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O'Brien v. Skinner

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Request Response

Pretrial detainees & convicted misdemeanants in jail not allowed to vote in N.Y. — although statute (unlike that in Pa. involved in Gosser) does not expressly preclude.

N.Y. Ct appeals held it was not unreasonable for State to provide no voting facilities for persons in jail — citing McDonald

Preliminary Memo

March 23, 1973 Conf.
List 1, Sheet 1

Appeal from Ct. of Appeals of New York (Scileppi; Fuld, dissenting, Burke, dissenting)

Timely

No. 72-1058 ASX

O'BRIEN

State Civil -- Appeal

V.

SKINNER

WRK-CAL FOR RESPONSE WITH VIEW TO NOTING PROBABLE JURISDICTION

1. Appellants, pretrial detainees and convicted misdemeanants incarcerated in a Monroe County, New York jail between August and November, 1972, requested that appellees provide means whereby the appellants could register and/or vote in the 1972 general elections. Appellants requested that facilities be provided at the jail, that they be transported to polling or registration locations, or that they be allowed to register and vote by absentee procedures.

This request was denied and appellants brought an action in the Supreme Court for the County of Monroe seeking relief in the nature of mandamus enabling them to register and vote. They sought (1) procedures enabling them to register and vote in person either at the jail or at established polling places, (2) a construction of the New York Election Law [§§ 153-a and 117-a of that law provide for absentee registration and voting by persons physically unable to personally appear because of illness or because their business takes them away from the city. Pre-trial detainees and convicted misdemeanants are not included in the categories of persons entitled to take advantage of such absentee procedures. However, they are not specifi cally excluded as in Goosby v. Osser, decided January 17, 1973] to permit appellants to cast ballots by absentee procedures, and (3) a declaration that the New York Election Law, if construed not to apply to appellants, denied them equal protection of the laws. The Supreme Court of Monroe County found that the term "physically disabled" in the election law included prisoners in the county jail. The trial judge ordered that prisoners who had already registered to vote be allowed to vote absentee. However, since the time for registration had passed, the prisoners who had not registered were not allowed an absentee ballot. The appellate Division of the Supreme Court modified this order to allow prisoners to register who had indicated their desire to register on or before the final registration date. The Court of Appeals of New York reversed, rejecting "out of hand" any scheme for transporting prisoners to polling or registration locations or for providing registration and polling facilities at the jail. The Court indicated that such schemes would be hazardous. The Court then held that the

New York Election Law did not require absentee registration and balloting for the appellants. The Court relied principally on the CA3 holding in Goosby v. Osser and this Court's decision in McDonald v. Board of Elections, 394 U.S. 802. The Court emphasized that appellants' underlying right to vote was not denied. Rather, the fact that they were unable to register and vote was one of the consequences of their incarceration. The Court then sustained the New York Election Law under the equal protection reasonableness test since the basic right to vote was not in issue.

2. Contentions: Appellants contend that the New York Election law is unconstitutional in that it allows certain categories of persons to register or vote by absentee procedures because they are unable to physically appear, while denying that privilege to appellants who are also unable to physically appear and who have been denied administrative relief, resulting in an absolute denial of the right to vote.

There is no Motion to Dismiss or Affirm.

3. DISCUSSION: This case seems to present the question left open in McDonald v. Board of Elections. In that case this Court noted that the record was barren of any facts indicating that Illinois officials would not provide alternative means of voting. Indeed, this case presents the question found substantial in Goosby v. Osser. In Goosby the petitioners had exhausted their administrative remedies as they have here. The only difference in this case and Goosby is that the Pennsylvania absentee statute in Goosby specifically precluded absentee voting by incarcerated persons. However, that distinction seems to be

without a difference since in both cases the detainees have been absolutely denied the right to vote.

On the question of jurisdiction, it appears that this case fits into the same situation presented in McDonald. There the petitioners had been released before this Court decided the case. However, the Court found that their release did not require dismissal. See McDonald, supra, 394 U.S. at 802, 803 n. 1.

I think a response should be requested.

There is no response.

3/14/73 Ziglar Op NY Ct. of Apps. Juris. St. appx.

Await discussion.
Probably a "note"

WCK 4/24/73

Pretrial detainees in jail DISCUSS
not allowed to vote in N.Y.

~~I~~
Fairly close to Goosby (Pa).

I agree with
N.Y. Ct/Opps that
transporting prisoners
to polls is out of Q:
also, setting up polling
booth in jail has
some hazards - why not?.
But query - why not
absentee ballots
Remand on this one?

