The Burger Court Opinion Writing Database

Carey v. Brown
447 U.S. 455 (1980)

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

HAB

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

CHAMBERS OF
THE CHIEF JUSTICE

April 29, 1980

RE: 79-703 - Carey v. Brown

Dear Bill:

Are you willing to take on a dissent in this case?

Regards,

WEB

Mr. Justice Rehnquist

cc: Mr. Justice Blackmun

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

CHAMBERS OF
THE CHIEF JUSTICE

June 16, 1980

Re: 79-703 - Carey v. Brown

Dear Bill:

I join your dissent.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 21, 1980

RE: No. 79-703 Carey v. Brown

Dear Chief:

I'll undertake the opinion for the Court in the above.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice Stevens

1st DRAFT

From: Mr. Justice Brennan

Circulated: MAY 29 1980

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SUPREME COURT OF THE UNITED STATES

Bernard Carey, as State's Attorney of Cook County, Illinois, Appellant

v.

Roy Brown, et. al.

No. 79-703

On Appeal from the United States Court of Appeals for the Seventh Circuit

[June ___, 1980]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

At issue in this case is the constitutionality under the First and Fourteenth Amendments of a state statute that bars all picketing of residences or dwellings, but exempts from its prohibition "the peaceful picketing of a place of employment involved in a labor dispute."

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 3, 1980

Re: 79-703 - Carey v. Brown

Dear Lewis:

I appreciate the careful reading you have given the draft opinion in this case and I am certainly willing to make what changes I can to accommodate your views. I share your concern that this opinion not imply that a nondiscriminatory prohibition of all residential picketing would be unconstitutional under traditional First Amendment analysis. Unlike the present case, that question would require us to balance the First Amendment rights of the picketers against the privacy interests of the homeowners. Whatever our resolution of that issue might be - and I confess that I am very much uncertain as to which side of the fence I would fall on - I agree that it is unnecessary to deal with that problem in this case. Indeed, it was precisely to emphasize the narrowness of our equal protection holding that I included part IV of the present draft.

Although I do not believe that the portions of the opinion which you highlight in your letter are inconsistent either with our prior cases or with a future decision upholding a total ban on residential picketing, I would propose to make the following changes to meet your concerns. As you requested, I will delete in its entirety the final sentence of the first paragraph on page 5, commencing with "Peaceful picketing . . . ." On the bottom of page 6, I will expand the quote from Mosley by adding two sentences and will substitute your proposed revision of the sentence immediately following the Mosley quote. I will also eliminate, as you requested, the sentence which begins, "Under this statute . . ." and continues onto page 7. Thus, after the cite to Rodriguez, the paragraph will conclude:

> As we explained in Mosley, "Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject. Given what Chicago tolerates from labor picketing, the

excesses of some nonlabor picketing may not be controlled by a broad ordinance prohibiting both peaceful and violent picketing. Such excesses 'can be controlled by narrowly drawn statutes,' Saia v. New York, 334 U.S., at 562, focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter." Police Department of Chicago v. Mosley, supra, at 101-102. Yet here, under the guise of preserving residential privacy, Illinois has flatly prohibited all nonlabor picketing even though it permits labor picketing that is equally likely to intrude on the tranquility of the home.

I'll also add an explicit statement to the effect that the constitutionality of a total prohibition on residential picketing is not before us, by inserting the following sentence at the end of footnote 2:

"Because we find the present statute defective on equal protection principles, we likewise do not consider whether a statute barring all residential picketing regardless of its subject matter would violate the First and Fourteenth Amendments."

I hope that these deletions and alterations will meet your suggestions. I will await your reaction before circulating a printed draft that incorporates these changes.

Sincerely,

Mr. Justice Powell

✓

3,4,6,7,13

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

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1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79–703

Bernard Carey, etc., Appellant, v. Roy Brown et al. | On Appeal from the United States Court of Appeals for the Seventh Circuit.

[June —, 1980]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

At issue in this case is the constitutionality under the First and Fourteenth Amendments of a state statute that bars all picketing of residences or dwellings, but exempts from its prohibition "the peaceful picketing of a place of employment involved in a labor dispute."

