan**

Circulated: _____

Recirculated: FEB 19 1986

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1986]

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84-1160

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

Dear Sandra

Here, as promised

Bill

1-20-86
Copy of 3rd
Draft

Circulated only to
SOC

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES 11-13

From: **Justice Brennan**

Circulated: _____

Recirculated: FEB 21 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[February ——, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

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During the investigation, the grand jury issued subpoenas for the appearance of two of Pembaur's employees. When

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

1, 5, 7, 8, 9, 11, 13

From: **Justice Brennan**

Circulated: _____

Recirculated: MAR 10 198

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March ——, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), the Court concluded that municipal liability under 42 U. S. C. § 1983 is limited to deprivations of federally protected rights caused by action taken "pursuant to official municipal policy of some nature . . . ." *Id.*, at 691. The question presented is whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy this requirement.

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To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: MAR 15 1986

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March ——, 1986]

JUSTICE BRENNAN delivered the opinion of the Court, except as to Part II–B.

In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), the Court concluded that municipal liability under 42 U. S. C. § 1983 is limited to deprivations of federally protected rights caused by action taken "pursuant to official municipal policy of some nature . . . ." *Id.*, at 691. The question presented is whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy this requirement.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 31, 1986

84-1160 - Pembaur v. Cincinnati

Dear Bill,

I am awaiting the dissent in this case.

Sincerely yours,

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 2, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Pembaur v. City of Cincinnati, No. 84-1160.

(1) No. 85-249, City of Little Rock v. Williams.

Williams was hired by Butler, a municipal judge, as a court clerk. Butler fired her for reporting to police that she had witnessed Butler deliberately destroy traffic tickets. Williams filed a §1983 action alleging that the dismissal violated her First Amendment rights. Her complaint charged Butler in his official capacity only, making it, in effect, an action against the City. Hutto v. Finney, 437 U.S. 678, 700 (1978); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690, n. 55 (1978).

The jury returned a verdict in Williams' favor, awarding her $40,000 in compensatory damages and $60,000 in punitive damages. The District Court set aside the punitive damages award on the basis of Newport v. Facts Concert, Inc., 453 U.S. 247 (1981). However, the court upheld the award of compensatory damages, rejecting the City's argument that Butler's action did not constitute municipal "policy" within the meaning of Monell.

A split panel of the Eighth Circuit affirmed the District Court's decision. A petition for rehearing en banc was granted, and the panel decision was vacated. An equally divided court then affirmed the District Court without opinion.

This leaves the opinion of the District Court, which is somewhat difficult to decipher. Butler testified at trial that, when he was first appointed, he went to see the City's personnel director regarding the hiring of a staff and was told that "traditionally the courts had been responsible for hiring and firing their own employees." Pet. App. 13. The District Court found that "[t]he authority to make employment decisions was given to Butler by the City personnel office when Butler took office a number of years ago," ibid., and that consequently Butler's employment decisions constituted municipal policy.

Under the principal opinion in Pembaur,

> [t]he fact that a particular official--even a policymaking official--has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.... The official must also be

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: FEB 24 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[February ——, 1986]

JUSTICE WHITE, concurring in the judgment.

The forcible entry made in this case was not then illegal under either federal or state law. The City of Cincinnati frankly conceded that forcible entry of third-party property to effect otherwise valid arrests was standard operating procedure. There is no reason to believe that the county was acting otherwise and would have abjured using lawful means to execute the capiases issued in this case. In any event, the county officials who had the authority to approve or disapprove such entries opted for the forceful entry, a choice that was later held to be inconsistent with the Fourth Amendment. This election sufficiently manifested county policy to warrant reversal in this case.

This conclusion, however, does not require embracing the loose definition of county "policy" expressed in the Court's opinion. I do not agree that every act of a so-called policymaker should be accepted as the policy of the governmental entity that employs him, even when done in the general course of his regular duties. County officials are sworn like other officials to obey the law, and it would be absurd to hold that the sheriff or the prosecutor in this case would have been executing county policy had he beaten a prisoner to death or ordered it done. Imposing liability on the county for acts contrary to its law and policy and contrary to what its officials have sworn to do is nothing less than an application of

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: MAR 3 1986

Substantially rewritten

SECOND DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March ——, 1986]

JUSTICE WHITE, concurring.

