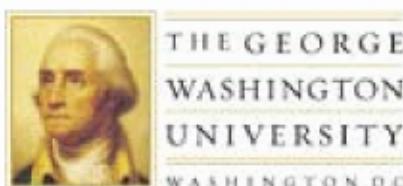


# The Burger Court Opinion Writing Database

*Foley v. Connelie*

435 U.S. 291 (1978)

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



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

From: The Chief Justice  
Circulated: JAN 16 1978

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

**1st DRAFT**

**SUPREME COURT OF THE UNITED STATES**

No. 76-839

Edmund Foley, Appellant,  
*v.*  
William G. Connellie, Individually  
and in His Capacity as Superin-  
tendent of the New York State  
Police, and S. A. Smith, Individ-  
ually, and in His Capacity as  
Director of Personnel of the New  
York State Police.

On Appeal from the  
United States District  
Court for the Southern  
District of New York.

[January —, 1978]

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

We noted probable jurisdiction in this case to consider whether a State may constitutionally limit the appointment of members of its police force to citizens of the United States.

The appellant, Edmund Foley, is an alien eligible in due course to become a naturalized citizen, who is lawfully in this country as a permanent resident. He applied for appointment as a New York State Trooper, a position which is filled on the basis of competitive examinations. Pursuant to a New York statute, Executive Law § 215 (3), state authorities refused to allow Foley to take the examination. The statute provides:

"No person shall be appointed to the New York State police force unless he shall be a citizen of the United States."

Appellant then brought this action in the United States District Court for the Southern District of New York, seeking

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

CHAMBERS OF  
THE CHIEF JUSTICE

January 24, 1978

Re: 76-839 - Foley v. Connelie

MEMORANDUM TO THE CONFERENCE

At page 3, line 11, between the words "to" and "exclude", insert the following, which was inadvertently omitted in the circulated draft.

limit financial assistance for  
higher education to citizens,  
Nyquist v. Mauclet, 432 U.S. 1  
(1977), to . . .

Regards,

WRB

To: Mr. Justice BREWSTER  
Mr. Justice BURGER  
Mr. Justice CLARK  
Mr. Justice HARLAN  
Mr. Justice MARSHALL  
Mr. Justice POWELL  
Mr. Justice REHNQUIST  
Mr. Justice STEVENS

From: The Chief Justice

SUBSTANTIAL CHANGES THROUGHOUT

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

Recirculated: JAN 25 1978

**2nd DRAFT**

**SUPREME COURT OF THE UNITED STATES**

No. 76-839

Edmund Foley, Appellant,  
v.

William G. Connelie, Individually  
and in His Capacity as Superin-  
tendent of the New York State  
Police, and S. A. Smith, Individ-  
ually, and in His Capacity as  
Director of Personnel of the New  
York State Police.

On Appeal from the  
United States District  
Court for the Southern  
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[January —, 1978]

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

We noted probable jurisdiction in this case to consider whether a State may constitutionally limit the appointment of members of its police force to citizens of the United States.

The appellant, Edmund Foley, is an alien eligible in due course to become a naturalized citizen, who is lawfully in this country as a permanent resident. He applied for appointment as a New York State Trooper, a position which is filled on the basis of competitive examinations. Pursuant to a New York statute, Executive Law § 215 (3), state authorities refused to allow Foley to take the examination. The statute provides:

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Appellant then brought this action in the United States District Court for the Southern District of New York, seeking

1 — 6,7,9

STYLISTIC CHANGES ONLY

To: Mr. Justice Blackmun  
 Mr. Justice Marshall  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens  
 Mr. Justice White

3rd DRAFT

MAR 20 1978

## SUPREME COURT OF THE UNITED STATES

No. 76-839

Edmund Foley, Appellant,

v.

William G. Connelie, Individually  
 and in His Capacity as Superin-  
 tendent of the New York State  
 Police, and S. A. Smith, Individ-  
 ually, and in His Capacity as  
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On Appeal from the  
 United States District  
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 District of New York.

[January —, 1978]

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

We noted probable jurisdiction in this case to consider whether a State may constitutionally limit the appointment of members of its police force to citizens of the United States.

The appellant, Edmund Foley, is an alien eligible in due course to become a naturalized citizen, who is lawfully in this country as a permanent resident. He applied for appointment as a New York State Trooper, a position which is filled on the basis of competitive examinations. Pursuant to a New York statute, Executive Law § 215 (3), state authorities refused to allow Foley to take the examination. The statute provides:

"No person shall be appointed to the New York State police force unless he shall be a citizen of the United States."

Appellant then brought this action in the United States District Court for the Southern District of New York, seeking

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

Rec'd 4/27/78  
4/28/78

CHAMBERS OF  
THE CHIEF JUSTICE

April 27, 1978

Re: Cases heretofore held for No. 76-839 - Foley v. Connelie

MEMORANDUM TO THE CONFERENCE:

I. No. 76-1616 - County of Los Angeles  
v. Chavez-Salido

(Vacate &  
Remand for  
reconsideration  
under Foley)

Appellees in this case are resident aliens who have been lawfully admitted to this country on a permanent basis. Each applied for a position as a Deputy Probation Officer with the County of Los Angeles. Two of these individuals were denied such positions solely on the basis of California Government Code § 1031(a), which limits employment as "peace officers" to citizens of the United States; under this statutory provision a Deputy Probation Officer is considered a "peace officer". Another appellee failed the examination required for the position; he was informed that it would be futile to appeal the test results since his alienage would disqualify him in any event.

Appellees brought this action in the District Court against Los Angeles County, its Acting Chief Probation Officer, Acting Director of Personnel and Personnel Officer for the County's Probation Department. The complaint alleged that the statutory exclusion of aliens from positions as "peace officers" violated the Equal Protection Clause and 42 U.S.C. §§ 1981 & 1983. All three appellees sought declaratory and injunctive relief and attorneys fees; in addition, the two appellants who were denied positions solely because of alienage demanded money damages from the County (not from the individual defendants).

A three-judge court was convened to hear the case. The court first held that it had jurisdiction over the County pursuant to 28 U.S.C. § 1331(a), in that the complaint stated a cause of action under the Fourteenth Amendment and § 1981,

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

November 14, 1977

RE: No. 76-839 Foley v. Connellie

Dear Potter:

In the above you, Thurgood, John and I are in dissent.  
If a dissent is to be written would you care to undertake it?

Sincerely,



Mr. Justice Stewart

cc: Mr. Justice Marshall  
Mr. Justice Stevens

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

November 15, 1977

RE: No. 76-839 Foley v. Connellie

MEMORANDUM TO: Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Stevens

Thurgood has agreed to prepare the dissent in  
the above.

W.J.B. Jr.

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 13, 1978

RE: No. 76-839 Foley v. Connelie

Dear Thurgood:

Please join me in the dissenting opinion you have  
prepared in the above.

Sincerely,



Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF  
JUSTICE W. J. BRENNAN, JR.

March 15, 1978

RE: No. 76-839 Foley v. Connelie

Dear John:

Please join me in the dissenting opinion you have  
prepared in the above.

Sincerely,



Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

March 15, 1978

Re: No. 76-839, Foley v. Connelie

Dear Chief,

Enclosed is a copy of a very short concurrence  
that I have sent to the printer this morning.

Sincerely yours,

P.S.  
I.

The Chief Justice

Copies to the Conference

March 15, 1978

No. 76-839, FOLEY v. CONNELIE

MR. JUSTICE STEWART, concurring.

The dissenting opinions convincingly demonstrate that it is difficult if not impossible to reconcile the Court's judgment in this case with the reasoning and authority of some of our past decisions. It is only because I have become increasingly doubtful about the validity of those decisions (in at least some of which I concurred) that I join the opinion of the Court in this case.

To: The Chief Just.,  
Mr. Justice Brennan,  
Mr. Justice White,  
~~Mr. Justice Marshall~~,  
Mr. Justice Black,  
Mr. Justice Powell,  
Mr. Justice Rehnquist,  
Mr. Justice Stevens

**1st DRAFT**

From: Mr. Justice Stewart

**SUPREME COURT OF THE UNITED STATES**

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

No. 76-839

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

Edmund Foley, Appellant,

v.

William G. Connelie, Individually  
and in His Capacity as Superin-  
tendent of the New York State  
Police, and S. A. Smith, Individ-  
ually, and in His Capacity as  
Director of Personnel of the New  
York State Police.

On Appeal from the  
United States District  
Court for the Southern  
District of New York.

[March —, 1978]

MR. JUSTICE STEWART, concurring.

The dissenting opinions convincingly demonstrate that it is difficult if not impossible to reconcile the Court's judgment in this case with the full sweep of the reasoning and authority of some of our past decisions. It is only because I have become increasingly doubtful about the validity of those decisions (in at least some of which I concurred) that I join the opinion of the Court in this case.

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

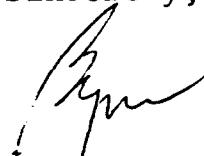
January 19, 1978

Re: 76-839 Foley v. Connelie

Dear Chief,

Please join me.

Sincerely,



The Chief Justice  
Copies to the Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

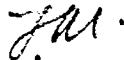
January 17, 1978

Re: No. 76-839, Foley v. Connelie

Dear Chief:

In due course I shall circulate a dissent in this one.

Sincerely,



T. M.

The Chief Justice

cc: The Conference

10 FEB 1978

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-839

Edmund Foley, Appellant,

*v.*

William G. Connelie, Individually and in His Capacity as Superintendent of the New York State Police, and S. A. Smith, Individually, and in His Capacity as Director of Personnel of the New York State Police.

On Appeal from the United States District Court for the Southern District of New York.

[February —, 1978]

**MR. JUSTICE MARSHALL, dissenting.**

Almost a century ago, in the landmark case of *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886), this Court recognized that aliens are "persons" within the meaning of the Fourteenth Amendment. Eighty-five years later, in *Graham v. Richardson*, 403 U. S. 365 (1971), the Court concluded that aliens constitute a "discrete and insular" minority, and that laws singling them out for unfavorable treatment "are therefore subject to strict judicial scrutiny." *Id.*, at 372, 376. During the ensuing six Terms, we have invalidated state laws discriminating against aliens on four separate occasions, finding that such discrimination could not survive strict scrutiny. *Sugarman v. Dougall*, 413 U. S. 634 (1973) (competitive civil service); *In re Griffiths*, 413 U. S. 717 (1973) (attorneys); *Examining Board v. Flores de Otero*, 426 U. S. 572 (1976) (civil engineers); *Nyquist v. Mauclet*, 432 U. S. 1 (1977) (financial assistance for higher education).

Today the Court upholds a law excluding aliens from public employment as state troopers. It bases its decision largely on *dictum* from *Sugarman v. Dougall, supra*, to the effect that

1 5

~~STYLISTIC CHANGES~~

14 FEB 1978

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

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No. 76-839

---

Edmund Foley, Appellant,  
*v.*William G. Connelie, Individually  
and in His Capacity as Superin-  
tendent of the New York State  
Police, and S. A. Smith, Individ-  
ually, and in His Capacity as  
Director of Personnel of the New  
York State Police.On Appeal from the  
United States District  
Court for the Southern  
District of New York.

[February —, 1978]

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

Almost a century ago, in the landmark case of *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886), this Court recognized that aliens are "persons" within the meaning of the Fourteenth Amendment. Eighty-five years later, in *Graham v. Richardson*, 403 U. S. 365 (1971), the Court concluded that aliens constitute a "'discrete and insular' minority," and that laws singling them out for unfavorable treatment "are therefore subject to strict judicial scrutiny." *Id.*, at 372, 376. During the ensuing six Terms, we have invalidated state laws discriminating against aliens on four separate occasions, finding that such discrimination could not survive strict scrutiny. *Sugarman v. Dougall*, 413 U. S. 634 (1973) (competitive civil service); *In re Griffiths*, 413 U. S. 717 (1973) (attorneys); *Examining Board v. Flores de Otero*, 426 U. S. 572 (1976) (civil engineers); *Nyquist v. Mauclet*, 432 U. S. 1 (1977) (financial assistance for higher education).

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15 MAR 1978

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-839

Edmund Foley, Appellant,

v.

William G. Connelie, Individually and in His Capacity as Superintendent of the New York State Police, and S. A. Smith, Individually, and in His Capacity as Director of Personnel of the New York State Police.

On Appeal from the United States District Court for the Southern District of New York.

[March —, 1978]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS join, dissenting.

Almost a century ago, in the landmark case of *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886), this Court recognized that aliens are "persons" within the meaning of the Fourteenth Amendment. Eighty-five years later, in *Graham v. Richardson*, 403 U. S. 365 (1971), the Court concluded that aliens constitute a "'discrete and insular' minority," and that laws singling them out for unfavorable treatment "are therefore subject to strict judicial scrutiny." *Id.*, at 372, 376. During the ensuing six Terms, we have invalidated state laws discriminating against aliens on four separate occasions, finding that such discrimination could not survive strict scrutiny. *Sugarman v. Dougall*, 413 U. S. 634 (1973) (competitive civil service); *In re Griffiths*, 413 U. S. 717 (1973) (attorneys); *Examining Board v. Flores de Otero*, 426 U. S. 572 (1976) (civil engineers); *Nyquist v. Mauclet*, 432 U. S. 1 (1977) (financial assistance for higher education).

Today the Court upholds a law excluding aliens from public employment as state troopers. It bases its decision largely on *dictum* from *Sugarman v. Dougall, supra*, to the effect that

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

From: Mr. Justice Blackmun

Circulated: 1/25/78

1st DRAFT

Recirculated

## SUPREME COURT OF THE UNITED STATES

No. 76-839

Edmund Foley, Appellant,

v.

William G. Connelie, Individually and in His Capacity as Superintendent of the New York State Police, and S. A. Smith, Individually, and in His Capacity as Director of Personnel of the New York State Police.

On Appeal from the United States District Court for the Southern District of New York.

[February —, 1978]

MR. JUSTICE BLACKMUN, concurring in the result.

Once again the Court is called upon to adjudicate the constitutionality of one of New York's many statutes that impose a requirement of citizenship for occupational activity.\* Although I have joined the Court in striking down citizenship requirements of this kind, see *Graham v. Richardson*, 403 U. S. 365 (1971); *In re Griffiths*, 413 U. S. 717 (1973); *Examining Board v. Flores de Otero*, 426 U. S. 572 (1976), including, specifically, some imposed by the State of New York, see *Sugarman v. Dougall*, 413 U. S. 634 (1973); and *Nyquist v. Mauclet*, 432 U. S. 1 (1977), I have no difficulty in agreeing with the result the Court reaches here.

The Court's prior cases clearly establish the standards to

\*One of the appellees in *Nyquist v. Mauclet* listed a succession of New York statutes requiring citizenship, or a declaration of intent to become a citizen, for no fewer than 38 occupations. Brief for Appellee Mauclet 19-22, nn. 8-44, inclusive. Some of the statutes have been legislatively repealed or modified, or judicially invalidated. Others, apparently, are still in effect: among them are those relating to the occupations of inspector, certified shorthand reporter, funeral director, masseur, physical therapist, and animal health technician.

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

From: Mr. Justice Blackmun

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

Recirculated: 3/15/78

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-839

Edmund Foley, Appellant, <i>v.</i> William G. Connelie, Individually and in His Capacity as Superin- tendent of the New York State Police, and S. A. Smith, Individ- ually, and in His Capacity as Director of Personnel of the New York State Police.	On Appeal from the United States District Court for the Southern District of New York.
--	---

[February —, 1978]

MR. JUSTICE BLACKMUN, concurring in the result.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

January 26, 1978

No. 76-839 Foley v. Connelie

Dear Chief:

Please join me.

Sincerely,

*Lewis Powell*

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 24, 1978

Re: No. 76-839 - Foley v. Connellie

Dear Chief:

Please join me.

Sincerely,

*Wm*

The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

January 18, 1978

Re: 76-839 - Foley v. Connellie

Dear Chief:

I shall await Thurgood's dissent.

Respectfully,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

March 14, 1978

Re: 76-839 - Foley v. Connelie

Dear Thurgood:

Although I have just sent an additional dissenting opinion to the printer, I would also like to be joined in your dissent.

Respectfully,



Mr. Justice Marshall

Copies to the Conference

Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

76-839 - Foley v. Connelie

From: Mr. Justice Stevens  
MAR 15 '78

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

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

MR. JUSTICE STEVENS, dissenting.

A State should, of course, scrutinize closely the qualifications of those who perform professional services within its borders. Police officers, like lawyers, must be qualified in their field of expertise and must be trustworthy. Detailed review of each individual's application for employment is therefore appropriate. Conversely, a rule which disqualifies an entire class of persons from professional employment is doubly objectionable. It denies the State access to unique individual talent; it also denies opportunity to individuals on the basis of characteristics that the group is thought to possess.

The first objection poses a question of policy rather than constitutional law. The wisdom of a rule denying a law enforcement agency the services of Hercule Poirot or Sherlock Holmes is thus for New York, not this Court, to decide. But the second objection raises a question of a different kind and a satisfactory answer to this question is essential to the validity of the rule: What is the group characteristic that justifies the unfavorable treatment of an otherwise qualified individual simply because he is an alien?

Wm. Bowen Oct 77

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

From: Mr. Justice Stevens

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

Recirculated: MAR 16 '78

*Printed*  
 1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-839

Edmund Foley, Appellant,

*v.*

William G. Connelie, Individually and in His Capacity as Superintendent of the New York State Police, and S. A. Smith, Individually, and in His Capacity as Director of Personnel of the New York State Police.

On Appeal from the United States District Court for the Southern District of New York,

[March —, 1978]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, dissenting.

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p. 3

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

From: Mr. Justice Stevens

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

Recirculated: MAR 17 '78

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-839

Edmund Foley, Appellant,

v.

William G. Connelie, Individually  
 and in His Capacity as Superin-  
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 ually, and in His Capacity as  
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 York State Police.

On Appeal from the  
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 Court for the Southern  
 District of New York.

[March —, 1978]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN  
 joins, dissenting.

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