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In an attempt to accommodate the growing number of people[1] who cannot be present at the polls on election day, many states and

1. The passage of the twenty-sixth amendment, which lowered the voting age in all elections to 18, enfranchised many students, who might be expected to apply for absentee ballots if they are attending schools away from their residences. New York

the federal government have enacted statutes that allow voters to cast their ballots in advance of the election either by mail or in person. Eligibility for these absentee ballots is, however, restricted to those voters who fall within the classifications set up by the statute, and occasionally the option is open only to those who wish to vote in general elections. The few court decisions that have reviewed state absentee-ballot legislation, or the lack of such legislation, have not shed much light on the constitutional validity of present eligibility schemes.[2]

In almost all states, the eligibility requirements in absentee-voting legislation are not all-inclusive, but leave certain classes of voters who are both unable to be at the polls and not permitted to cast absentee ballots. It has been estimated that three million qualified voters were unable to vote in the 1968 presidential election because they were ineligible to receive absentee ballots under local law.[3] Congress did not wait for prodding from the courts to remedy this serious situation, at least with regard to federal elections. In an effort to ensure that all qualified voters, regardless of where they might be on election day, have the opportunity to vote for President and Vice-President, Congress enacted federal absentee-voting legislation, along with other voting reform measures, in the Voting Rights Act Amendments of 1970.[4] Congress found that "the lack of sufficient opportunities for . . . absentee balloting in presidential elections . . . denies or abridges the inherent constitutional right of citizens to vote . . . [and] to enjoy their free movement across State lines" and that state legislation restricting the availability of absentee ballots "does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections."[5] The amendments order the states to

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City officials cited student voters as a reason for the increase in the number of absentee ballots from almost 29,500 in 1968 to over 48,800 in 1972. N.Y. Times, Nov. 7, 1972, at 24, col. 3 (late city ed.).

2. *Compare* McDonald v. Board of Election Commrs., 394 U.S. 802 (1969) *and* Fidell v. Board of Elections, 343 F. Supp. 913 (E.D.N.Y.), *aff'd.*, 409 U.S. 972 (1972) *with* Goosby v. Osser, 452 F.2d 39 (3d Cir. 1971), *revd.*, 409 U.S. 512 (1973) *and* O'Brien v. Skinner, 409 U.S. 1240 (1972) (Marshall, Cir. J.).

3. *Hearings on S. 818, S. 2456, S. 2507, and Title IV of S. 2029 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2d Sess. 281 (1969-70).

4. Act of June 22, 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified in 42 U.S.C. §§ 1973b, 1973c, 1973aa to 1973bb-4 (1970)). Section 6 of the Act, 42 U.S.C. § 1973aa (1970), prohibits, until 1975, the use of literacy tests in determining voting qualifications in any local, state, or federal election in any state or political subdivision to which similar restrictions in the Voting Rights Act of 1965, 42 U.S.C. § 1973b (1970), do not already apply. Section 6 also abolishes state durational residency requirements for voting for President and Vice-President, establishes the uniform absentee-ballot provisions described in the text, 42 U.S.C. § 1973aa-1 (1970), and, as modified by the decision in Oregon v. Mitchell, 400 U.S. 112 (1970), reduces the voting age in federal elections to eighteen. 42 U.S.C. § 1973bb to bb-2 (1970).

5. 42 U.S.C. § 1973aa-1(a) (1970).

provide absentee ballots in presidential elections to any otherwise qualified resident who expects to be absent from his district on election day and has applied for a ballot at least seven days before the election.[6]

In nonpresidential elections voters must still meet the requirements of the varied,[7] and generally less inclusive, state provisions.[8] Maine has the most sweeping statute; it provides that *any* registered voter may cast an absentee ballot.[9] Presumably, those who are able to vote in person do so, but the statute does not require applicants for absentee ballots to demonstrate an inability to reach the polls. In all other states, voters who wish to cast an absentee ballot must demonstrate that they fall within a statutory classification.

Although most states provide absentee ballots in all elections,

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6. 42 U.S.C. § 1973aa-1(d) (1970). If an otherwise qualified voter is not eligible to vote in his district because he has taken up residence there within thirty days before the particular election and therefore does not satisfy local registration requirements, that voter must be allowed to vote in person or to cast an absentee ballot in the district in which he resided immediately before he moved to the new location. 42 U.S.C. § 1973aa-1(e) (1970).

7. Occasionally a statute is tailored to meet the unique needs of the electorate. For example, in Alaska, where extreme weather conditions can reasonably be anticipated, the expected inaccessibility of the polls is an authorized reason for obtaining an absentee ballot. ALASKA STAT. § 15.20.010(3) (1962). In the Gulf Coast state of Mississippi workers on off-shore oil rigs and commercial fishing boats may obtain absentee ballots. MISS. CODE ANN. § 3203-302(3) (Supp. 1972).