No. 72-1058
O'Brien v. Skinner

A response was requested and received. I agree with ~~me~~ the analysis of the cert pool memo and attribute no significance to the fact that the prisoners in Goosby were precluded by law from the franchise while in the present case they are barred by the absence of any provision to cast their ballots.

I recommend that you

NOTE PROBABLE JURISDICTION

Conf 5/4/73

Court CA - N.Y. | Voted on ....., 19... | No. 72-1058

Argued ....., 19... | Assigned ....., 19...

Submitted ....., 19... | Announced ....., 19...

EDWARD F. O'BRIEN, ET AL., Appellants

vs.

ALBERT SKINNER, SHERIFF, MONROE COUNTY, ET AL.

1/31/73 Appeal filed.

Noted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.			✓											
Powell, J.				✓										
Blackmun, J.				✓										
Marshall, J.				✓										
White, J.				✓										
Stewart, J.				✓										
Brennan, J.				✓										
Douglas, J.				✓										
Burger, Ch. J.														

JCJjr/gg 10-16-73

MEMORANDUM

TO: Justice Powell

FROM: John Jeffries DATE: October 16, 1973

No. 72-1058 O'Brien v. Skinner

The parties dispute the applicable standard for determining the constitutionality of a state statutory scheme which accord to pretrial detainees and incarcerated misdemeanants no opportunity to vote. This question was posed but not answered in McDonald v. Board of Election, 394 U.S. 802 (1968) (Warren; Harlan and Stewart concurring in the result without opinion) and Goosby v. Osser, 35 L Ed 2d 36 (1973) (Brennan, unanimous). In McDonald pretrial detainees challenged the unavailability of absentee ballots under Illinois law. This Court concluded that strict scrutiny was not required:

> "Such an exacting approach is not necessary here, however, for two readily apparent reasons. First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race. Secondly, there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots . . . . Faced as we are with a constitutional question, we cannot

> lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting," 394 U.S., at 807-08.

In Goosby the Court faced the question avoided in McDonald:

> "Petitioners' constitutional challenges to the Pennsylvania scheme are in sharp contrast. Petitioners allege that, unlike the appellants in McDonald, the Pennsylvania statutory scheme absolutely prohibits them from voting, both because a specific provision affirmatively excludes "persons confined in a penal institution" from voting by absentee ballot, . . . and because requests by members of petitioners' class to register and to vote either by absentee ballot, or by personal or proxy appearance at polling places outside the prison, or at polling booths and registration facilities set up at the prisons, or generally by any means satisfactory to the election officials, had been denied." 35 L. Ed. 2d., at 44.

The Court found this a not insubstantial constitutional question and remanded for consideration by a three-judge court.

Appellees' reliance on McDonald is misplaced. These appellants, like the petitioners in Goosby, contend not merely that they have been denied absentee ballots but that they are absolutely precluded from exercising the franchise. Furthermore, I see no significane in the fact that the Pennsylvania statute considered in Goosby expressly excluded pretrial detainees while the New York scheme merely makes no provision for these appellants to cast their ballots. Lastly, I do not think it wise to attempt a distinction between pretrial detainees and incarcerated misdemeanants. Under New York law, both classes of people have the substantive right to vote if they can find a way to exercise it. So, for example, both a indictee who can make

bail and a convicted misdemeanant on a suspended sentence may vote. I do not know whether New York might constitutionally deprive misdemeanants as well as felons of the right to vote, but the state has not attempted to do so.

Because the New York statute absolutely disenfranchises appellants' class, I believe that strict scrutiny is required. The fact that the disenfranchisement is incidental to lawful incarceration rather than direct and explicit does not seem to me dispositive. In Rosario v. Rockefeller you considered a similarly incidental burden on the right to vote. You rejected the argument that that statute did not sufficiently implicate that right as to require strict scrutiny:

> "Our decisions, moreover, have never required a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred. Rather, they have uniformly recognized that any serious burden or infringement on such "constituionally protected activity" is sufficient to establish a constitutional violation, Dunn v. Blumstein . . . ." 36 L. ed. 2d, at 12.

You therefore concluded:

> "The inquiry thus becomes whether the instant statute, burdening as it does fundamental constitutional rights, can withstand the strict judicial scrutiny called for by our prior cases." Id., at 13.

If you accept the application of this reasoning to the instant case, the remaining inquiry is whether the state can show a compelling interest in its

present scheme. I think not. Transporting prisoners to polling places would undoubtedly raise harrowing problems, but there are less difficult means available. The prison authorities could allow registration and polling to take place in the jail or the state election officials could send absentee ballots to those who are "judicially incapacitated" from voting at the usual places. I would reverse.

