

The Burger Court Opinion Writing Database

Connell v. Higginbotham

403 U.S. 207 (1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

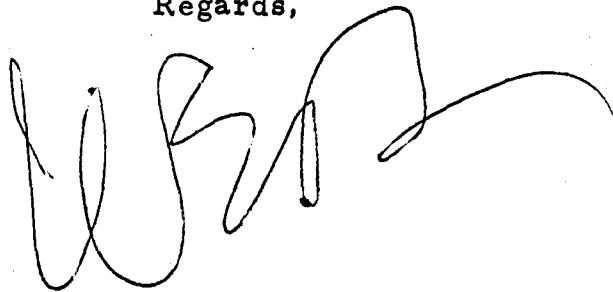
January 15, 1971

Re: No. 79 - Connell v. Higginbotham

MEMORANDUM TO THE CONFERENCE

After reviewing the files in this case and preparing a full-scale opinion, I concluded we will have said enough on the subject of "oaths" this Term. Therefore, I have reduced the disposition to a Per Curiam and it is enclosed. I believe it fully reflects the Conference vote to reverse in part and affirm in part.

Regards,



*Join with
Ginsburg?
Stevens & Brennan
All would concur
as a matter of course*

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

No. 79 - Connell v. Higginbotham

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

Per Curiam.

From: The Chief Justice
This is an appeal from an action commenced in the United
Circulated: JAN 15 1971

Recirculated:
States District Court for the Middle District of Florida challenging

the constitutionality of sections 876.05 - 876.10 of Fla. Stat. Ann.,
and the various loyalty oaths upon which appellant's employment as
a school teacher was conditioned. The three-judge U.S. District
Court declared three of the five clauses contained in the oaths to be
unconstitutional, ^{1/} and enjoined the state from conditioning employ-
ment on the taking of an oath including the language declared uncon-
stitutional. The appeal is from that portion of the District Court
decision which upheld the remaining two clauses in the oath: I do

^{1/}
The clauses declared unconstitutional by the court below
required the employee to swear: (a) "that I am not a member of the
Communist Party"; (b) "that I have not and will not lend my aid,
support, advice, counsel or influence to the Communist Party"; and
(c) "that I am not a member of any organization or party which be-
lieves in or teaches, directly or indirectly, the overthrow of the
Government of the United States or of Florida by force or violence."

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

February 5, 1971

CHAMBERS OF
THE CHIEF JUSTICE

Re: No. 79 -- Connell v. Higginbotham

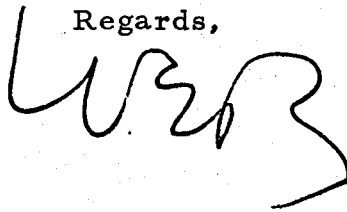
MEMORANDUM TO THE CONFERENCE:

I have Judge Blackmun's memo of February 2 proposing an alternative treatment.

I would be quite willing to deal with the case on the basis of Justice Stewart's position implemented by Harry Blackmun's proposal. Justices Black, Douglas and Brennan do not agree.

Justices Harlan and White have already joined the Per Curiam. If they will join in the alternative disposition now suggested there will be a court for that result.

Regards,



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

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

See pg 2

Printed
1st DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 79.—OCTOBER TERM, 1970

Recirculated: **MAR 5 1971**

Stella Connell, Appellant, } On Appeal From the United
v. } States District Court for
James M. Higginbotham } the Middle District of
et al. } Florida.

[March —, 1971]

PER CURIAM.

This is an appeal from an action commenced in the United States District Court for the Middle District of Florida challenging the constitutionality of §§ 876.05–876.10 of Fla. Stat. Ann., and the various loyalty oaths upon which appellant's employment as a school teacher was conditioned. The three-judge U. S. District Court declared three of the five clauses contained in the oaths to be unconstitutional,* and enjoined the State from conditioning employment on the taking of an oath including the language declared unconstitutional. The appeal is from that portion of the District Court decision which upheld the remaining two clauses in the oath: I do hereby solemnly swear or affirm (1) "that I will support the Constitution of the United States and of the State of Florida"; and (2) "that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence."

*The clauses declared unconstitutional by the court below required the employee to swear: (a) "that I am not a member of the Communist Party"; (b) "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party"; and (c) "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

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

CHAMBERS OF
THE CHIEF JUSTICE

March 31, 1971

No. 79 - Connell v. Higginbotham

MEMORANDUM TO THE CONFERENCE:

On the threshold of April is perhaps a good time to eliminate areas of needless tension and I therefore enclose a revised draft Per Curiam. I now leave all "obvious historical truisms" to stand or fall on their own obviousness.