8. The state statutes defining groups of voters eligible for absentee ballots are:
ALA. CODE tit. 17, § 64(16) (Supp. 1972); ALASKA STAT. §§ 15.20.010-.015 (1962); ARIZ. REV. STAT. ANN. § 16-1101 (Supp. 1972); ARK. STAT. ANN. § 3-903 (Supp. 1971); CAL. ELECTIONS CODE § 14620 (West 1961); COLO. REV. STAT. ANN. §§ 49-14-1 (1964), 49-25-2 (Supp. 1965); CONN. GEN. STAT. ANN. §§ 9-134, -135 (Supp. 1973); DEL. CODE ANN. tit. 15, § 5503 (Supp. 1970); D.C. CODE ANN. § 1-1109(b) (Supp. 1972); FLA. STAT. ANN. § 97.021(6) (Supp. 1972); GA. CODE ANN. 34-1401 (Supp. 1972); HAWAII REV. STAT. §§ 15-1, -12 (Supp. 1971); IDAHO CODE § 34-1001-1 to -3 (Supp. 1972); ILL. ANN. STAT. ch. 46, § 19-1 (Smith-Hurd Supp. 1973); IND. ANN. STAT. § 29-4901 (Supp. 1972); IOWA CODE ANN. § 53.1 (1973); KAN. STAT. ANN. §§ 25-1119, -1229 (Supp. 1972); KY. REV. STAT. §§ 125.220, .230 (Supp. 1972); LA. REV. STAT. ANN. § 18:1071 (1969); ME. REV. STAT. ANN. tit. 21, §§ 1251-62 (1964); MD. ANN. CODE art. 33, §§ 27-1 to -2 (Supp. 1972); MASS. ANN. LAWS ch. 54, § 86 (Supp. 1972); MICH. COMP. LAWS ANN. §§ 168.758-.759a (Supp. 1972); MINN. STAT. ANN. § 207.02 (Supp. 1973); MISS. CODE ANN. §§ 3203-202, -302 (Supp. 1972); MO. ANN. STAT. § 112.010 (Supp. 1973); MONT. REV. CODES ANN. § 23-3701 (Supp. 1973); NEB. REV. STAT. §§ 32-802 (1968), -803 (Supp. 1972); NEV. REV. STAT. § 293.313 (1971); N.H. REV. STAT. ANN. §§ 60:1, :17 (1970), :26 (Supp. 1972); N.J. STAT. ANN. § 19:57-3 (Supp. 1973); N.M. STAT. ANN. § 3-6-3 (1970); N.Y. ELECTIONS LAW §§ 117, 117-a (McKinney 1964), *as amended*, (McKinney Supp. 1972); N.C. GEN. STAT. ANN. § 163-226 (1972); N.D. CENT. CODE ANN. § 16-18-01 (1971); OHIO REV. CODE ANN. § 3509.02 (Page 1972); OKLA. STAT. ANN. tit. 26, §§ 326, 343 (Supp. 1972); ORE. REV. STAT. § 253.010 (1971); PA. STAT. ANN. tit. 25, § 3146.1 (Supp. 1973); R.I. GEN. LAWS ANN. § 17-20-1 (1969); S.C. CODE OF LAWS §§ 23-442, -449.31 (Supp. 1971); S.D. COMP. LAWS ANN. § 12-19-1 (Supp. 1973); TENN. CODE ANN. § 2-602 (Supp. 1972); TEX. ELECTION CODE art. 5.05, subdivs. 1, 2a (Supp. 1972); UTAH CODE ANN. § 20-6-1 (Supp. 1973); VT. STAT. ANN. tit. 17, § 121(1) (1968); VA. CODE ANN. § 24.1-227 (1973); WASH. REV. CODE ANN. § 29.36.010 (Supp. 1972); W. VA. CODE ANN. § 3-3-1 (1971); WIS. STAT. ANN. § 6.85 (Supp. 1973); WYO. STAT. ANN. § 22.1-135 (Supp. 1973).

9. ME. REV. STAT. ANN. tit. 21, §§ 1251-62 (1964).

four restrict their use to general elections.[10] In many states, eligibility is determined by the voter's actual distance from his home. The majority of states require absence from the county of the voter's residence;[11] others require absence from the state,[12] the city,[13] or the precinct.[14] Some absentee-ballot legislation encompasses classes of voters who are within the election district but cannot reach the polls. Almost all states allow the physically incapacitated to cast absentee ballots.[15] Some also furnish absentee ballots to students,[16] to election

10. DEL. CODE ANN. tit. 15, § 5503 (Supp. 1970); N.Y. ELECTIONS LAW §§ 117, 117-a (McKinney 1964), *as amended*, (McKinney Supp. 1972); N.C. GEN. STAT. ANN. § 163-226 (1972); R.I. GEN. LAWS ANN. § 17-20-1 (1969).

11. ALA. CODE tit. 17, § 64(16)(b) (Supp. 1972); COLO. REV. STAT. ANN. § 49-14-1 (1964); DEL. CODE ANN. tit. 15, § 5503 (Supp. 1970); D.C. CODE ANN. § 1-1109(b) (Supp. 1972); FLA. STAT. ANN. § 97.021(6)(e) (Supp. 1972); HAWAII REV. STAT. § 15-1 (Supp. 1971) (absence from district, county, or island); ILL. ANN. STAT. ch. 46, § 19-1 (Smith-Hurd Supp. 1973); IND. ANN. STAT. § 29-4901 (Supp. 1972); IOWA CODE ANN. § 53.1(1) (1973); KAN. STAT. ANN. § 25-1119 (Supp. 1972); KY. REV. STAT. § 125.230(1) (Supp. 1972); LA. REV. STAT. ANN. § 18.1071 (1969) (absence from parish); MD. ANN. CODE art. 33, § 27-1(a) (Supp. 1972); MISS. CODE ANN. § 3203-302 (Supp. 1972); MO. ANN. STAT. § 112.010 (Supp. 1973); MONT. REV. CODES ANN. § 23-3701 (Supp. 1973); NEB. REV. STAT. § 32-803 (1968), *as amended*, (Supp. 1972); N.M. STAT. ANN. § 3-6-3 (1970); N.Y. ELECTIONS LAW § 117(1) (McKinney 1964) (if resident of New York City, then absent from that city); N.C. GEN. STAT. ANN. § 163-226 (1972); N.D. CENT. CODE ANN. § 16-18-01 (1971); OHIO REV. CODE ANN. § 3509.02 (Page 1972); OKLA. STAT. ANN. tit. 26, § 326 (Supp. 1972); ORE. REV. STAT. § 253.010(1)(a) (1971); PA. STAT. ANN. § 3146.1(j) (Supp. 1973); TENN. CODE ANN. § 2-602 (Supp. 1972); TEX. ELECTION CODE art. 5.05, subdiv. 1 (Supp. 1972); UTAH CODE ANN. § 20-6-1 (Supp. 1973); VA. CODE ANN. § 24.1-227(1) (absence from city also); W. VA. CODE ANN. § 3-3-1(3) (1971); WYO. STAT. ANN. § 22.1-135 (Supp. 1973) (absence from "place of residence").

