

# The Burger Court Opinion Writing Database

## *O'Brien v. Skinner*

414 U.S. 524 (1974)

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



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: Mr. Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: NOV 29 1973

No. 72-1058

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]

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 pro-  
vide appellants with any means of registering and vot-  
ing 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 Mon-  
roe County, including the Board of Elections, to estab-  
lish 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 re-  
quested 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-

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

NOT RECORDED IN THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Chief Justice Burger  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Harlan

3rd DRAFT

From: Mr. Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 72-1058

Recirculated: DEC 27 1971

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,<sup>1</sup> 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

<sup>1</sup> Matter of *O'Brien v. Skinner*, 31 N. Y. 2d 317, 338 N. Y. S. 2d 890 (1972).

To: Mr. Justice  
Mr. Justice  
Mr. Justice  
Mr. Justice  
Mr. Justice  
Mr. Justice  
Mr. Justice  
Mr. Justice

4th DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated

No. 72-1058

Recirculated: JAN 3 1974

Edward F. O'Brien et al.,  
Appellants,

Albert Skinner, Sheriff,  
Monroe County, et al.

On Appeal from the Court  
of Appeals of New York.

[January —, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of  
the Court

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Appeals of New York taken by 72 persons who were at  
the time of the trial of the original action, detained in  
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The Court of Appeals of New York,<sup>1</sup> by divided vote,  
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Before the November 1972 general elections in New  
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in compliance with a mobile registration procedure which

<sup>1</sup> Matter of *O'Brien v. Skinner*, 31 N. Y. 2d 317, 338 N. Y. S.  
2d 890 (1972)

FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

November 29, 1973

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

WV  
William O. Douglas

cc: The Conference

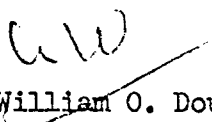
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

January 3, 1974

Dear Chief:

In 72-1058, O'Brien v. Skinner  
please join me.

  
William O. Douglas

The Chief Justice

cc: The Conference

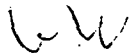
Supreme Court of the United States  
Washington, D. C. 20543

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.

  
William O. Douglas

Mr. Justice Marshall

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,

*Brennan*

The Chief Justice

cc: The Conference

FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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,

*Will*

Mr. Justice Marshall

cc: The Conference

COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

No. 72-1058

From: Stewart, J.

Circulated: DFG 5

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.

Recirculated: \_\_\_\_\_

[December —, 1973]

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; *Cipriano v. 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.

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

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

11/7/73

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1058

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

[December —, 1973]

MR. JUSTICE MARSHALL, concurring.

While I join the opinion of the Court, my analysis of the issues presented here requires further elaboration.

I fully agree with the Court's holding that the Court of Appeals' reliance on our decision in *McDonald v. Board of Election Commissioners*, 394 U. S. 802 (1969), was misplaced. Although we rejected in *McDonald* a claim similar to that presented by appellants here, the crux of our decision was our conclusion that the rational basis test was the proper standard to apply in evaluating the prisoners' equal protection claims. We relied heavily in *McDonald* on the fact that there was no evidence that the State made it impossible for the appellants to exercise their right to vote. As the Court noted,

"the record is barren of any indication 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 themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their their own." 394 U. S., at 808 n. 6.

The Court therefore characterized the appellants' claim by saying "[i]t is thus not the right to vote which is at

THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1058

Circulated: \_\_\_\_\_

Recirculated: JAN 2 1974

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 —, 1974]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring.

While I join the opinion of the Court, my analysis of the issues presented here requires further elaboration.

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The Court therefore characterized the appellants' claim by saying "[i]t is thus not the right to vote which is at

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Black  
Mr. Justice Powell  
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES: Marshall, J.

No. 72-1058

Circulated: \_\_\_\_\_

Recirculated: JAN 7 1974

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 —, 1974]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, concurring.

While I join the opinion of the Court, my analysis of the issues presented here requires further elaboration.

I fully agree with the Court's holding that the Court of Appeals' reliance on our decision in *McDonald v. Board of Election Commissioners*, 394 U. S. 802 (1969), was misplaced. Although we rejected in *McDonald* a claim similar to that presented by appellants here, the crux of our decision was our conclusion that the rational basis test was the proper standard to apply in evaluating the prisoners' equal protection claims. We relied heavily in *McDonald* on the fact that there was no evidence that the State made it impossible for the appellants to exercise their right to vote. As the Court noted,

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The Court therefore characterized the appellants' claim by saying "[i]t is thus not the right to vote which is at



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

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1058

From: Blackmun, J.

Circulated: 12/11

Recirculated: \_\_\_\_\_

Edward F. O'Brien et al.  
Appellants

Albert Skinner, Sheriff,  
Monroe County, et al

On Appeal from the Court  
of Appeals of New York.

[December —, 1973]

MR. JUSTICE BLACKMUN, dissenting.

Once again we are confronted with a claim, fashionable of late, that a State's statute which, because of its positive provisions, *Rosario v. Rockefeller*, 410 U. S. 752 (1973); *Kusper v. Pontikes*, 414 U. S. — (1973); see *Goosby v. Osser*, 409 U. S. 512 (1973), or because of its failure to provide particular persons particular relief, as here, is an unconstitutional deprivation of the right to vote. And once again the Court strikes down the State's statute.

Because I think the Court is unnecessarily and unwisely elevating and projecting constitutional pronouncement into an area—and into distant and obscure corners of that area—that, for me, should be a domain reserved for the State's own housekeeping, I dissent.

I join, and with some emphasis, the Court's observations and those of MR. JUSTICE STEWART and MR. JUSTICE MARSHALL in their respective concurring opinions, to the effect that the much amended New York statutes here under challenge cut unevenly. Surely, no one would claim that they are now a model of the draftman's art. The absentee voting privilege appears to be available for the voter who is an inmate of a veterans' bureau hospital, New York Election Law § 117 (McKinney's, 1964), but not, seemingly, due to the statute's silence (unless he can qualify "because of illness or physical disability," *id.*,

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

2nd DRAFT

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. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissenting.

Once again we are confronted with a claim, fashionable of late, that a State's statute which, because of its positive provisions, *Rosario v. Rockefeller*, 410 U. S. 752 (1973); *Kusper v. Pontikes*, 414 U. S. — (1973); see *Goosby v. Osser*, 409 U. S. 512 (1973), or because of its failure to provide particular persons particular relief, as here, is an unconstitutional deprivation of the right to vote. And once again the Court strikes down the State's statute.

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

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1058

Circulated: \_\_\_\_\_

Recirculated: 12/13/73

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]

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STYLISTIC CHANGES

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1058

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

Circulated: \_\_\_\_\_

Recirculated: 1/2/74

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]

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

5th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Blackmun, J.

No. 72-1058

Circulated: \_\_\_\_\_

Edward F. O'Brien et al.,  
Appellants.

v.

Albert Skinner, Sheriff,  
Monroe County, et al.

Recirculated: 1/9/74

On Appeal from the Court  
of Appeals of New York.

[December —, 1973]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissenting.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

December 4, 1973

No. 72-1058 O'Brien v. Shinner

Dear Chief:

Please join me.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

January 3, 1974

No. 72-1058 O'Brien v. Skinner

Dear Chief:

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

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS



*Supreme Court of the United States**Memorandum*

-----, 19-----

I will join your Dissent  
in O'Brien unless you  
want to be exclusive

WHR?

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,



Mr. Justice Blackmun

Copies to the Conference

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