JCJjr/

gg

Jeffries

No. 72-1058 O'BRIEN v. SKINNER (Voting rights of jail detainees & misdemeanants serving time in County Jail) Argued 11/6/73

~~Oscar Brown~~

McDonald not controlling as there was no showing of absolute denial of absentee voting. This case involves Q we left open in Goosby v Osser.

Best argument for State (appellee) is that statute is remedial & its benefits need not be extended to everyone at same time (see p 3 my Notes)

State has not adopted legislation ~~as~~ to effect that misdemeanants can't vote.

Egger (for appellants)

Two Q's:
1. as to voting
2. as to registering for voting

N.Y. provides for registering, as well as voting, ~~the~~ of absentees who are "physical disabled".

State interest in both "constitutional & fundamental" !!

If misdemeanants are out on "work release" or other programs they may vote.

Must scrutinize carefully the alleged state interests.

Eggers (cont)

Relying on E/P clause.

The discrimination here is against Petes. in favor of other "disabled" persons - in hospitals, nursing homes.

Right to vote also should not be made to depend upon whether individual is imprisoned in his own county or some other county.

Detainee has a higher claim under D/P clause - still presumed to be innocent.

But N.Y. has not, ~~the~~ as matter of state policy, proscribed voting by misdemeanants (as it has felons) and so they are entitled to same protection as detainees

Considine (for N.Y.)

Statutes are remedial - not aimed at any particular class.

There is no legal class here - certainly no suspect class.

Hard to believe - check this

Responding to Q by Brennan, Considine thinks that statute applies only to detainees who live within the County - so that detainees from other counties would be eligible for absentee ballots.

Considerations (cont.)

This is State's best argument

The privilege of absentee voting need not be extended to all possible persons at the same time. The Leg. has expanded the privilege over the years. There was no singling out of particular class. The extent of the privilege yet has not been extended to include Petrs.

These Petrs brought their own disability on themselves.

No. 72-1058, O'Brien v. Skinner Reversed

Conference November 7, 1973

The Chief Justice ~~Affd~~ Reverse

McDonald seems controlling

(Chief passed on first vote & then concluded he was wrong about McDonald)

Douglas, J. Reverse

Brennan, J. Reverse

McDonald not controlling & Goosby left this open.

Stewart, J. Reverse (tentative)

McDonald not controlling. Goosby not controlling either - and only this is a sub. fed Q

Three Petrs are eligible to vote

Field would have construed N.Y. law to allow absentee voting - but we can't construe N.Y. law.

Potter will not join any opinion that talks about compelling state interest or strict scrutiny. He thinks this non-issue.

White, J. Reverse

~~Stewart~~

Strict scrutiny has been applied in voting cases in which I have joined. But it is irrational to distinguish bet. person out on bail charged with crime & one in jail who can't make bail.

Marshall, J. Reverse

Blackmun, J. ~~Affirm in Part~~ Part as to detainees

Rational basis test is applicable.

Affirm as to misdemeanant but in doubt as to detainee

Will not go along with any "compelling state interest".

Powell, J. Reverse

Three Pats. have been denied right to vote absolutely.

N.Y. has not chosen to withhold vote from misdemeanants as it has with respect to felons.

Rehnquist, J. Affirm

No difference between misdemeanants at large & those locked up.

Joined by
Douglas

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: The Chief Justice

Circulated: NOV 29 1973

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 72–1058

Edward F. O'Brien et al., Appellants, *v.* Albert Skinner, Sheriff, Monroe County, et al. — On Appeal from the Court of Appeals of New York.

[December —, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This is an appeal from the judgment of the Court of Appeals of New York taken by 72 persons who were at the time of the trial of the original action, detained in confinement but not then under any voting disability under the laws of New York. The Court of Appeals, by divided vote, held that failure of the State to provide appellants with any means of registering and voting was not a violation of the New York statute and not a denial of any federal or state constitutional right.

Before the November 1972 general elections in New York, the appellants applied to the authorities of Monroe County, including the Board of Elections, to establish a mobile voters registration unit in the county jail in compliance with a mobile registration procedure which had been employed in some county jails in New York State. This request was denied and appellants then requested that they be either transported to polling places under appropriate restrictions, or in the alternative, that they be permitted to register and vote under New York's absentee voting provisions, New York Elections Law §§ 117–a and 153–a. Those sections of the statute pro-

Sadly -
Do a
Join
Recmd.
LFP
12/1/73
Although I find the opinion a bit short on analysis & vague as to the Constitutional basis, I agree with result.

vide that persons who are "physically disabled" may vote by absentee ballot.* The election authorities denied the request, taking the position that they were under no obligation to permit the appellants to register or to vote in person and that inmates did not qualify for absentee voting under the provisions of the New York statutes as they were not disabled in any medical sense.