12. CONN. GEN. STAT. ANN. § 9-135 (Supp. 1973); N.J. STAT. ANN. § 19:57-3 (Supp. 1973); R.I. GEN. LAWS ANN. § 17-20-1 (1969).

13. COLO. REV. STAT. ANN. § 49-25-2 (Supp. 1965); MASS. ANN. LAWS ch. 54, § 86 (Supp. 1972); MICH. COMP. LAWS ANN. § 168.758(1)(e) (Supp. 1973); N.H. REV. STAT. ANN. §§ 60:1 (1970), :26 (Supp. 1972) (N.H. REV. STAT. ANN. § 60:17 (1970) requires the spouse of an armed serviceman to be absent from the city, but applies no such requirement to the serviceman); VA. CODE ANN. § 24.1-227(1) (1973) (absence from county also); WIS. STAT. ANN. § 22.1-135 (Supp. 1973).

14. ALASKA STAT. § 15.20.010(1) (1962); ARIZ. REV. STAT. ANN. § 16-1101A (Supp. 1972); CAL. ELECTIONS CODE § 14620 (West 1961); GA. CODE ANN. § 34-1401 (Supp. 1972) (election district); MINN. STAT. ANN. § 207.02 (Supp. 1973); NEV. REV. STAT. § 293.313(1)(a) (1971); S.D. COMP. LAWS ANN. § 12-19-1 (Supp. 1973); WASH. REV. CODE ANN. § 29.36.010 (1) (Supp. 1972).

15. ALASKA STAT. § 15.20.010(2) (1962); ARIZ. REV. STAT. ANN. § 16-1101A (Supp. 1972); ARK. STAT. ANN. § 3-903(b) (Supp. 1971); CAL. ELECTIONS CODE § 14620 (West 1961); COLO. REV. STAT. ANN. §§ 49-14-1 (1964), 49-25-2 (Supp. 1965); CONN. GEN. STAT. ANN. § 9-135 (Supp. 1973); DEL. CODE ANN. tit. 15, § 5503(b) (Supp. 1970); D.C. CODE ANN. § 1-1109(b) (Supp. 1972); FLA. STAT. ANN. § 97.021(6)(a) (Supp. 1972); GA. CODE ANN. § 34-1401 (Supp. 1972); HAWAII REV. STAT. § 15-12(2) (Supp. 1971); IDAHO CODE § 34-1002A(4) (Supp. 1973); ILL. ANN. STAT. ch. 46, § 19-1 (Smith-Hurd Supp. 1973); IND. ANN. STAT. § 29-4901 (Supp. 1972); IOWA CODE ANN. § 53.1(2) (1973); KAN. STAT. ANN. § 25-1229 (Supp. 1972); KY. REV. STAT. § 125.220 (Supp. 1972); MD. ANN. CODE art. 33, § 27-2(a) (Supp. 1972); MASS. ANN. LAWS ch. 54, § 86 (Supp. 1972); MICH. COMP. LAWS ANN. § 168.758(1)(a) (Supp. 1972); MINN. STAT. ANN. § 207.02 (Supp. 1973); MISS. CODE ANN. § 3203-302(4) (Supp. 1972); MO. ANN. STAT. § 112.010 (Supp. 1973); MONT. REV. CODES ANN. § 23-3701 (Supp. 1973); NEB. REV. STAT. § 32-802 (1968); NEV. REV. STAT. § 293.313 (1)(b) (1971); N.H. REV. STAT. ANN. §§ 60:1 (1970), :26 (Supp. 1972); N.J. STAT. ANN. § 19:57-3 (Supp. 1973); N.M. STAT. ANN. § 3-6-3 (1970); N.Y. ELECTIONS LAW § 117-a

workers stationed at precincts other than their own,[17] to persons over sixty-five years of age,[18] and to persons whose religious beliefs prevent them from attending the polls on election day.[19]

Under all except the most liberal statutes, some qualified voters who are not able to reach the polls are not eligible for absentee ballots. For instance, parents with very young or sick children may be unable to leave their homes to vote, yet a state that grants absentee ballots only to voters who are themselves ill would deny absentee ballots to the parents. Similarly, jurors and business people who are involved in all-day conferences or called out of town might be denied absentee ballots.