The forcible entry made in this case was not then illegal under federal, state, or local law. The City of Cincinnati frankly conceded that forcible entry of third-party property to effect otherwise valid arrests was standard operating procedure. There is no reason to believe that the respondent County was acting otherwise, would have abjured using lawful means to execute the capiases issued in this case, or had limited the authority of its officers to use force in executing capiases. Further, the county officials who had the authority to approve or disapprove such entries opted for the forceful entry, a choice that was later held to be inconsistent with the Fourth Amendment. This election sufficiently manifested county policy to warrant reversal in this case.

This does not mean that every act of municipal officers with final authority to effect or authorize arrests and searches represents the policy of the municipality. It would be different if *Steagald* v. *United States*, 451 U. S. 204 (1981), had been decided when the events at issue here occurred, if the state constitution or statutes had forbade forceful entries without a warrant, or if there had been a municipal ordinance to this effect. Local law enforcement officers are expected to obey the law and ordinarily swear to do so when they take office. Where the controlling law places limits on their authority, they cannot be said to have the authority to

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: MAR 1 7 19

p. 1

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March ——, 1986]

JUSTICE WHITE, concurring.

The forcible entry made in this case was not then illegal under federal, state, or local law. The City of Cincinnati frankly conceded that forcible entry of third-party property to effect otherwise valid arrests was standard operating procedure. There is no reason to believe that the respondent would abjure using lawful means to execute the capiases issued in this case or had limited the authority of its officers to use force in executing capiases. Further, the county officials who had the authority to approve or disapprove such entries opted for the forceful entry, a choice that was later held to be inconsistent with the Fourth Amendment. Vesting discretion in its officers to use force and its use in this case sufficiently manifested county policy to warrant reversal of the judgment below.

This does not mean that every act of municipal officers with final authority to effect or authorize arrests and searches represents the policy of the municipality. It would be different if *Steagald* v. *United States*, 451 U. S. 204 (1981), had been decided when the events at issue here occurred, if the state constitution or statutes had forbade forceful entries without a warrant, or if there had been a municipal ordinance to this effect. Local law enforcement officers are expected to obey the law and ordinarily swear to do so when they take office. Where the controlling law places limits on

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 10, 1985

Re: No. 84-1160 - Pembaur v. City of Cincinnati

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 17, 1986

Re: No. 84-1160-Pembaur v. Cincinnati

Dear Bill:

I am still with you.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 23, 1986

Re: No. 84-1160, Pembaur v. Cincinnati

Dear Bill:

Please join me.

Sincerely,

Harry

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 23, 1986

84-1160 Pembaur v. Cincinnati

Dear Bill:

The Chief Justice has asked me to draft a dissent.

This is on my list of things to do. I'll try not to delay you.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

02/21

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: FEB 2 2 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[February ——, 1986]

JUSTICE POWELL, dissenting.

The Court today holds Hamilton County liable for the forcible entry in May 1977 by deputy sheriffs into petitioner's office. The entry and subsequent search were pursuant to capiases for third parties—petitioner's employees—who had failed to answer a summons to appear as witnesses before a grand jury investigating petitioner. When petitioner refused to allow the sheriffs to enter, one of them, at the request of his supervisor, called the office of the County Prosecutor for instructions. The Assistant County Prosecutor received the call, and apparently had some doubt about what advice to give. He referred the question to the County Prosecutor, who advised the deputy sheriffs to "go in and get [the witnesses]" pursuant to the capiases.

This five word response to a single question over the phone is now found by this Court to have created an official county policy for which Hamilton County is liable under § 1983. This holding is wrong for at least two reasons. First, the prosecutor's response and the deputies' subsequent actions did not violate any constitutional right that existed at the time of the forcible entry. Second, no official county policy could have been created solely by an off-hand telephone response from a busy County Prosecutor.

02/22

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated:

Recirculated: FEB 22 '86

Stylistic Changes Throughout.