This should take care of the dissenting views but will not meet Potter Stewart's remand position, so I assume his split concurrence will stand.

Throughout the remainder of the Term we will need to conserve our resources for more important debates than on truisms!

Regards,

W.B.

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

From: The Chief Justice
SUPREME COURT OF THE UNITED STATES
Circulated: _____

No. 79.—OCTOBER TERM, 1970

Recirculated: MAR 31 1971

Stella Connell, Appellant, } On Appeal From the United
v. } States District Court for
James M. Higginbotham } the Middle District of
et al. } Florida.

[April —, 1971]

PER CURIAM.

This is an appeal from an action commenced in the United States District Court for the Middle District of Florida challenging the constitutionality of §§ 876.05–876.10 of Fla. Stat. Ann., and the various loyalty oaths upon which appellant's employment as a school teacher was conditioned. The three-judge U. S. District Court declared three of the five clauses contained in the oaths to be unconstitutional,* and enjoined the State from conditioning employment on the taking of an oath including the language declared unconstitutional. The appeal is from that portion of the District Court decision which upheld the remaining two clauses in the oath: I do hereby solemnly swear or affirm (1) "that I will support the Constitution of the United States and of the State of Florida"; and (2) "that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence."

* The clauses declared unconstitutional by the court below required the employee to swear: (a) "that I am not a member of the Communist Party"; (b) "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party"; and (c) "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

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

CHAMBERS OF
THE CHIEF JUSTICE

June 3, 1971

Re: No. 79 - Connell v. Higginbotham

MEMORANDUM TO THE CONFERENCE:

My records show that Justices Black, Douglas, Harlan, White and Blackmun joined my per curiam.

Justices Marshall and Brennan have joined in a dissent.

Justice Stewart concurs in part and dissents in part.

Absent further word this should come down Monday.

Regards,

WBB

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1

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

CHAMBERS OF
JUSTICE HUGO L. BLACK

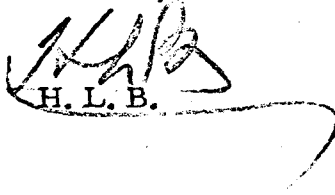
January 18, 1971

Dear Chief,

Re: No. 79 - Connell v. Higginbotham

I like most of your proposed per curiam in the above case and would be delighted to join it if you would take out the clause on page 3 saying: "Although beliefs are by no means irrelevant to action or prediction of future acts." With this deletion I shall join the opinion enthusiastically. Otherwise I regret I shall have to concur in the judgment, noting my disagreement as above.

Sincerely,


H. L. B.

The Chief Justice

cc: Members of the conference

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

CHAMBERS OF
JUSTICE HUGO L. BLACK

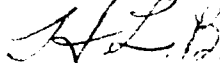
February 3, 1971

Dear Harry:

Re: No. 79- Connell v. Higginbotham

I have your memorandum suggesting we certify a question to the Supreme Court of Florida as to the interpretation of one part of the Florida Loyalty Oath. I have carefully considered your suggestion but regret to tell you that I am opposed to it.

Sincerely,



H. L. B.

Mr. Justice Blackmun

cc: Members of the Conference

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

CHAMBERS OF
JUSTICE HUGO L. BLACK

March 18, 1971

Dear Thurgood,

No. 79 - Connell v. Higginbotham

Please join me in your concurrence.

Sincerely,

H. L. B.

Mr. Justice Marshall.

NOT REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

T.M.

697
21 ✓

April 2, 1971

Re: No. 79- Connell v. Higginbotham

Dear Chief,

I have your Per Curiam circulation of
March 31st in this case and note that it took out
the sentences to which I had some objections. I
am glad to agree to the opinion in its present form.

Sincerely,


H. L. B.

The Chief Justice

♥ cc: Mr. Justice Marshall

February third
1971

Dear Harry:

I have your memorandum in
No. 79 -- Connell v. Higginbotham.

I vote "no" on the proposal
to certify the case to the Florida
Supreme Court.

William O. Douglas

Mr. Justice Blackmun

CC: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

January 19, 1971

Re: No. 79 - Connell v. Higginbotham

Dear Chief:

I am glad to join your per curiam as is, but I am afraid I would have difficulty in joining if the emendation suggested by my Brother Black is made.