Since legislative action or inaction has caused their inability to cast a ballot, these citizens might be expected to seek relief in the courts. There have been two constitutional challenges to absentee-voting legislation. In the first, voters, otherwise eligible to vote in a general election, who did not meet state requirements for obtaining absentee ballots objected to those requirements. In the second, voters otherwise eligible to vote in a primary election objected to a state statutory scheme that provides absentee ballots only in general elections. The Supreme Court rejected the first challenge essentially because the issue was not properly framed. The second challenge was

(McKinney 1964), *as amended*, (McKinney Supp. 1972); N.C. GEN. STAT. ANN. § 163-226(a)(2) (1972); N.D. CENT. CODE ANN. § 16-18-01 (1971); OHIO REV. CODE ANN. § 3509.02 (Page 1972) (requires entry into hospital); OKLA. STAT. ANN. tit. 26, § 326 (Supp. 1972); ORE. REV. STAT. § 253.010(1)(a) (1971); PA. STAT. ANN. tit. 25, § 3146.1(k) (Supp. 1973); R.I. GEN. LAWS ANN. § 17-20-1 (1969); S.D. COMP. LAWS ANN. § 12-19-1 (Supp. 1973); TENN. CODE ANN. § 2-602(c) (Supp. 1972); TEX. ELECTION CODE art. 5.05, subdiv. 1 (Supp. 1972); UTAH CODE ANN. § 20-6-1 (Supp. 1973); VT. STAT. ANN. tit. 17, § 121(1) (1968); VA. CODE ANN. § 24.1-227(4) (1973); WASH. REV. CODE ANN. § 29.36.010(2) (Supp. 1972); W. VA. CODE ANN. § 3-3-1(1) (1971); WIS. STAT. ANN. § 6.85 (Supp. 1973); WYO. STAT. ANN. § 22.1-135 (Supp. 1973).

16. ALA. CODE tit. 17, § 64(16)(a) (Supp. 1972); CONN. GEN. STAT. ANN. § 9-135 (Supp. 1973); LA. REV. STAT. ANN. § 18.1071 (1969); MISS. CODE ANN. § 3203-302(1) (Supp. 1972); N.J. STAT. ANN. § 19:57-3 (Supp. 1973); N.Y. ELECTIONS LAW § 117(3)(c) (McKinney 1964); S.C. CODE OF LAWS § 23-442(2)(e) (Supp. 1971); VA. CODE ANN. § 24.1-227(3) (1973).

17. FLA. STAT. ANN. § 97.021(6)(b) (Supp. 1972); GA. CODE ANN. § 34-1401 (Supp. 1972); ILL. ANN. STAT. ch. 46, § 19-1 (Smith-Hurd Supp. 1973); IND. ANN. STAT. § 29-4901 (Supp. 1972); MICH. COMP. LAWS ANN. § 168.758(1)(c) (Supp. 1972); W. VA. CODE ANN. § 3-3-1 (1971).

18. ARIZ. REV. STAT. ANN. § 16-1101A (Supp. 1972); MICH. COMP. LAWS ANN. § 168.758 (1)(d) (Supp. 1972); R.I. GEN. LAWS ANN. § 17-20-1 (1969) ("old age" or "other physical infirmities"); WYO. STAT. ANN. § 22.1-135 (Supp. 1973) ("old age").

19. ARIZ. REV. STAT. ANN. § 16-1101B (Supp. 1972); CAL. ELECTIONS CODE § 14620 (West 1961); COLO. REV. STAT. ANN. §§ 49-14-1 (1964), 49-25-2 (Supp. 1965); FLA. STAT. ANN. § 97.021(6)(c) (Supp. 1972); HAWAII REV. STAT. § 15-12(2) (Supp. 1971); ILL. ANN. STAT. ch. 46, § 19-1 (Smith-Hurd Supp. 1973); MICH. COMP. LAWS ANN. § 168.758(1)(b) (Supp. 1972); MINN. STAT. ANN. § 207.02 (Supp. 1973); MO. ANN. STAT. § 112.010 (Supp. 1973); N.J. STAT. ANN. § 19:57-3 (Supp. 1973); N.M. STAT. ANN. § 3-6-3 (1970); OHIO. REV. CODE ANN. § 3509.02 (Page 1972); TENN. CODE ANN. § 2-602 (Supp. 1972); TEX. ELECTION CODE art. 5.05, subdiv. 1 (Supp. 1972); VT. STAT. ANN. tit. 17, § 121(i) (1968); WASH. REV. CODE ANN. § 29.36.010(3) (Supp. 1972); WIS. STAT. ANN. § 6.85 (Supp. 1973); WYO. STAT. ANN. § 22.1-135 (Supp. 1973).

rejected by a three-judge lower court and affirmed without opinion by the Supreme Court. The murky status of the law arising out of this combination of a poorly presented case and a summary affirmance without opinion was further clouded by a subsequent Supreme Court opinion that suggested that a different result might have been reached in the first case had the issue been properly framed.

The first case was *McDonald v. Board of Election Commissioners.*[20] The appellants, a class of unsentenced inmates awaiting trial in the Cook County jail, could not vote in person at their precincts on the day of a primary election because they were detained in jail, charged with nonbailable offenses or unable to raise bail money. Although they were all qualified voters in Cook County and had made timely application for absentee ballots, the Board of Election Commissioners had denied their requests on the ground that the Illinois Election Code did not provide for absentee ballots for members of their class. The applicable sections of the Code defined four groups who were entitled to absentee ballots: (1) those absent from the county of their residence on the day of the election for any reason, (2) those physically incapacitated, (3) those whose religious observances prevented them from attending the polls, and (4) those acting as poll watchers in precincts other than their own.[21] In their attack on this statutory scheme the appellants presented two arguments based on the equal protection clause of the fourteenth amendment. First, they contended that the second legislative classification described above arbitrarily distinguished between medically incapacitated and "judicially" incapacitated voters. Second, they maintained that the statute was also arbitrary in that it denied them absentee ballots because they were Cook County residents confined in a Cook County jail, while it allowed absentee ballots to residents jailed outside Cook County as "voters absent from the county of their residence."