5, 6, 8

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[February ——, 1986]

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02/24

Stylistic changes throughout: see pp. 8, 10

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated:

Recirculated: FEB 27, 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[February ——, 1986]

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March 4, 1986

84-1160 Pembaur v. City of Cincinnati

Dear Sandra:

This is a reply to your letter asking whether there is a relationship between Owen v. City of Independence and my discussion on retroactivity in Part I of my dissent.

It is of course true that Owen was discharged without being accorded a procedural due process hearing as required by Roth and Sindermann. The city argued that since these two cases were decided a couple of months prior to the discharge, it should not be held liable for the failure to have provided a hearing. But the Court's decision imposing liability on the City of Independence was based on its view of the plain language of §1983 and the absence of any indication in the legislative history of §1983 that municipalities were to be accorded immunity.

Immunity and retroactivity are distinct and separate doctrines that address different concerns. In some cases perhaps the underlying issues may be similar (the concept of foreseeability may apply to both), but nothing in retroactivity analysis requires consideration of immunity or vice versa.

My dissent in Pembaur is based on what can be viewed as an exception to the general rule that cases will be applied retroactively. I suppose Owen can be said to illustrate the general rule, although it did not say a word about retroactivity. Although Roth and Sindermann were mentioned, neither of those cases contained any discussion of immunity or retroactivity.

In sum, I think it is quite clear that nothing in Owen forecloses retroactivity analysis, and Steagald is the kind of case in which the Court has declined to apply retroactivity. This case illustrates the unfairness of retroactive application particularly in the Sixth Circuit where the law was settled to the contrary.

I appreciate your giving me the opportunity to address your concern, and hope that you will agree with Part I of my dissent. I also would rejoice if you also joined Part II.

Sincerely,

Justice O'Connor

lfp/ss

03/07

Stylistic Changes Throughout.

pp. 6, 10

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: MAR 7 '86

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March ——, 1986]

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated:

Recirculated: MAR 21 1986

Stylistic Changes Throughout.
p. 5, 6, 10, 11

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March ——, 1986]

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: MAR 21 1986

Recirculated: MAR 24 1986

See fn 4 on

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 26, 1986]

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

The Court today holds Hamilton County liable for the forcible entry in May 1977 by deputy sheriffs into petitioner's office. The entry and subsequent search were pursuant to capiases for third parties—petitioner's employees—who had failed to answer a summons to appear as witnesses before a grand jury investigating petitioner. When petitioner refused to allow the sheriffs to enter, one of them, at the request of his supervisor, called the office of the County Prosecutor for instructions. The Assistant County Prosecutor received the call, and apparently was in doubt as to what advice to give. He referred the question to the County Prosecutor, who advised the deputy sheriffs to "go in and get them" [the witnesses] pursuant to the capiases.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 27, 1986

Re: 84-1160 - Pembaur v. City of Cincinnati

Dear Lewis:

Please join me in your dissent.

Sincerely,

Justice Powell

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March ——, 1986]

JUSTICE STEVENS, concurring in part and concurring in the judgment.

This is not a hard case. If there is any difficulty, it arises from the problem of obtaining a consensus on the meaning of the word "policy"—a word that does not appear in the text of 42 U. S. C. § 1983, the statutory provision that we are supposed to be construing. The difficulty is thus a consequence of this Court's lawmaking efforts rather than the work of the Congress of the United States.[1]

With respect to both the merits of the constitutional claim and the county's liability for the unconstitutional activities of its agents performed in the course of their official duties, there can be no doubt that the Congress that enacted the Klu Klux Act in 1871 intended the statute to authorize a recovery in a case of this kind. When police officers chopped down the

[1] See *Oklahoma City* v. *Tuttle*, —— U. S. ——, —— (1985) (STEVENS, J., dissenting) ("While the Court purports to answer a question of statutory construction . . . its opinion actually provides us with an interpretation of the word 'policy' as it is used in Part II of the opinion in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 690–695 (1978). The word 'policy' does not appear in the text of § 1983, but it provides the theme for today's decision"). It may be significant that the issue has apparently become, not the purpose and scope of 42 U. S. C. § 1983, but the nature of the liability "envisioned" by this Court "in *Monell*." *Post* (O'CONNOR, J., concurring in judgment); *post* at 8 (POWELL, J., dissenting).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

From: **Justice Stevens**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1160

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March ——, 1986]

JUSTICE STEVENS, concurring in part and concurring in the judgment.