Sincerely,

J. M. H.

The Chief Justice

CC: The Conference

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

CHAMBERS OF
JUSTICE JOHN M. HARLAN

February 1, 1971

Re: No. 79 - Connell v. Higginbotham

Dear Harry:

Referring to our telephone conversation of the other day, I have recanvassed the matter in light of your tentative suggestions as to acquiring a majority for this presently messed-up case.

For myself, I still prefer the Chief Justice's per curiam to Potter Stewart's proposed disposition. However, I would be prepared to go along with a disposition such as Stewart's if a Court can be mustered for that course.

Still another possibility would be to resort to the Florida certification procedure. See Aldrich v. Aldrich, 375 U.S. 75 (1963); 378 U.S. 540 (1964). In addition, see Dresner v. City of Tallahassee, 375 U.S. 136 (1963); 378 U.S. 539 (1964). This course might be preferable to Stewart's proposal, since we would retain jurisdiction here of the present appeal, withholding disposition until the Florida Supreme Court has returned on our request for a certificate, whereas Stewart's proposal might invite the cumbersome route of a new appeal following the three-judge court's action after abstaining in favor of a preliminary construction by the state courts.

I am not circulating copies of this letter to the Conference.

Sincerely,



Mr. Justice Blackmun

April 2, 1971

Re: No. 79 - Connell v. Higginbotham

Dear Chief:

31.

I agree with your circulation of March

Sincerely,

J. M. H.

The Chief Justice

CC: The Conference

Did not send this but joined
Marshall's concurrence

January 20, 1971

RE: No. 79 - Connell v. Higginbotham

Dear Chief:

I want to join your Per Curiam in the above but, contrary to my Brother Harlan, I am afraid I would have difficulty in joining it if the emendation suggested by my Brother Black is not made.

Sincerely,

W. J. B. Jr.

The Chief Justice

cc: The conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 3, 1971

RE: No. 79 - Connell v. Higginbotham

Dear Harry:

My vote would be not to resort to the certification procedure to ask the proposed question. For me, the portion of the oath referred to is unconstitutional even if interpreted as suggested by the question.

Sincerely,


W.J.B. Jr.

Mr. Justice Blackmun

cc: The Conference

April 1, 1971

RE: No. 79 - Connell v. Higginbotham

Dear Thurgood:

Does the Chief's revision in the above
move you to withdraw your concurrence? I
am with you whichever way you go.

Sincerely,

Mr. Justice Marshall

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 26, 1971

RE: No. 79 - Connell v. Higginbotham

Dear Thurgood:

Please join me in your re-draft
of the opinion in the above.

Sincerely,

Bill
W. J. B. Jr.

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 23, 1970

MEMORANDUM TO THE CONFERENCE

No. 79, Connell v. Higginbotham

After the Conference last Friday, it occurred to me that I had not made entirely clear my position in this case. It is simply this:

I would uphold as clearly constitutional the first clause of the oath as it comes to us from the 3-judge district court: "I will support the Constitution of the United States and of the State of Florida" As to the second clause of the oath: "and that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence," I would remand to the district court to give the parties an opportunity to get an authoritative construction from the state courts of the meaning of the clause. If the clause embraces the teacher's philosophical or political beliefs, I think it is constitutionally invalid. If, on the other hand, the clause does no more than test whether the first clause of the oath can be taken "without mental reservation or purpose of evasion," I think it is constitutionally valid. I therefore believe it would be wise to give the Florida courts an opportunity to construe the meaning of the clause before we pass on its constitutionality. As you know, the Supreme Court of Florida has explicitly held that the various clauses of the oath are severable. Cramp v. Board of Public Instruction of Orange County, 137 So.2d 828.

P.S.
P.S.

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Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: JAN 19 1971

No. 79.—OCTOBER TERM, 1970

Recirculated: _____

Stella Connell, Appellant, } On Appeal From the United
v. } States District Court for
James M. Higginbotham } the Middle District of
et al. } Florida.

[January —, 1971]

MR. JUSTICE STEWART, concurring in part and dissenting in part.

The Court upholds as clearly constitutional the first clause of the oath as it comes to us from the three-judge District Court: "I will support the Constitution of the United States and of the State of Florida" With this ruling I fully agree.