The Supreme Court for Monroe County in New York considered the claims presented by the appellants and treated them as a proceeding in the nature of mandamus. The conclusion reached by that court was that the legislature of New York had provided for absentee registration and voting by any voter unable to appear personally because of confinement in an institution (other than a mental institution). The court concluded that the election laws should be construed to apply to an inmate confined in jail and not otherwise disenfranchised since this constituted a "physical disability" and therefore entitled such persons to exercise the voting privileges permitted by absentee ballot. However, the court noted that there was no showing that any of the persons claiming these rights had timely filed all the necessary forms but that this could yet be accomplished in time for voting by absentee ballot in November 1972. The Appellate Division of the Fourth Judicial Department of the Supreme Court of New York on review gave a similar construction to the Election Laws stating:

"We believe that petitioners being so confined are

*New York Election Law § 117–a and § 153–a (McKinney Supp. 1972) provides for absentee voting and registration where a voter is "Unavoidably absent from his residence [or county] because he is an inmate of a veterans' bureau hospital, or . . . because his duties, occupation or business require him to be elsewhere . . . or . . . because he is on vacation elsewhere on the day of the election. . . ."

physically disabled from voting and should be permitted to do so by casting absentee ballots."

On appeal to the New York Court of Appeals, however, these holdings were reversed, that court stating:

> "the right to vote does not protect or insure against those circumstances which render voting impracticable. The fact of incarceration imposes many other disabilities, some private, others public, of which voting is only one. Under the circumstances and in view of the legislature's failure to extend these absentee provisions to others similarly disadvantaged, it hardly seems possible that petitioner's right to vote has been arbitrarily denied them. It is enough that these handicaps, then, are functions of attendant impracticabilities or contingencies, not legal design."

Judge Fuld, dissented, being of the view that §§ 117–a and 153–a of the Election Law of New York should be read in the manner announced by the Appellate Division. Judge Burke, joining Judge Fuld, agreed, stating additionally that any construction of the Election Law precluding appellants from exercising their right to register and vote violated the equal protection guarantees of the Fourteenth Amendment.

It is important to note at the outset that the New York election laws here in question do not raise any question of disenfranchisement of a person because of conviction for criminal conduct; none of these appellants are disabled from voting except by reason of not being able physically—in the very literal sense—to go to the polls on election day or to make the appropriate registration in advance by mail. The New York statutes are silent as to providing registration or voting facilities in jails and penal institutions. If a New York resident

eligible to vote is confined in a county jail in a county in which he does not reside, paradoxically, he may secure an absentee ballot and vote and he may also register by mail. No question is presented in this case as to the power of a State to deprive persons convicted of crimes of the right to vote. Some of the present appellants are persons who were convicted of misdemeanors; others are persons confined awaiting trial but unable to provide an appropriate bail bond.

It is now well established that the right to vote is an inherent and fundamental right of citizenship and any infringement of that right is open to careful judicial scrutiny. This Court had occasion to examine claims somewhat similar to those presented here in *McDonald* v. *Board of Election Comm'rs*, 394 U. S. 802 (1969). There a state statute provided for absentee voting by persons "medically incapacitated" and for pretrial detainees who were incarcerated outside their county of residence. After reviewing various arguments against allowing detained prisoners to vote, including the fear of improper persuasion at the hands of prison authorities or other public employees, the Court noted that there was no evidence indicating

> "that the state might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls . . . ." 394 U. S., at 808 n. 6.

The Court then went on to sustain the statute:

> "Since there is nothing in the record to show that appellants are in fact absolutely prohibited from voting by the state . . . ." *Id.*, at 808 n. 7.

More recently in *Goosby* v. *Osser*, 409 U. S. 512 (1973), the Court again considered the problem of inmate voting and concluded that unlike the voting restrictions in the

McDonald case, the statute there in question was an absolute bar to voting because of a specific provision that "persons confined in a penal institution were not permitted to vote by absentee ballot." It is clear, therefore, that the appellants here, like the petitioners in *Goosby*, bring themselves within the precise fact structure that the *McDonald* holding said might produce a different result.