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To: The Chief Justice
Justice Brennan
Justice White
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Justice Blackmun
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From: **Justice O'Connor**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March ——, 1986]

JUSTICE O'CONNOR, concurring in the judgment.

For the reasons stated by JUSTICE WHITE, I agree that the municipal officers here were acting as policy makers within the meaning of *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). As respondent freely conceded, forcible entry of third-party property to effect an arrest was standard operating procedure in May, 1977. That procedure was consistent with federal, state and local law at the time the case arose. Moreover, under state law as definitively construed by the Court of Appeals, the county officials who opted for the forcible entry "had the authority to approve or disapprove such entries." *Ante*, at —— (WHITE J., concurring). Thus, with JUSTICE WHITE, I agree that "this election sufficiently manifested county policy to warrant reversal in this case." *Id.*, at ——. Because, however, I believe that the reasoning of the majority goes beyond that necessary to decide the case, and because I fear that the standard the majority articulates may be misread to expose municipalities to liability beyond that envisioned by the Court in *Monell*, I concur only in the judgment.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 7, 1986

Re: 84-1160 Pembaur v. Cincinnati

Dear Lewis,

I should have written you before circulating my opinion concurring in the judgment in this case. I have very mixed feelings about the case and I finally decided, reluctantly, to adhere to my original conference vote. Had the issue of retroactivity of Steagald been raised and argued, I would have agreed with that part of the separate writing.

Sincerely,

Sandra

Justice Powell

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March ——, 1986]

JUSTICE O'CONNOR, concurring in the judgment.

For the reasons stated by JUSTICE WHITE, I agree that the municipal officers here were acting as policy makers within the meaning of *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). As the City of Cincinnati freely conceded, forcible entry of third-party property to effect an arrest was standard operating procedure in May, 1977. Given that this procedure was consistent with federal, state and local law at the time the case arose, it seems fair to infer that respondent county's policy was no different. Moreover, under state law as definitively construed by the Court of Appeals, the county officials who opted for the forcible entry "had the authority to approve or disapprove such entries." *Ante*, at —— (WHITE J., concurring). Given this combination of circumstances, I agree with JUSTICE WHITE that the decision to break down the door "sufficiently manifested county policy to warrant reversal in this case." *Id.*, at ——. Because, however, I believe that the reasoning of the majority goes beyond that necessary to decide the case, and because I fear that the standard the majority articulates may be misread to expose municipalities to liability beyond that envisioned by the Court in *Monell*, I concur only in the judgment.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 11, 1986

No. 84-1160 Pembaur v. City of Cincinnati

Dear Bill,

I believe I can join Parts I and IIA of your opinion and concur in the judgment and I will circulate a revised opinion so stating. That will at least provide a court for a good portion of the basic analysis and framework. Thanks for reminding me of the breakdown of your opinion making this possible.

Sincerely,

Sandra

Justice Brennan

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: MAR 11 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March ——, 1986]

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

For the reasons stated by JUSTICE WHITE, I agree that the municipal officers here were acting as policy makers within the meaning of *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). As the City of Cincinnati freely conceded, forcible entry of third-party property to effect an arrest was standard operating procedure in May, 1977. Given that this procedure was consistent with federal, state and local law at the time the case arose, it seems fair to infer that respondent county's policy was no different. Moreover, under state law as definitively construed by the Court of Appeals, the county officials who opted for the forcible entry "had the authority to approve or disapprove such entries." *Ante*, at —— (WHITE J., concurring). Given this combination of circumstances, I agree with JUSTICE WHITE that the decision to break down the door "sufficiently manifested county policy to warrant reversal of the judgment below." *Id.*, at ——. Because, however, I believe that the reasoning of the majority goes beyond that necessary to decide the case, and because I fear that the standard the majority articulates may be misread to expose municipalities to liability beyond that envisioned by the Court in *Monell*, I join only parts I and IIA of the Court's opinion and the judgment.