As to the second contested clause of the oath, "I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence," I would remand to the District Court to give the parties an opportunity to get from the state courts an authoritative construction of the meaning of the clause. If the clause embraces the teacher's philosophical or political beliefs, I think it is constitutionally infirm. *Baird v. State Bar of Arizona*, ante, at — (concurring opinion); *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642; *Cantwell v. Connecticut*, 310 U. S. 296, 303-304. If, on the other hand, the clause does no more than test whether the first clause of the oath can be taken "without mental reservation or purpose of evasion," I think it is constitutionally valid. *Law Students Civil Rights Research Council, Inc. v. Wadmond*, ante, at 8-9. The Florida courts should, therefore, be given an opportunity to construe the clause before the federal courts pass on its constitutionality.

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 3, 1971

Re: No. 79, Connell v. Higginbotham

Dear Harry:

I am not at all averse to the suggestion contained in your memorandum of February 2.

Sincerely yours,

P. S.

Mr. Justice Blackmun

cc: The Conference

February 2, 1971

Re: No. 79 - Connell v. Higginbotham

Dear Chief:

Please join me in your per
curiam opinion for this case.

Sincerely,

B.R.W.

The Chief Justice

cc: The Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

Circulated: JAN 20 1971

No. 79.—OCTOBER TERM, 1970

Recirculated: _____

Stella Connell, Appellant, } On Appeal From the United
v. } States District Court for
James M. Higginbotham } the Middle District of
et al. } Florida.

[January —, 1971]

MR. JUSTICE MARSHALL, concurring.

I agree that Florida may require state employees to affirm that they "will support the Constitution of the United States and of the State of Florida." Such a forward-looking, promissory oath of constitutional support does not in my view offend the First Amendment's command that the grant or denial of governmental benefits cannot be made to turn on the political viewpoints or affiliation of a would-be beneficiary. I also agree that Florida may not base its employment decisions, as to state teachers or any other hiring category, on an applicant's willingness *vel non* to affirm "that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence."

However, in striking down the latter oath, the Court insists that "beliefs are by no means irrelevant to action or the prediction of future acts." This language suggests that the Court's objection runs, not against Florida's determination to exclude those who "believe in the overthrow," but only against the State's decision to regard unwillingness to take the oath as conclusive, irrebutable proof of the proscribed belief. But in my view it simply does not matter what kind of evidence a State can muster to show that a job applicant "believes in the overthrow." For state action injurious to an individual cannot be justified on account of the nature of the individual's

To: The Chief Justice
 Mr. Justice Black
 Mr. Justice Douglas
 Mr. Justice Harlan
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Blackmun

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79.—OCTOBER TERM, 1970

From: Marshall, J.

Circulated: JAN 20 1971

Recirculated:

Stella Connell, Appellant, } On Appeal From the United
 v. } States District Court for
 James M. Higginbotham } the Middle District of
 et al. } Florida.

[January —, 1971]

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

I agree that Florida may require state employees to affirm that they "will support the Constitution of the United States and of the State of Florida." Such a forward-looking, promissory oath of constitutional support does not in my view offend the First Amendment's command that the grant or denial of governmental benefits cannot be made to turn on the political viewpoints or affiliations of a would-be beneficiary. I also agree that Florida may not base its employment decisions, as to state teachers or any other hiring category, on an applicant's willingness *vel non* to affirm "that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence."

However, in striking down the latter oath, the Court insists that "beliefs are by no means irrelevant to action or the prediction of future acts." This language suggests that the Court's objection runs, not against Florida's determination to exclude those who "believe in the overthrow," but only against the State's decision to regard unwillingness to take the oath as conclusive, irrebuttable proof of the proscribed belief. But in my view it simply does not matter what kind of evidence a State can muster to show that a job applicant "believes in the overthrow." For state action injurious to an individual cannot be

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
✓ Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

Circulated: _____

No. 79.—OCTOBER TERM, 1970

Recirculated: 3-23-71

Stella Connell, Appellant, } On Appeal From the United
v. } States District Court for
James M. Higginbotham } the Middle District of
et al. } Florida.

[March —, 1971]

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

I agree that Florida may require state employees to affirm that they "will support the Constitution of the United States and of the State of Florida." Such a forward-looking, promissory oath of constitutional support does not in my view offend the First Amendment's command that the grant or denial of governmental benefits cannot be made to turn on the political viewpoints or affiliations of a would-be beneficiary. I also agree that Florida may not base its employment decisions, as to state teachers or any other hiring category, on an applicant's willingness *vel non* to affirm "that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence."

However, in striking down the latter oath, the Court insists that "beliefs are not irrelevant to action or the prediction of future acts." This language suggests that the Court's objection runs, not against Florida's determination to exclude those who "believe in the overthrow," but only against the State's decision to regard unwillingness to take the oath as conclusive, irrebutable proof of the proscribed belief. But in my view it simply does not matter what kind of evidence a State can muster to show that a job applicant "believes in the overthrow."