New York's election statute, as construed by its highest court, discriminates between categories of qualified voters in a way that is wholly arbitrary. Medically disabled persons are permitted to register by mail and to vote by absentee ballot. Voters held in jail awaiting trial in a county other than their residence are also permitted to register and vote by mail; however, persons confined on the same basis in the county of their residence are completely denied the ballot. The New York statutes, as construed, operate as a restriction which is "so severe as to constitute an unconstitutionally onerous burden on the . . . exercise of the franchise." *Rosario* v. *Rockefeller*, 410 U. S. 752, 760 (1973). Appellants and others similarly situated are under no legal disability impeding their right to register or to vote; they are simply not allowed to use the absentee ballot and are denied any alternative means of casting their vote.

The arbitrary nature of these statutes as so construed and applied is indicated by the fact that a person confined on a misdemeanor conviction is denied the right to register by mail and vote by absentee ballot, whereas he would be permitted to vote if he were on parole or other temporary release before his sentence had expired. Similarly, incarcerated persons who have not been found guilty of any criminal conduct but are merely awaiting trial and unable to make bail, are denied these benefits although persons similarly situated but released on bail are under no disability.

It is not the function of this Court to construe a state statute contrary to the construction given it by the highest court of that State and we, therefore, have no choice but to hold that as construed the New York statute fails to meet constitutional standards.

Reversed and remanded for further proceedings not inconsistent with this opinion.

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 29, 1973

Dear Chief:

Kindly join me in your opinion in 72-1058, O'Brien v. Skinner.

WOD

William O. Douglas

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 3, 1973

RE: No. 72-1058 O'Brien v. Skinner

Dear Chief:

I agree.

Sincerely,

Bill

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 3, 1973

Re: No. 72-1058 - O'Brien v. Skinner

Dear Chief:

I shall probably try my hand at a short dissent in this case.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

December 4, 1973

No. 72-1058 O'Brien v. Shinner

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

I must say I agree with him & prefer it to CJ's opinion.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

No. 72-1058

Circulated: DEC 5 1973

Recirculated: _____

Edward F. O'Brien et al., Appellants, *v.* Albert Skinner, Sheriff, Monroe County, et al. | On Appeal from the Court of Appeals of New York.

[December —, 1973]

I'd joined CJ

MR. JUSTICE STEWART, concurring in the result.

Insofar as the opinion of the Court implies or suggests that there is a constitutional right to vote, I must respectfully disagree. No such right exists. For "the right to vote in state elections is nowhere expressly mentioned" in the Constitution, *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 665, and this Court has long since held that there is no constitutional right to vote, as such, *Minor* v. *Happersett,* 88 U. S. (21 Wall.) 162. See also *San Antonio School District* v. *Rodriguez,* 411 U. S. 1, 59 n. 2 (concurring opinion).

The Equal Protection Clause of the Fourteenth Amendment does, however, confer the right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population. See, *e. g., Dunn* v. *Blumstein,* 405 U. S. 330, 336; *Ciprianov. City of Houma,* 395 U. S. 701, 706; *Kramer* v. *Union Free School District,* 395 U. S. 621, 626–628; *Harper* v. *Virginia Board of Elections, supra; Reynolds* v. *Sims,* 377 U. S. 533. And more generally, the Equal Protection Clause forbids any State to make classifications that are wholly arbitrary and capricious and hence invidiously discriminatory. See, *e. g., James* v. *Strange,* 407 U. S. 128; *Rinaldi* v. *Yeager,* 384 U. S. 305.

I think it is clear that under the Constitution New York could have validly decided to provide no opportunity for its citizens to engage in either absentee registration or absentee voting. Cf. *McDonald* v. *Board of Election*, 394 U. S. 802. But the State has not chosen such a course. Rather, New York extends absentee *registration* privileges to voters who are unable to appear personally because of "illness or physical disability," and to those required to be outside their counties of residence on normal registration days because of their "duties, occupation or business."[1] In addition, New York extends absentee voting privileges to those voters unable to get to the polls because of illness or physical disability,[2] to those who are inmates of veterans' bureau hospitals, and to those who are absent from their home

[1] At the time this permit was brought, New York Election Law § 153–a provided, in pertinent part:

"1. A voter residing in an election district in which the registration is required to be personal or in an election district in a county or city in which permanent personal registration is in effect, and who is unable to appear personally for registration because he is confined at home or in a hospital or institution, other than a mental institution because of illness or physical disability or because his duties, occupation or business require him to be outside the county of residence, or if a resident of the city of New York, outside said city, on such days, may be registered in the manner provided by this section. A voter residing in an election district in which personal registration is not required may file an application for absentee registration in accordance with the provisions of this section and also may be registered in the manner otherwise provided by law."

Effective January 1, 1973, § 153–a was repealed, and replaced by New York Election Law § 153, which contains substantially identical provisions.

[2] New York Election Law § 117–a provides, in pertinent part:

"1. A qualified voter, who, on the occurrence of any general election, may be unable to appear personally at the polling place of the election district in which he is a qualified voter because of illness or physical disability may also vote as an absentee voter under this chapter, . . ."

county on election day either because of "duties, occupation or business" or vacation.[3] Indeed, New York apparently even extends absentee registration and voting opportunities to convicted misdemeanants and pre-trial detainees incarcerated outside the counties of their residence.[4]

Yet, despite all this, the State denies the opportunity for either registration or voting to the class of otherwise wholly eligible voters to which the appellants belong—misdemeanants and pre-trial detainees incarcerated within their home counties.[5] In my view, this statutory classification works an invidious and wholly arbitrary discrimination, one that falls far short of satisfying even

---

[3] New York Election Law § 117 provides, in pertinent part:

"1. A qualified voter, who, on the occurrence of any general election, may be—

"a. unavoidably absent from his residence because he is an inmate of a veterans' bureau hospital, or

"b. unavoidably absent from the county of his residence, or, if a resident of the city of New York, from said city, because his duties, occupation or business require him to be elsewhere on the day of election, or

"c. absent from the county of his residence, or, if a resident of the city of New York from said city, because he is on vacation elsewhere on the day of election,

"may vote on an absentee voter under this chapter."

[4] At oral argument, counsel for the appellees conceded that Monroe County election officials have interpreted the portions of New York Election Laws § 117 and 153–a that extend absentee voting and registration privileges to those whose "duties, occupation or business" require absence from their home counties as including convicted misdemeanants and pre-trial detainees incarcerated outside Monroe County.

[5] New York Constitution, Art. II, § 3, provides that "[t]he legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime." Pursuant to that constitutional mandate, New York Election Law § 152 excludes only convicted felons from exercise of the franchise.

the minimal Fourteenth Amendment requirement that there be "some rationality in the nature of the class singled out." *Rinaldi* v. *Yeager, supra,* at 308–309. Given New York's decision to provide means for registration and voting to the broad groups of eligible absentee voters enumerated above, it must surely provide some functionally equivalent means to the appellants, whose physical insulation is directly caused by the State itself.

For these reasons, I conclude that the New York statutes, as construed by the State's highest court, operate to deny equal protection to the appellants, and hence run afoul of the Fourteenth Amendment. Consequently, I concur in the judgment of the Court.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 6, 1973

Re: No. 72-1058 - O'Brien v. Skinner

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 10, 1973

Re: No. 72-1058 - O'Brien v. Skinner

Dear Harry:

Please join me in your dissenting opinion.

Sincerely,

WHR

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 13, 1973

RE: No. 72-1058 O'Brien v. Skinner

Dear Thurgood:

Please join me in your concurring opinion in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

December 27, 1973

Re: No. 72-1058 - Edward F. O'Brien, et al v.
Albert Skinner, et al

MEMORANDUM TO THE CONFERENCE:

On further review of the first circulated draft opinion I conclude that we can appropriately decide the case on 14th Amendment grounds without the frequently debated constitutional status of the "right to vote" in state elections.

The enclosed draft represents little physical alteration but turns the holding exclusively on 14th Amendment Equal Protection, making it unnecessary to deal with the "fundamental right" aspect of voting -- reference to which is omitted.

Regards,

WEB

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: The Chief Justice

Circulated: _____

Recirculated: DEC 27 1973

SUPREME COURT OF THE UNITED STATES

No. 72–1058

Edward F. O'Brien et al., Appellants, *v.* Albert Skinner, Sheriff, Monroe County, et al. | On Appeal from the Court of Appeals of New York.

[January —, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This is an appeal from the judgment of the Court of Appeals of New York taken by 72 persons who were at the time of the trial of the original action, detained in confinement. Some are simply detained awaiting trial, others are confined pursuant to misdemeanor convictions; none are subject to any voting disability under the laws of New York.

The Court of Appeals of New York,[1] by divided vote, held that failure of the State to provide appellants with any means of registering and voting was not a violation of the New York statute and not a denial of any federal or state constitutional right.

Before the November 1972 general elections in New York, the appellants applied to the authorities of Monroe County, including the Board of Elections, to establish a mobile voters registration unit in the county jail in compliance with a mobile registration procedure which

[1] Matter of *O'Brien* v. *Skinner*, 31 N. Y. 2d 317, 338 N. Y. S. 2d 890 (1972).

had been employed in some county jails in New York State. This request was denied and appellants then requested that they be either transported to polling places under appropriate restrictions, or in the alternative, that they be permitted to register and vote under New York's absentee voting provisions which, essentially, provide that qualified voters are allowed to register and vote by absentee measures if they are unable to appear personally because of illness or physical disability, or because of their "duties, occupation or business." The statutes also allow absentee voting, but not registration, if the voter is away from his residence on election day because he is confined in a veterans' hospital or is away on vacation.[2]

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[2] At the time this permit was brought, New York Election Law § 153–a provided, in pertinent part:

"1. A voter residing in an election district in which the registration is required to be personal or in an election district in a county or city in which permanent personal registration is in effect, and who is unable to appear personally for registration because he is confined at home or in a hospital or institution, other than a mental institution because of illness or physical disability or because his duties, occupation or business require him to be outside the county of residence, or if a resident of the ctiy of New York, outside said city, on such days, may be registered in the manner provided by this section. A voter residing in an election district in which personal registration is not required may file an application for absentee registration in accordance with the provisions of this section and also may be registered in the manner otherwise provided by law."

Effective January 1, 1973, § 153–a was repealed, and replaced by New York Election Law § 153, which contains substantially identical provisions.

New York Election Law § 117–a provides, in pertinent part:

"1. A qualified voter, who, on the occurrence of any general election, may be unable to appear personally at the polling place of the election district in which he is a qualified voter because of illness or physical disability may also vote as an absentee voter under this chapter. . . ."

[*Footnote 2 continued on p. 3*]

The election authorities denied the request, taking the position that they were under no obligation to permit the appellants to register or to vote in person and that inmates did not qualify for absentee voting under the provisions of the New York statutes.

The Supreme Court for Monroe County in New York considered the claims presented by the appellants and treated them as a proceeding in the nature of mandamus. The conclusion reached by that court was that the legislature of New York had provided for absentee registration and voting by any voter unable to appear personally because of confinement in an institution (other than a mental institution). The court concluded that the election laws should be construed to apply to an inmate confined in jail and not otherwise disenfranchised since this constituted a "physical disability" in the sense that he was physically disabled from leaving his confinement to go to the polls to vote, and that the statute therefore entitled such persons to vote by absentee ballot. However, the court noted that there was no showing that any of the persons claiming these rights had timely filed all the necessary forms but that this could yet be accomplished in time for voting by absentee ballot in November 1972. The Appellate Division of the Fourth Judicial

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New York Election Law § 117 provides, in pertinent part:

"1. A qualified voter, who, on the occurrence of any general election, may be—

"a. unavoidably absent from his residence because he is an inmate of a veterans' bureau hospital, or

"b. unavoidably absent from the county of his residence, or, if a resident of the city of New York, from said city, because his duties, occupation or business require him to be elsewhere on the day of election, or

"c. absent from the county of his residence, or, if a resident of the city of New York from said city, because he is on vacation elsewhere on the day of election,

"may vote on an absentee voter under this chapter."

Department of the Supreme Court of New York on review gave a similar construction to the Election Laws stating:

> "We believe that petitioners being so confined are physically disabled from voting and should be permitted to do so by casting absentee ballots."

On appeal to the New York Court of Appeals, however, these holdings were reversed, that court stating:

> "the right to vote does not protect or insure against those circumstances which render voting impracticable. The fact of incarceration imposes many other disabilities, some private, others public, of which voting is only one. Under the circumstances and in view of the legislature's failure to extend these absentee provisions to others similarly disadvantaged, it hardly seems possible that petitioner's right to vote has been arbitrarily denied them. It is enough that these handicaps, then, are functions of attendant impracticabilities or contingencies, not legal design."

Judge Fuld dissented being of the view that §§ 117–a and 153–a of the Election Law of New York should be read in the manner announced by the Appellate Division. Judge Burke, joining Judge Fuld, agreed, stating additionally that any construction of the Election Law precluding appellants from exercising their right to register and vote violated the equal protection guarantees of the Fourteenth Amendment.

It is important to note at the outset that the New York election laws here in question do not raise any question of disenfranchisement of a person because of conviction for criminal conduct. As we noted earlier these appellants are not disabled from voting except by reason of not being able physically—in the very literal

sense—to go to the polls on election day or to make the appropriate registration in advance by mail. The New York statutes are silent concerning registration or voting facilities in jails and penal institutions, except as they provide for absentee balloting. If a New York resident eligible to vote is confined in a county jail in a county in which he does not reside, paradoxically, he may secure an absentee ballot and vote and he may also register by mail presumably because he is "unavoidably absent from the county of his residence." [3]

Thus under the New York statutes, two citizens awaiting trial—or even awaiting a decision whether they are to be charged—sitting side by side in the same cell, may receive different treatment as to voting rights. As we have noted, if the citizen is confined in the county of his legal residence he cannot vote by absentee ballot as can his cellmate whose residence is in the adjoining county. Although neither is under any legal bar to voting, one of them can vote by absentee ballot and the other cannot.

This Court had occasion to examine claims similar to those presented herein in *McDonald* v. *Board of Election Comm'rs*, 394 U. S. 802 (1969). There a state statute provided for absentee voting by persons "medically incapacitated" and for pretrial detainees who were incarcerated outside their county of residence. Unlike the present case, however, in *McDonald* "there [was] nothing in the record to show that appellants [were] in fact absolutely prohibited from voting by the State . . . ," *id.*, at 808 n. 7, since there was the possibility that the

[3] At oral argument, counsel for the appellees conceded that Monroe County election officials have interpreted the portions of New York Election Laws § 117 and 153-a that extend absentee voting and registration privileges to those whose "duties, occupation or business" require absence from their home counties as including convicted misdemeanants and pre-trial detainees incarcerated outside Monroe County.

State might furnish some other alternative means of voting. *Id.*, at 808. Essentially the Court's disposition of the claims in *McDonald* rested on failure of proof.

More recently in *Goosby* v. *Osser*, 409 U. S. 512 (1973), the Court again considered the problem of inmate voting and concluded that unlike the voting restrictions in the *McDonald* case, the statute there in question was an absolute bar to voting because of a specific provision that "persons confined in a penal institution were not permitted to vote by absentee ballot." It is clear, therefore, that the appellants here, like the petitioners in *Goosby*, bring themselves within the precise fact structure that the *McDonald* holding foreshadowed.

New York's election statutes, as construed by its highest court, discriminate between categories of qualified voters in a way that, as applied to pre-trial detainees and misdemeanants, is wholly arbitrary. Medically disabled persons are permitted to register by mail and to vote by absentee ballot. Voters held in jail awaiting trial in a county other than their residence are also permitted to register by mail and vote by absentee ballot; however, persons confined for the same reason in the county of their residence are completely denied the ballot. The New York statutes, as construed, operate as a restriction which is "so severe as to constitute an unconstitutionally onerous burden on the . . . exercise of the franchise." *Rosario* v. *Rockefeller*, 410 U. S. 752, 760 (1973). Appellants and others similarly situated are, as we have noted, under no legal disability impeding their legal right to register or to vote; they are simply not allowed to use the absentee ballot and are denied any alternative means of casting their vote.

The construction given the New York statutes by its trial court and the Appellate Division may well have been a reasonable interpretation of New York law, but

the highest court of the State has concluded otherwise and it is not our function to construe a state statute contrary to the construction given it by the highest court of a State. We have no choice, therefore, but to hold that, as construed, the New York statute denies appellants the equal protection of the law guaranteed by the Fourteenth Amendment.

Reversed and remanded for further proceedings not inconsistent with this opinion.

January 3, 1973

No. 72-1058 O'Brien v. Skinner

Dear Chief:

Please join me in your recirculation (3rd draft) in the above case.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 3, 1974

Dear Chief:

In 72-1058, O'Brien v. Skinner

please join me.

WOD

William O. Douglas

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 3, 1974

Dear Thurgood:

Please join me in your separate opinion in 72-1058, O'Brien v. Skinner.

WW

William O. Douglas

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 7, 1974

Re: No. 72-1058, O'Brien v. Skinner

Dear Chief,

I am glad to join your opinion for the Court, as recirculated January 3, and shall withdraw my concurring opinion.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
11-19-73								
1st draft. 11-29-73 3rd draft 12-27-73 4th draft 1-4-74	join CJ. 11-29-73 join CJ. again 1-3-74 also join TM. in separate opinion 1-3-74	join CJ. 12-3-73 join TM 12/13/73	Concurring opinion 2nd draft 12/5/73 Withdraws Concurrence joins CJ. 1-7-74	join CJ. 12-6-73	Concurring Opinion 1st draft 12-7-73 2nd draft 1-2-74 3rd draft 1-7-74 with WOD + WJB in Concurrence 1-7-74	Will dissent 12-3-73 Dissent 1st draft 12-11-73 2nd draft 12-11-73 3rd draft 12/13/73 4th draft dissent with WHR joining 1-4-74 5th draft 1-9-74	join CJ 12/4/73 joins 3rd draft 12/13/73	join 1st draft 12/10/73
					No. 72-1058	O'Brien v. Skinner		