The Court's disposition of *McDonald* was largely dictated by its selection of a standard of review to test the validity of the state's classification under the equal protection clause. In previous cases dealing with voting the Court had used a strict standard of review;[22] it had required that the classification be precisely tailored so as to accomplish the state's purpose and that the purpose be a compelling one.[23]

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20. 394 U.S. 802 (1969).

21. *See* ILL. REV. STAT. ch. 46, § 19-1 (Smith-Hurd Supp. 1973).

22. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965); Reynolds v. Sims, 377 U.S. 533 (1964).

23. *E.g.*, Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972). The only challenged voting requirements that have survived strict judicial scrutiny are the fifty-day durational residency requirements in Marston v. Lewis, 410 U.S. 679 (1973), and Burns v. Fortson, 410 U.S. 686 (1973). *See also* Dunn v. Blumstein, *supra*, at 343-44, 347; Abate v. Mundt, 403 U.S. 182, 185-87 (1970).

In *McDonald* the Court distinguished these earlier cases. First, it noted that the distinctions made by Illinois were not based on suspect classifications such as wealth or race. Second, the court could not find a clear showing that the *McDonald* appellants had in fact been disenfranchised:[24] "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 own."[25] Rather, the Court pointed out, the case involved a claimed right to absentee ballots and did not involve the right to vote. Because of the failure to demonstrate a denial of a fundamental right such as the right to vote, the Court applied the more traditional equal protection analysis: "The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal."[26] This rational relationship test is a much less stringent standard of review than the compelling interest test; in fact, under its guise the Court has often upheld classifications that appeared to be arbitrary on their face.[27]

Applying the rational relationship standard to the appellant's first argument in *McDonald,* the Court found that the classification of medically incapacitated voters was reasonable, since such persons, in order to obtain absentee ballots, had been required to present affidavits from their doctors in order to demonstrate their absolute inability to reach the polls, whereas the pretrial detainees had not shown that they were "absolutely prohibited" from voting.[28] The Court rejected the appellants' second argument on the ground that the difference in treatment between those detained in the county of their residence and those held elsewhere might have been motivated by a legislative fear that officials would try to influence the votes of local inmates.[29]

The Court emphasized the remedial nature of the Illinois absentee-voting legislation. The state, it said, had simply made it easier for certain classes of people to vote; it had not denied the vote to anyone.[30] The Court noted that Illinois had consistently expanded

24. 394 U.S. at 807-08.

25. 394 U.S. at 808 n.6.

26. 394 U.S. at 809.

27. *E.g.,* Richardson v. Belcher, 404 U.S. 78 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948).

28. 394 U.S. at 809-10.

29. 394 U.S. at 810.

30. 394 U.S. at 809-10.

the number of groups included in the absentee-voting legislation and that the present scheme was more liberal than many of those in force in other states.[31] The fact that Illinois did not go further and allow all possible classes of voters to cast absentee ballots "should not render void its remedial legislation, which need not . . . 'strike at all evils at the same time.' "[32]

The *McDonald* appellants made a critical mistake in failing to request other means of voting besides absentee ballots. As a result, their argument that they had been denied the right to vote was not presented in the clearest possible terms.

In *Fidell v. Board of Elections*,[33] New York's election law, which makes provision for absentee ballots only in general elections,[34] was challenged. The plaintiffs alleged that they would be unable to vote in person in a primary election, and thus avoided the error made in *McDonald*, but they too were unsuccessful in their attempt to obtain absentee ballots. One of the individual named plaintiffs was on active duty with the United States Coast Guard and would be stationed outside the state on the date of the June 1972 primary election. Another attended college outside New York. A third, an airline stewardess, would be out of the state on election day if her work schedule so required. A fourth was incapacitated and physically unable to travel to a polling place. They claimed that by requiring them to vote in person if they wished to vote in the primary election at all, the statute denied them the vote in violation of their right to equal protection of the law and their right to travel.[35]

The Board of Elections contended that providing absentee ballots in primary elections would be impractical and expensive, for last minute changes in the candidates frequently require election eve modifications in the ballots, and a different ballot is required for each of the state's 12,750 election districts.[36] The court found that the state had demonstrated a rational basis for its action, refused to use the strict, compelling interest standard of judicial review, and stated summarily that "[t]he cases applying such stringent standards as a compelling state interest and striking down state practices have involved exclusion from the ballot of a class of voters on grounds far different from those presented in the present case."[37]

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31. 394 U.S. at 810-11.

32. 394 U.S. at 811, *quoting* Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 610 (1935).

33. 343 F. Supp. 913 (E.D.N.Y.), *aff'd.*, 409 U.S. 972 (1972).

34. N.Y. ELECTIONS LAW § 117 (McKinney 1964), *as amended*, (McKinney Supp. 1972). New York is one of only four states with such a restriction. *See* note 10 *supra*.

35. Plaintiffs also claimed that the state was required by the Voting Rights Act Amendments of 1970 to provide them with absentee ballots, but the lack of any provision that so provided caused them to abandon that argument. 343 F. Supp. at 916.

36. 343 F. Supp. at 915.

37. 343 F. Supp. at 915.

Citing *McDonald*, the court focused on the remedial nature of primaries, which, it noted, allowed for more citizen participation in candidate selection than did the procedures used in states that had no primary elections:

> While it is true as a general proposition that the right to vote in primaries receives the same constitutional protection as the right to vote in general elections, . . . it is also true that many states nominate candidates, or choose delegates to national nominating conventions, by means of caucuses or conventions at which, if there is indeed any provision at all for general participation, party members are required to be physically present in order to record their choices. . . . It is our view that when the legislature decides to employ the primary, it is not constitutionally required to do more than avoid arbitrary or invidious classifications.[38]

The complaint was dismissed, and the Supreme Court affirmed without opinion.

The effect of the Supreme Court's decisions in *McDonald* and *Fidell* is unclear. *McDonald* can be explained by inadequate argument by counsel; *Fidell* applies only to primary elections. Moreover, while a summary affirmance, such as that made by the Supreme Court in *Fidell*, is technically a decision on the merits,[39] the Court has indicated that such affirmances are not always to be given full precedential value. For example, in *Dunn v. Blumstein*,[40] the state of Tennessee argued that a challenge to its durational residence requirements for voting was foreclosed by a 1965 summary affirmance of a case that upheld similar requirements in Maryland.[41] The Court brushed aside the earlier case, noting that it had been decided summarily, without oral argument, and that it had subsequently become clear to the Court that "a more exacting test is required for any standard that 'place[s] a condition on the exercise of the right to vote.' "[42]

Thus, it appears that the Supreme Court has not yet spoken definitively on the existence or nonexistence of a right to an absentee ballot. When the Supreme Court next considers the issue, the decision will turn on the standard of review used to test the classifications

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38. 343 F. Supp. at 916.

39. *E.g.*, Barton v. Sentner, 353 U.S. 963, 963 (1957) (Burton & Clark, JJ., dissenting). *See* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 197 (4th ed. 1969).

40. 405 U.S. 330 (1972).

41. 405 U.S. at 337, *citing* Drueding v. Devlin, 380 U.S. 125 (1965).

42. 405 U.S. at 337, *quoting* Bullock v. Carter, 405 U.S. 134, 143 (1972). The disinclination to give summary affirmances full precedential weight may become more common as a result of the Court's swollen docket. Because of its large caseload, in recent years the Court has summarily upheld well over half the appeals that have come before it. *See* R. STERN & E. GRESSMAN, *supra* note 39, at 194. *See generally* P. FREUND, THE SUPREME COURT OF THE UNITED STATES 14-15 (1961); Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 74 n.365 (1964).

established by a state.[43] Although the compelling interest standard is commonly used in voting cases, the Supreme Court has explained that not every limitation or incidental burden placed on the franchise will trigger strict scrutiny under the equal protection clause.[44] The lower court in *Fidell* found that the denial of the use of absentee ballots in primary elections was such an exception to the general rule. The court's logic, however, is difficult to accept. Although recognizing that, as a general proposition, the Supreme Court has afforded the same constitutional protections to the right to vote in primaries as are afforded to the right to vote in general elections,[45] the court, citing *McDonald*, concluded that, because primaries are "remedial" in nature, they should be treated differently in regard to the question of a voter's right to receive an absentee ballot.[46]

However, the remedial language in *McDonald* did not go to whether the rational basis standard should be used in evaluating plaintiff's equal protection argument, but was rather one factor in the Court's *application* of the rational basis test, which had already been accepted as appropriate for other reasons. Prominent among these reasons was the failure of the plaintiffs to claim a total denial of the right to vote, a failure that was not repeated in *Fidell*. The *McDonald* Court said:

> [The strict standard] 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. . . . We are then left with the more traditional standards for evaluating appellants' equal protection claims . . . . The distinctions drawn by the challenged statute . . . will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of [a legitimate state end]. . . . With this much discretion, a legislature traditionally has been allowed to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" . . . .[47]

43. The classification involved in absentee-ballot legislation could be one of several types. For example, in *McDonald*, the plaintiffs objected to a state statute that allowed absentee ballots to certain people who were unable to get to the polls but not to others. It is unclear whether the assailed classification in *Fidell* was (a) the distinction between those voters who cannot vote in person in general elections, who are given absentee ballots, and those who cannot vote in person in primary elections, who have no alternative means of exercising the franchise, or (b) the distinction between those able to go to the polls in person to vote in primary elections and those unable to do so.

44. Bullock v. Carter, 405 U.S. 134, 143 (1972).

45. 343 F. Supp. at 916, *citing* Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941).

46. 343 F. Supp. at 916.

47. 394 U.S. at 807-09, *quoting* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955).

This language can be contrasted with previous voting cases in which the strict standard was applied; in those cases the Court had not tolerated delay in granting the right to vote.[48]

McDonald, and perhaps *Fidell*, appear to be the only instances in which it could be argued that the Supreme Court has refused to apply a strict standard of review to classifications by means of which a state has effectively denied the vote to some of its citizens. The present Court evidently feels that the proper standard of review is still an open question, at least where the plaintiffs have alleged that all alternatives have been foreclosed. In *Goosby v. Osser*,[49] the plaintiffs objected to a statutory scheme that required that polling places be open to the public—thus eliminating the possibility of facilities in jails and asylums—and that also prohibited those confined in penal institutions from voting by absentee ballot.[50] A federal district judge held that the plaintiff's claim that the scheme was unconstitutional presented no case or controversy[51] and dismissed the complaint. The court of appeals affirmed, apparently on the ground that the claims were wholly insubstantial under *McDonald*, which was found to be dispositive as to the standard used to review statutes that set forth the mechanics of controlling the exercise of the franchise (*e.g.*, establishing polling places, requirements for obtaining absentee ballots), as opposed to statutes controlling its selective distribution (*e.g.*, residency requirements for registering to vote).[52] The Supreme Court disagreed and pointed out that the plaintiffs in *Goosby*, unlike those in *McDonald*, alleged that they were absolutely prohibited from voting.[53] The Court went on to state: "We neither decide nor intimate any view upon the merits. It suffices that we hold that *McDonald* does not 'foreclose the subject' of petitioners' challenge to the Pennsylvania statutory scheme."[54] The Court then remanded the

48. *E.g.*, Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).

49. 409 U.S. 512 (1973).

50. 409 U.S. at 513-14. *See* Devlin v. Osser, 434 Pa. 408, 254 A.2d 303 (1969); PA. STAT. ANN. tit. 25, §§ 623-17(e), -20 (1963), 2602(w)(12) (Supp. 1973).

51. He reached this conclusion because the principal defendants admitted that the statutes were unconstitutional. 409 U.S. at 514-15 & 515 n.3.

52. 452 F.2d 39, 40 (3d Cir. 1971).

53. 409 U.S. at 521-22.

54. 409 U.S. at 522. Justice Marshall, sitting as a Circuit Justice, had occasion to address the issue in O'Brien v. Skinner, 409 U.S. 1240 (1972). Seventy-two prisoners, who were in jail serving sentences for misdemeanors or awaiting trial, challenged an absentee-voting statute that allowed ballots only to those whose confinement in state institutions was due to physical disability. Although Justice Marshall ultimately decided that the prisoners applied to him at too late a date, four days before the election, he did state in dictum:

> I am not persuaded, however, that *McDonald* governs this case. . . . In *McDonald* there was "nothing in the record to indicate that the Illinois statutory scheme [had] an impact on appellants' ability to exercise the fundamental right to vote." . . . Here, in contrast, it seems clear that the State has rejected alternative means

case to a three-judge district court for a hearing on the merits. Therefore, it is still possible that the stricter standard will be used in evaluating state requirements that restrict access to absentee ballots.

As indicated above, the Court has adopted the strict approach in other voting situations and has held that, because of the importance of voting rights, classifications "which might invade or restrain them must be closely scrutinized and carefully confined."[55] The use of this standard in situations like *Fidell* could arguably be rejected on the ground that the individual voter, and not the state, is responsible for any possible disenfranchisement. It could be said that a voter who has chosen to be absent on election day, like a person who waits to vote after the polls have closed, has voluntarily foregone the right to vote. Some absences, however, are clearly not voluntary. For instance, one named plaintiff in *Fidell* was a member of the armed forces. The plaintiffs in *McDonald* were detained by the state itself, although they had been neither tried nor convicted of any crimes. Other absences, while not caused by the state, are nevertheless far from dictated by individual choice. Physical disability, such as that suffered by one *Fidell* plaintiff, often prevents voters from reaching the polls.

Even those actions that appear voluntary on the surface are often in fact beyond the control of the wandering voter. A student attending a school away from his voting district may not be able to afford to attend school near home or to return on election day,[56] and some employees may in effect be forced to risk their jobs in order to stay in the area to vote. *McDonald* recognized that many such persons, including "those serving on juries within the county of their residence, mothers with children who cannot afford a baby sitter, persons attending ill relations within their own county, doctors who are often called on to do emergency work, and businessmen called away from their precincts on business," are ineligible to receive absentee ballots under Illinois law.[57]

Even if these absences are considered to be voluntary, voluntariness should not be a substantial factor in deciding upon a standard of review. In *Kramer v. Union Free School District No. 15*,[58] the

> by which applicants might exercise their right to vote. Deprivation of absentee ballots is therefore tantamount to deprivation of the franchise itself . . . .
> 409 U.S. at 1241.

55. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966).

56. The problem of the student voter may be somewhat alleviated by judicial decisions allowing students to establish residences in their college towns, *see, e.g.*, Wilkins v. Bentley, 385 Mich. 670, 189 N.W.2d 423 (1971), but not all courts have recognized this possibility. *See, e.g.*, Gorenberg v. Onondaga County Bd. of Elections, 38 App. Div. 2d 145, 328 N.Y.S.2d 198 (1971).

57. 394 U.S. at 810 n.8.

58. 395 U.S. 621 (1969). *See also* Dunn v. Blumstein, 405 U.S. 330 (1972), where the state residency requirement gave the voter a choice between either staying in his old state and voting or exercising his constitutional right to travel by moving to a new state and not voting. The Court held the requirement unconstitutional.

Court struck down a state statute that required voters in school district elections to be owners or lessors of real property in the district or parents or guardians of children enrolled in the local public schools. The plaintiff, a stockbroker, was a bachelor who lived with his parents. Although his ineligibility to vote was arguably the result of his choice not to rent or buy a dwelling place, the Court did not find that factor significant.

In short, the proper test to be applied to any state classification that denies absentee ballots to some class of qualified state electors is the strict test, which requires that the state defend its classification by showing that it is precisely tailored and that it serves a compelling governmental interest. It is unlikely that a state will be able to meet this burden. For example, one of the state interests posited to justify restricting the availability of absentee ballots to certain defined classes of voters is the prevention of fraud.[59] It is doubtful whether this justification would survive judicial scrutiny. If the state is to deny the absentee ballot to certain classes of voters on this basis, it must narrowly classify voters as to their proclivity to commit fraud. The classifications now made by most states have nothing to do with the prevention of fraud.

If the state does not allow any voters to use absentee ballots, justifications for the consequent unequal treatment between those who can and those who cannot vote in person might again center on fraud. But there are other, less drastic means to the same end, for the elaborate mechanisms already established by the states to protect their electoral processes from fraud by those who vote in person[60] can also be used to safeguard them against fraud on the part of absentee voters. For example, while a state does have a legitimate interest in preventing an illegitimate invasion by nonresident voters,[61] absentee voters, by definition, must fulfill all voting qualifications, including residence, in order to obtain a ballot. The exclusion of

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59. *See, e.g.*, Bullington v. Grabow, 88 Colo. 561, 298 P. 1059 (1931); Haggard v. Misko, 164 Neb. 778, 83 N.W.2d 483 (1957); Matter of Baker, 126 Misc. 49, 213 N.Y.S. 524 (Sup. Ct. 1925). Courts often obfuscate discussions of the possibilities of fraud in the electoral process with discourses on democracy. In a case involving allegedly illegal absentee ballots, the Supreme Court of Florida expressed its concern about safeguarding election results:

> No democracy can long endure if the electorate is corrupted and enticed to depart from the constitutional pattern on election day. . . . [T]he most abject traitor to democratic institutions is the one who buys or intimidates the electorate for personal gain and next to him is the voter who habitually goes into the open market and pawns his vote to anyone who will purchase it. They are the termites and screw-worms of democracy and if not exterminated, they will surely wreck the ship of state as the latter will destroy the house or the dumb creature on which they feed. . . . If democracy is as precious as we profess it to be, why not pursue its enemies as relentlessly as we do the boll weevil, the tobacco bug, the Mediterranean fruit fly or the bean beetle?

State *ex rel.* Whitley v. Rinehart, 140 Fla. 645, 651-52, 192 S. 819, 822 (1939).

60. *See, e.g.*, N.Y. ELECTIONS LAW §§ 190-226 (McKinney 1964), *as amended*, (McKinney Supp. 1972) (detailed procedures for conduct of elections).

61. Dunn v. Blumstein, 405 U.S. 330, 345 (1972).

would-be absentee voters does nothing to further the state's valid goal of ensuring bona fide residence. Another valid fear is the use of fictitious voter names. Again, the state also faces this problem with regard to those who vote in person. A comparison of signatures on ballot applications with registration lists is a sufficient safeguard in both cases. Double voting can be prevented by the reasonable precaution of cross-checking lists of those who vote in person with lists of absentee voters.

The Supreme Court's disposition of *Dunn v. Blumstein*[62] is evidence that state schemes premised on the prevention of fraud that do not always achieve their goals in the least restrictive manner may not survive strict scrutiny by the courts. The Court in *Dunn* determined that, while durational residence laws may have once been necessary to deter voting by nonresidents, that objective is now adequately fulfilled by the voter registration cutoff date, which gives a state a reasonable length of time before an election to verify a voter's residence. In the absence of proof that a longer period than that provided by the registration cutoff is necessary, any further residence requirement constitutes an unconstitutional deprivation of the vote.[63]

The reasoning in *Dunn* can be applied to absentee-voting statutes. In an age of increasing computerization and sophisticated recording techniques, mere allegations of potential fraud should not be sufficient to restrict the availability of absentee ballots. The congressional determination that seven days is enough time to detect fraud in the use of absentee ballots in presidential and vice-presidential elections[64] is one answer to state claims that further limitations are necessary.

Additional costs and administrative burdens are the only other justifications that have been advanced for a state's denial of absentee ballots. In *Fidell*, New York claimed that last-minute changes in the ballot plus the necessity of a different ballot for each election district made it impractical to provide absentee ballots in primaries.[65] The credibility of this argument is greater in *Fidell* than in *McDonald*, where the step of providing absentee ballots to certain groups voting in the election in question had already been taken. It may be that the additional cost of enlarging the number of eligible classes would

62. 405 U.S. 330 (1972).

63. 405 U.S. at 336. The Court also noted that the Voting Rights Act Amendments of 1970, discussed in note 4 *supra*, abolished residence requirements for presidential and vice-presidential elections and established the permissible registration cutoff at thirty days before the election. It stated that "[t]here is no reason to think that what Congress thought was unnecessary to prevent fraud in presidential elections should not also be unnecessary in other elections." 405 U.S. at 349 n.19.

64. *See* 42 U.S.C. § 1973aa-1(d) (1970).

65. *See* text accompanying note 36 *supra*.

be minimal, since the machinery for processing absentee ballots already exists. But even in cases where the government has not set up machinery for absentee ballots, it remains the government's responsibility to run elections and bear the costs incurred.[66] The basic mechanism for processing votes exists; the state must only supply and count the extra ballots. Moreover, fears of increases in administrative costs cannot be ordained as constitutional justifications to deny the vote.[67]

Thus, if the compelling interest standard is adopted, as it should be, it is likely that state limitations on access to absentee ballots when no alternative means of voting are available will be found to be unconstitutional on equal protection grounds. If a rational basis test is applied, however, it is likely that the present state statutory schemes will be upheld.

66. *See, e.g.*, Bullock v. Carter, 405 U.S. 134, 148-49 (1972), where Chief Justice Burger stated: "Viewing the myriad governmental functions supported from general revenues, it is difficult to single out any of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern."

67. *See* Bullock v. Carter, 405 U.S. 134, 148-49 (1972).