I

On September 7, 1977, several of the appellees, all of whom are members of a civil rights organization entitled the Committee Against Racism, participated in a peaceful demonstration on the public sidewalk in front of the home of Michael Bilandic, then Mayor of Chicago, protesting his alleged failure to support the busing of school children to achieve racial integration. They were arrested and charged with Unlawful Residential Picketing in violation of Ill. Rev. Stat., ch. 38, § 21.1–2, which provides:

> "It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assem-

3, 6, 18

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79–703

Bernard Carey, etc., Appellant, v. Roy Brown et al. | On Appeal from the United States Court of Appeals for the Seventh Circuit.

[June —, 1980]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

At issue in this case is the constitutionality under the First and Fourteenth Amendments of a state statute that bars all picketing of residences or dwellings, but exempts from its prohibition "the peaceful picketing of a place of employment involved in a labor dispute."

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> "It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assem-

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 30, 1980

Re: No. 79-703, Carey v. Brown

Dear Bill,

I am glad to join your opinion for the Court. Enclosed herewith are two copies of a brief concurrence I have today sent to the printer.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

NO. 79-703, CAREY v. BROWN

Mr. Justice Stewart, concurring.

The opinion of the Court in this case, as did the Court's opinion in Police Department of Chicago v. Mosley, 408 U.S. 92, invokes the Equal Protection Clause of the Fourteenth Amendment as the basis of decision. But what was actually at stake in Mosley, and is at stake here, is the basic meaning of the constitutional protection of free speech:

> "[W]hile a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes, and may even forbid altogether such use of some of its facilities; what a municipality may not do under the First and Fourteeenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression." Hudgens v. NLRB, 424 U.S. 507, 520. (citations omitted).

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

From: Mr. Justice Stewart

Circulated: 2 JUN 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79–703

Bernard Carey, etc., Appellant, *v.* Roy Brown et al. | On Appeal from the United States Court of Appeals for the Seventh Circuit.

[June —, 1980]

MR. JUSTICE STEWART, concurring.

The opinion of the Court in this case, as did the Court's opinion in *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, invokes the Equal Protection Clause of the Fourteenth Amendment as the basis of decision. But what was actually at stake in *Mosley*, and is at stake here, is the basic meaning of the constitutional protection of free speech:

> "[W]hile a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes, and may even forbid altogether such use of some of its facilities; what a municipality may *not* do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression." *Hudgens* v. *NLRB*, 424 U. S. 507, 520. (Citations omitted.)

It is upon this understanding that I join the opinion and judgment of the Court.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 5, 1980

Re: 79-703 - Carey v. Brown

Dear Bill,

Please join me in your June 5 circulation.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 29, 1980

Re: No. 79-703 - Carey v. Brown

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 16, 1980

Re: No. 79-703 - Carey v. Brown

Dear Bill:

Please join me in your dissent in this case.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference

June 2, 1980

79-703 Carey v. Brown

Dear Bill:

I am in accord with almost all of your excellent opinion, but do have one concern. Some of the language on pages 5 and 6 seems arguably inconsistent with language in Part IV. It also seems unnecessary in this case.

On pages 5 and 6 there is some language that can be read as implying - if not indeed as saying - that the First Amendment would protect picketing of a private residence if there were reasonable time, place and manner restrictions. See page 5, commencing with the quotation from Hague and going to the end of that paragraph. The final sentence in the paragraph is what primarily disturbs me. I would think it could be ommitted with no detriment to your opinion.

On page 6, I would find it difficult to join - in its present form - the language commencing six lines from the bottom of the page ("Yet here . . .") and continuing to the end of that paragraph at the top of page 7.

It seems to me that the language I have identified may be construed as not entirely consistent with emphasis in Part IV on the sanctity of the home. Consider, for example, the sentence near the end of page 15 to the effect that the tranquility and privacy of the home is of "the highest order in a free and civilized society". I agree fully with this, and therefore would find it difficult to agree that a private home could be picketed at all.

I think you could resolve my concerns by eliminating the sentence on page 5, commencing "Peaceful picketing . . .". And by revising the sentence at the bottom of page 6 to read as follows:

> "Yet here, under the guise of preserving residential privacy, Illinois has flatly prohibited all nonlabor picketing even though it permits labor picketing that is equally likely to intrude on the tranquility of the home."

Then, it would be consistent to delete the remainder of this paragraph that extends over to page 7.

If we were to "look down the road" to the next case, I would prefer to say that a nondiscriminatory ban on all picketing of private residences probably would infringe no legitimate First Amendment interests. But saying even this, is unnecessary in this case.

I am not now circulating this letter to the Conference. If you can accommodate my concern this will be unnecessary.

Sincerely,

Mr. Justice Brennan

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 4, 1980

79-703 Carey v. Brown

Dear Bill:

In view of the clarifying language changes that you are willing to make, I am glad to join your opinion for the Court.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

HA

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 30, 1980

Re: No. 79-703 - Carey v. Brown

Dear Chief:

I will be happy to undertake the dissent in this case.

Sincerely,

The Chief Justice

Copy to Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 29, 1980

Re: No. 79-703 Carey v. Brown

Dear Bill:

The Chief has asked me to undertake the writing of a dissent in this case, which I hope to have around in due course.

Sincerely,

Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 9 JUN 1980

Recirculated: _____

No. 79-703 - Carey v. Brown

MR. JUSTICE REHNQUIST, dissenting.

I address the merits of the Court's constitutional decision first, although I also seriously question the appellees' standing to assert the grounds for invalidity on which the Court apparently relies.[1/] One who reads the opinion of the Court is probably left with the impression that Illinois has enacted a residential picketing statute which reads: "All residential picketing, except for labor picketing, is prohibited." Such an impression is entirely understandable; indeed, it is created by the Court's own phrasing throughout the opinion. The Court asserts that Illinois, "in exempting from its general prohibition only the 'peaceful picketing of a place of employment involved in a labor dispute', . . . discriminates between lawful and unlawful conduct based upon . . . content. . . ." (emphasis added). Ante at 5. It states that "information about labor disputes may be freely disseminated, but discussion of all other issues is restricted." Id. The Court finds that the permissibility of residential picketing in Illinois is dependent "solely on the nature of the message being conveyed". (emphasis added) Id. And again the Court states that "Illinois has flatly prohibited all non-labor picketing" while the statute is said to "broadly permit[ ] all peaceful labor picketing" Ante at 6, 9.

Dissenting opinions are more likely than not to quarrel with the Court's exposition of the law, but my intitial quarrel is with the accuracy of the Court's paraphrasing and selective quotation from the Illinois statute. The complete language of the statute, set out accurately in the text of the Court's opinion, reveals a legislative

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnqu

2d
~~1st~~ DRAFT

Circulated: _____

17 JUN 19
Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-703

Bernard Carey, etc., Appellant, *v.* Roy Brown et al.	On Appeal from the United States Court of Appeals for the Seventh Circuit.

[June —, 1980]

MR. JUSTICE REHNQUIST, with whom the CHIEF JUST and MR. JUSTICE BLACKMUN joins, dissenting.

I address the merits of the Court's constitutional decision first, although I also seriously question the appellees' standing to assert the grounds for invalidity on which the Court apparently relies.[1] One who reads the opinion of the Court is probably left with the impression that Illinois has enacted a residential picketing statute which reads: "All residential picketing, except for labor picketing, is prohibited." Such an impression is entirely understandable; indeed, it is created

[1] The Court premises its finding that the appellees have standing to challenge the statute at least in part on the basis of the appellant's "concessions" at oral argument that the State was not persisting in its challenge to appellees' standing in this Court. See *ante*, pp. 5–6, n. 5. But we have said that "we are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument." *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 170 (1972). Moreover, while appellant may have chosen not to challenge appellees' standing to argue that they had been denied equal protection under the statute, appellant certainly did not concede that appellees had standing to argue that other individuals desiring to picket under circumstances dissimilar to appellees might be denied equal protection under the statute. In fact, counsel quite explicitly stated that the Court should only consider the constitutionality of prohibiting the appellees' conduct: "I would urge that the . . . First Amendment question only be as applied to the plaintiffs, to the conduct that the plaintiffs actually engaged in. . . ." Tr. of Oral Arg. 17. And this is the standing question that is implicated by the Court's opinion. See *infra*, at —.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 30, 1980

Re: 79-703 - Carey v. Brown

Dear Bill:

Please join me.

Respectfully,

J

Mr. Justice Brennan

Copies to the Conference