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 26, 1971

Done for me

MEMORANDUM TO THE CONFERENCE

Re: No. 79 - Connell v. Higginbotham

Herewith is my re-drafted opinion in
No. 79 - Connell v. Higginbotham. As it now
stands it is a concurrence in the result rather
than a full concurrence.

T.M.
T.M.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
✓ Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

Circulated: _____

No. 79.—OCTOBER TERM, 1970

Recirculated: 5/26/71

Stella Connell, Appellant, } On Appeal From the United
v. } States District Court for
James M. Higginbotham } the Middle District of
et al. } Florida.

[June —, 1971]

MR. JUSTICE MARSHALL, concurring in the result.

I agree that Florida may require state employees to affirm that they "will support the Constitution of the United States and of the State of Florida." Such a forward-looking, promissory oath of constitutional support does not in my view offend the First Amendment's command that the grant or denial of governmental benefits cannot be made to turn on the political viewpoints or affiliations of a would-be beneficiary. I also agree that Florida may not base its employment decisions, as to state teachers or any other hiring category, on an applicant's willingness *vel non* to affirm "that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence."

However, in striking down the latter oath, the Court has left the clear implication that its objection runs, not against Florida's determination to exclude those who "believe in the overthrow," but only against the State's decision to regard unwillingness to take the oath as conclusive, irrebuttable proof of the proscribed belief. Due process may rightly be invoked to condemn Florida's mechanistic approach to the question of proof. But in my view it simply does not matter what kind of evidence a State can muster to show that a job applicant "believes in the overthrow." For state action injurious to an individual cannot be justified on account of the nature of

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 3, 1971

Re: No. 79 - Connell v. Higginbotham

Dear Chief:

I have your memorandum on the
above case. According to my records, my
opinion is not a dissent but a concurrence
in the result, and it is joined by Justices
Douglas and Brennan.

Sincerely,


T.M.

The Chief Justice

cc: The Conference

Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
✓ Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun

5th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

No. 79.—OCTOBER TERM, 1970

Circulated: _____

Recirculated: 6/8/71

Stella Connell, Appellant, } On Appeal From the United
v. } States District Court for
James M. Higginbotham } the Middle District of
et al. } Florida.

[June —, 1971]

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

I agree that Florida may require state employees to affirm that they "will support the Constitution of the United States and of the State of Florida." Such a forward-looking, promissory oath of constitutional support does not in my view offend the First Amendment's command that the grant or denial of governmental benefits cannot be made to turn on the political viewpoints or affiliations of a would-be beneficiary. I also agree that Florida may not base its employment decisions, as to state teachers or any other hiring category, on an applicant's willingness *vel non* to affirm "that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence."

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February 2, 1971

MEMORANDUM TO THE CONFERENCE

Re: No. 79 - Connell v. Higginbotham

Dear Brethren:

Mr. Justice Harlan and I have not as yet indicated our votes in this case. Each of us is somewhat troubled and wonders whether the Florida certification procedure under Florida Appellate Rule 4.61, which the Court employed in Aldrich v. Aldrich, 375 U.S. 75 and 249 (1963) and 378 U.S. 549 (1964) and in Dressner v. City of Tallahassee, 375 U.S. 136 (1963) and 378 U.S. 539 (1964), would be of any assistance to us in this somewhat troublesome little case. Certification perhaps would accomplish directly what Mr. Justice Stewart has in mind and, in addition, might have the advantage of retaining jurisdiction here and of avoiding further cumbersome and time-consuming 3-judge procedure.

If this suggestion has any appeal for the Conference, a question somewhat along the following lines might be formulated: Does that portion of the oath prescribed for State employees by Fla. Stats. Ann. § 876.05(1) reading:

"I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence."

reach to any extent the prospective employee's political or philosophical beliefs or does it serve only as a measure

- 2 -

for determining whether the employee is able to take, without mental reservation or purpose of evasion, the preceding portion of the oath reading:

"I will support the Constitution of the United States and of the State of Florida"

Sincerely,

H. A. B.

March 5, 1971

Re: No. 79 - Connell v. Higginbotham

Dear Chief:

Please join me in your proposed Per Curiam
for this case.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

April 1, 1971

Re: No. 79 - Connell v. Higginbotham

Dear Chief:

Please join me in the revised *Per Curiam*
you have prepared for this case.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference