

## DOES FOOTNOTE FOUR DESCRIBE?

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Does Footnote Four describe? Two of the editors of this, my favorite journal, certainly think so: "Footnote Four encompasses much of the ensuing half-century of constitutional law."<sup>1</sup> They join very esteemed company, from John Hart Ely<sup>2</sup> to the late Robert G. McCloskey.<sup>3</sup> And, over the years, most conversations I've heard agree. The conventional wisdom is that the Court ran with the First Amendment, supported voting rights claims, and extended judicial protection to those in need of protecting: the politically powerless, especially racial and religious minorities.

While there is more than one meaning of Footnote Four—as Louis Luskey, Stone's law clerk, complained<sup>4</sup>—let me set out what I interpret the dominant meaning of Footnote Four to be. First, forget paragraph one; Hughes wrote it anyway, and it can be fully subsumed by paragraphs two and three.<sup>5</sup> Second, following paragraph two, the Court polices the twin gates of the political process: voting and speech. Third, following paragraph three, the Court protects, through whatever constitutional provision is appropriate, those the government stigmatizes.

I don't think this analysis holds. Until at least 1962, exceptions like the *Japanese Exclusion Cases* and the domestic security cases undermine severely the supposed descriptive accuracy of Footnote Four. Thereafter, for at least a decade, Footnote Four offers a reasonable fit with the Court's results. But an equally valid explanation can account for the entire 1938-73 era: the Court was combining with the Federal Government and Northern elites to create a set of national norms, eradicating in the process that which was different or backward.

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1. Daniel Farber and Philip Frickey, *Is Carolene Products Dead?* 79 Cal. L. Rev. 685, 690 (1991).

2. John Hart Ely, *Democracy and Distrust* (Harv. U. Press, 1980).

3. Robert G. McCloskey, *The American Supreme Court* (U. of Chi. Press, 1960).

4. Louis Lusky, *Footnote Redux*, 82 Colum. L. Rev. 1093 (1982).

5. But see note 113 *infra*.

## I

Even more than the Civil War Amendments left prior constitutional history in its own era, the New Deal revolution created an abrupt constitutional demarcation. What went before was legally irrelevant. Its function came to be that of a measuring rod to mark change. Before the revolution the commerce power did not reach the coal industry. After the revolution it attached to wheat grown for home consumption. That's a switch; indeed, it is so much so, that Robert Jackson, who had been on both sides, first as the Administration's lawyer and then as a justifying justice, wondered in a memo whether the Court had any future function at all if federal authority were sustained in the case.<sup>6</sup> Footnote Four answered that question in a big way, allowing the Court to leave the economic realm completely while continuing to be a major player in the constitutional landscape. The key case, decided just a year after Jackson's majority opinion sustained the regulation of home grown wheat, was *West Virginia v. Barnette*,<sup>7</sup> which, fittingly enough, was also written by Jackson (adopting the solo Stone dissent in *Gobitis*<sup>8</sup>).

This is the standard Footnote Four thesis. From my perspective, however, the focus on the Court's protecting minorities results in a singular inability to see that there was both more and less to what the Court was doing.

First, let me take the evidence on which the role of Footnote Four is based. Jehovah's Witnesses, blacks, and organized labor won their cases with much greater frequency than they had in the pre-1937 period. Since they could not prevail in the political process because they lacked the numbers, Footnote Four enthusiasts consider them discrete and insular minorities within the scope of the Footnote. I'll concede on the Jehovah's Witnesses without hesitation; but organized labor is something else again. The judicial victories of organized labor, while marking a change from the pre-1937 era, are better characterized as favoritism, this time for a new winner. The Old Court with its conservative Republican bias protected economic elites. The New Deal Court, manned by individuals whose fealty to the New Deal's economic vision was unquestioned, protected an essential organization (possibly the most essential) in the New Deal coalition. To be

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6. Thomas A. Mason, *Harlan Fiske Stone* 594 (Viking Press, 1956).

7. 319 U.S. 624 (1943).

8. 310 U.S. 586 (1940).

sure, organized labor was not popular everywhere,<sup>9</sup> but it was popular in Washington and that is where it won first major legislative and then major judicial victories. The Court embraced unions not because they were discrete and insular minorities, but because they were politically powerful allies.<sup>10</sup> While blacks, too, were voting members of the New Deal coalition, politically powerless is nevertheless an apt description, and *Missouri ex rel. Gaines v. Canada*,<sup>11</sup> beginning the road to *Brown*, was decided almost contemporaneously with *Carolene Products*. When the Court struck down segregation, it was acting paradigmatically as a Footnote Four court should. The hesitancy of *Naim v. Naim*,<sup>12</sup> *Shuttlesworth v. Birmingham*,<sup>13</sup> and *Lassiter v. Northampton County Board of Elections*<sup>14</sup> were regrettable, but perhaps explicable.<sup>15</sup>

*Barnette* has a slightly different appearance if it is viewed against the background of the revulsion toward *Gobitis*. Frankfurter thought his opinion would foster patriotism as the country needed to prepare for war. Yet as a *Barnette* footnote showed<sup>16</sup> the similarities between the Nazi salute and the flag salute were obvious and uncomfortable. And patriotism was not the message that everyone took from *Gobitis*; vigilantes in small communities in all parts of the country acted as if the decision were an official imprimatur declaring open season on the Witnesses.<sup>17</sup> Major newspapers, hardly the bastions of liberalism of that era, editorialized overwhelmingly against Frankfurter's position<sup>18</sup>—so much

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9. *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Thomas v. Collins*, 323 U.S. 516 (1945).

10. In 1947 when unions were not so popular and the Justice Department was going after the United Mine Workers, John L. Lewis's union lost. *United States v. United Mine Workers*, 330 U.S. 258 (1947).

11. 305 U.S. 337 (1937).

12. 350 U.S. 891 (1955); 350 U.S. 985 (1956).

13. 358 U.S. 101 (1958) (sustaining a facially unconstitutional pupil placement law against a facial challenge).

14. 360 U.S. 45 (1959).

15. An unidentified justice reportedly explained *Naim v. Naim*: "One bombshell at a time is enough." Quoted in Gerald Rosenberg, *The Hollow Hope* 81 (U. of Chi. Press, 1991).

16. *Barnette*, 319 U.S. at 628 n.3.

17. Mason, *Harlan Fiske Stone* at 533 (cited in note 6); Peter Irons, *The Courage of Their Convictions* 23 (Free Press, 1988). On June 10, 1940 the St. Louis Post-Dispatch wrote: "It would be a mistake to attribute these outbreaks of violence against religious minorities solely to the United States Supreme Court's opinion . . . Yet there can be little doubt that most unfortunate decision will be an encouragement for self-appointed guardians of patriotism and the national moralists to take the law into their own hands." (quoted in Mason, *Harlan Fiske Stone* at 533 (cited in note 6)).

18. One hundred seventy-one of the leading newspapers criticized *Gobitis*, while "only a handful approved it." Mason, *Harlan Fiske Stone* at 532 (cited in note 6).

so that when Douglas told Frankfurter of Black's change of position (to agreement with Stone's dissent), Frankfurter sarcastically asked if Black had been reading his Constitution. Douglas quipped, "No, but he has read the papers."<sup>19</sup> Finally, as Eleanor Roosevelt and others noted, there is something un-American about putting school children to the choice of persecution in the present or eternal damnation in the future. Maybe it could be said that everyone was a Footnote Four devotee, but a better position is that *Gobitis* was so wrong that lots of people knew it very quickly.

Second, my argument against the dominance of Footnote Four is not limited to the areas where it is credited with explanatory force. A full review of the Court's civil liberties docket reminds a reader that there were 112,000 Japanese Americans, a quintessential discrete and insular minority, who suffered extensive discrimination on the West Coast, a prejudice so pervasive that it included elected officials such as Earl Warren. When World War II came, the Japanese Americans—and they alone—were treated as if they were hostile enemy "nonaliens"<sup>20</sup> with their loyalties attaching to Japan rather than their native land. Thus they were interned for the duration (which turned out to be well after the 1944 elections and for some into 1946). The Supreme Court legitimized the internments, with Stone, author of Footnote Four, using his position as Chief Justice first to obtain unanimity<sup>21</sup> and then to hold the Court.<sup>22</sup> The whimpering conclusion of *Ex parte Mitsuye Endo*,<sup>23</sup> that habeas was available to individuals whom the government admitted were loyal, only underscores the enormity of *Korematsu*.

The only plausible way of accommodating the wholesale violation of all civil liberties (save only the right to live) involved in the forced relocation to internment camps is to join the *Korematsu* majority's conclusion that war is hell. It belabors the obvious to say that Footnote Four required the opposite outcome. The only way the *Japanese Exclusion Cases* can be accommodated to Footnote Four is as a wartime exception. This seems valid to me, although *Barnette* neither discussed nor used such an idea; and the irrationality of relocating the Japanese in California, but not Hawaii, only underscores the prejudice behind Exec-

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19. Irons, *The Courage of Their Convictions* at 23 (cited in note 17).

20. The relocation orders referred to "alien and nonalien" rather than citizen and noncitizen.

21. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

22. *Korematsu v. United States*, 323 U.S. 214 (1944).

23. 323 U.S. 283 (1944).

utive Order 9066. Furthermore, the concept of a war-time exception can explain *Korematsu* only so long as there is no strong post-war example that also undermines the supposed dominance of Footnote Four.

Enter the communists and their fellow travellers. From 1948 until 1962, with a notable exception for 1955-1957, reds and pinks were huge losers in civil liberties litigation (not to mention the cases never brought). This period is both slighted and misunderstood in legal discussions generally,<sup>24</sup> but its impact on the Footnote Four thesis is comparable to that of the *Japanese Exclusion Cases*.

Like the Japanese, it is hard to beat reds (and to a lesser extent pinks) as a discrete and insular minority. After the War, they were few in number, had no representation in any relevant U.S. institution, were part of no coalition that had any power. Indeed, if they had merely been powerless, this era would lack its distinctive flavor. To go with powerlessness, they were hated: everybody's favorite target for hostile actions.<sup>25</sup> Douglas, despite his powerful dissent in *Dennis v. United States*,<sup>26</sup> could not avoid calling communists "miserable merchants of unwanted ideas."<sup>27</sup> Jackson devoted his concurring opinion in *Douds*<sup>28</sup> to explaining why the government could single out communists, but not other political parties, for adverse treatment. And they got it.

The Justice Department successfully decapitated their leadership with criminal prosecutions.<sup>29</sup> The Attorney General's list

24. As I have noted in another context, the First Amendment is a prime example where the traditional Whig history of progress unfolding has resulted in both ignoring and downsizing the results of the communist cases. Lucas A. Powe Jr., *The Fourth Estate and the Constitution* 89-90 (U. of Cal. Press, 1991). In a more current debate, Bruce Ackerman's thesis on constitutional development, *We The People: Foundations* (Belknap Press, 1991) at 108, 135-36, significantly understates the import of McCarthyism and the communist litigation.

25. If the doctrine of suspect classifications is a roundabout way of uncovering official attempts to inflict inequality for its own sake—to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members—it would seem to follow that one set of classifications we should treat as suspicious are those that disadvantage groups we know to be the object of widespread vilifications, groups we know others (specifically those who control the legislative process) might wish to injure.

Ely, *Democracy and Distrust* at 153 (cited in note 2). Although Ely goes on to offer important qualifications, the communists were not, for example, burglars. At their absolute worst they may have been would-be Stalinist mass murderers, but no one ever supplied any evidence of even the beginnings of the attempt.

26. 341 U.S. 494 (1951).

27. *Id.* at 588 (Douglas, J., dissenting).

28. *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

29. *Dennis v. United States*, 341 U.S. 494 (1951); the second-string leadership was convicted after *Dennis* and certiorari was consistently denied until the grant in *Yates v. United States*, 350 U.S. 947 (1956).

provided an ingenious way of denying employment not only to members, but to fellow travellers as well.<sup>30</sup> The federal Loyalty Security Board used it with devastating effect.<sup>31</sup> The House Un-American Activities Committee made sure that no one missed the message and held hearings whose only intelligible purpose was “exposure for exposure’s sake,”<sup>32</sup> thereby rendering those named even more unemployable. And the Court affirmed it all, right down to the shameless reassembling into a special session so that the Rosenbergs could be executed without delay (even though opinions on why the execution could be held without delay came down later).<sup>33</sup>

Those cases dealt with citizens who were painted red or pink. For aliens the outcomes were even worse. In 1939 the Court had held on statutory grounds that an alien who had joined and resigned from the Communist Party could not be deported based on discontinued membership simpliciter.<sup>34</sup> Congress was having none of that and reversed in the Alien Registration Act of 1940. The Act was unmistakably retroactive. Even if membership in the Communist Party had been perfectly legal and innocent and ended prior to the Act, membership was a sufficient ground for deportation. In *Harisiades v. Shaughnessy*<sup>35</sup> the Court sustained the Act on facts showing that membership was innocent and triggered by a specific injustice that communists were protesting at the time.

Things got worse with the McCarran Act of 1950, in which one provision relieved the government of its burden of proving that the deportee-defendant believed in the overthrow of the government. The McCarran Act was sustained in *Galvan v. Press*,<sup>36</sup> where the deportee had lived in the United States for three decades, worked and married, but had joined the party during World War II (when the party actively supported the government) and ceased membership in 1946. The majority harkened back to the *Japanese Exclusion Cases* to note that we could treat American citizens badly too. Eventually, in *Fleming v. Nestor*,<sup>37</sup> the Court approved a statutory bar on social security payments

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30. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951).

31. *Bailey v. Richardson*, 341 U.S. 918 (1951) (affirming by an equally divided Court with Clark not participating; once Clark could participate, it’s at least 5-4 to sustain the program).

32. *Watkins v. United States*, 354 U.S. 178, 229 (1957).

33. *Rosenberg v. United States*, 346 U.S. 273 (1953).

34. *Kessler v. Strecker*, 307 U.S. 22 (1939)

35. 342 U.S. 580 (1952).

36. 347 U.S. 522 (1954).

37. 363 U.S. 603 (1960).

to those deported for the transgression of joining the Communist Party when it was legal to do so. The idea of aliens, much less aliens who liked the era of the Popular Front, as a discrete and insular minority had not yet occurred to anyone.

After McCarthy's late-1954 censure, the Court nibbled at the fringes of the loyalty-security program, culminating in a 12 for 12 batting average for communists in 1957. Without going into great detail, the post-1951 communist cases typically manifested an egregious injustice. In *Peters v. Hobby*,<sup>38</sup> the Solicitor General, for the first time, refused to sign the government brief. (But the Assistant Attorney General for the Civil Division did, thereby meriting a D.C. Circuit appointment for Warren Burger.) Several of the cases were tainted with admitted perjured testimony (hence the *Jencks*<sup>39</sup> ruling). And cases like *Schwartz v. Board of Bar Examiners of New Mexico*<sup>40</sup> or *Sweezy v. New Hampshire*<sup>41</sup> would be preposterous (were it not for subsequent cases like *In re Anastaplo*<sup>42</sup> or *Wilkinson v. United States*<sup>43</sup>). With McCarthy wholly discredited and the cases presenting outrage after outrage, the Court, not unreasonably, could believe it was engaging in a mopping up operation, finishing off the good work initiated by the Senate and the liberal press.

The Court wholly misread American politics. The congressional reaction, beginning with *Pennsylvania v. Nelson*,<sup>44</sup> but escalating geometrically in 1957, was so intense<sup>45</sup> that the Court quickly retreated. In 1962, a year after it affirmed that George Anastaplo's belief in the principles of the Declaration of Independence justified the Illinois Bar Association in asking him whether he was a communist (and further justified the bar's refusal to admit him to membership upon his refusal to recant), the Court voted to require the NAACP to answer Florida's questions about supposed communist infiltration, questions that could have

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38. 349 U.S. 331 (1955).

39. *Jencks v. United States*, 353 U.S. 657 (1957).

40. 353 U.S. 232 (1957) (evidence of exemplary moral character from 1939-53 could not be outweighed by Party membership during 1930s even with some arrests (without convictions) and use of aliases for a three year period).

41. 354 U.S. 234 (1957) ("classical Marxist" economist's refusal to answer questions relating to a lecture he gave at a state university and about adherents to the Progressive Party held protected).

42. 366 U.S. 82 (1961) (belief in Declaration of Independence justifies State Bar in asking specific questions about adherence to communism).

43. 365 U.S. 399 (1961) (protesting HUAC hearings justifies calling person as witness and questioning him about adherence to communism).

44. 350 U.S. 497 (1956) (holding that the Smith Act preempted a sedition conviction law where the sedition was against the Federal Government).

45. Walter F. Murphy, *Congress and the Court* (U. of Chi. Press, 1962).

ended the NAACP's ability to function in the South by forcing access to membership lists.<sup>46</sup> Only Frankfurter's timely stroke, leading to his retirement, saved the NAACP. When *Gibson v. Florida Legislative Investigation Committee*<sup>47</sup> was reargued, Goldberg provided the fifth vote to reverse.

While there ought not be ambiguities in what I'm saying, I'll state it more directly. When the victims of massive constitutional violations are very discrete — less than a million in the entire nation — and very insular — wholly lacking any chance at coalition building or any other way of prevailing — and they are subject to hostile legislation that applies to them and them alone, then Footnote Four's descriptive accuracy stands or falls on whether they win or lose. The Japanese Americans and communists lost big time. If Footnote Four has any real meaning, these cases must come out the other way. When they don't, Footnote Four doesn't.

That takes us to 1962, twenty-four years after Footnote Four. This almost halves the claim that Footnote Four describes the half century of constitutional law following its announcement. In 1962, however, *Baker v. Carr* was decided over Frankfurter's Chicken Little dissent, and Frankfurter departed, thereby creating the real Warren Court. From Goldberg's confirmation on, there seemed to be<sup>48</sup> five votes for anything, and anything certainly meant Footnote Four. Furthermore, for reasons that stunned both conservatives and liberals, adding Warren Burger and Harry Blackmun and then Lewis Powell and William Rehnquist did not turn the Court into a set of knee-jerk "strict constructionists," although by the mid-1970s it did result in the Court settling comfortably into a defense of whatever constitutional status quo then existed.<sup>49</sup>

## II

There are no losing litigants comparable to the Japanese Americans or the communists in the decade following Frankfurter's retirement. The best one could offer is that women never won in the 1960s. But after *Hoyt v. Florida*<sup>50</sup> they didn't lose

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46. Bernard Schwartz, *Super Chief* 453 (N.Y.U. Press, 1983) (reporting the initial 5-4 vote to sustain the Florida Legislative Committee contempt finding).

47. 372 U.S. 539 (1963).

48. But see *Adderley v. Florida*, 385 U.S. 39 (1966); *Swain v. Alabama*, 380 U.S. 202 (1965); *Walker v. Birmingham*, 388 U.S. 307 (1967).

49. L.A. Powe, Jr., *The Court Between Hegemonies*, 49 Wash. & Lee L. Rev. 31 (1992).

50. 368 U.S. 57 (1961).

either. Between that 1961 decision and *Reed v. Reed*,<sup>51</sup> a decade later, there were no cases.

That omission aside, everything else from the “real” Warren Court looks very much like Footnote Four. And that trend continued for women and aliens into the early 1970s. In no prior or subsequent era was there such protection for free speech and voting rights. *New York Times v. Sullivan* commenced a singularly remarkable era in First Amendment jurisprudence, encompassing not only libel, but also domestic security, street demonstrations, and obscenity, implementing the legacy of Holmes and Brandeis. “[T]he Court’s decisions generally pushed for a newer, farther boundary.”<sup>52</sup> “Neither before or since has there been such an outpouring of law on freedom of speech and the press. And never has it been so protective of the interests of dissent and so skeptical of government claims of the social harm that supposedly would be forthcoming” if its claims were not sustained.<sup>53</sup> As a result, the Court no longer clung to its absolutist position that First Amendment claims could never overcome the government’s need to root out communism wherever found; in the post-Frankfurter era, accused reds and pinks won all their cases. For the first time in years there was no group that was a consistent First Amendment loser, because losses, like *Adderley v. Florida*<sup>54</sup> or *Walker v. Birmingham*<sup>55</sup> or *Miskin v. New York*<sup>56</sup> were rare. Here *United States v. O’Brien*<sup>57</sup> and *Ginzburg v. United States*,<sup>58</sup> however, stand out; the Court should have known better. In the latter case there is no excuse because the Brennan majority was taking a minority of one and creating an ex post facto law to get him; in the former one might offer the excuse that the vote on the case occurred prior to the Tet Offensive and its changing of public opinion.

With voting, all claims prevailed. *Baker v. Carr* had set the stage, but it seems unlikely that anyone could have anticipated

51. 404 U.S. 71 (1971).

52. Powe, *The Fourth Estate and the Constitution* at 97 (cited in note 24).

53. *Id.* at 104.

54. 385 U.S. 39 (1966) (upholding trespass conviction for students demonstrating outside a jail to protest arrest and imprisonment of fellow students who had attempted to integrate movie theaters).

55. 388 U.S. 307 (1967) (contempt order for violating temporary injunction valid even though injunction forbid violating facially unconstitutional ordinance).

56. 383 U.S. 502 (1966) (S-M magazines can be obscene if they appeal to the prurient interest of their intended audience).

57. 391 U.S. 367 (1968) (draft card burning not protected speech).

58. 383 U.S. 463 (1966) (a bad man who “panders” in selling smut may be convicted for obscenity even if materials not obscene).

the sweep of *Reynolds v. Sims*,<sup>59</sup> *Katzenbach v. Morgan*,<sup>60</sup> and *Kramer v. Union Free School District*.<sup>61</sup>

The Court's intensive run on civil rights during this period began with a Goldberg opinion announcing that the time for all deliberate speed was over.<sup>62</sup> In the context of schools, the run accelerated with *Green v. County School Board of New Kent County*'s sacking of freedom of choice plans and demanding instead plans that promised "realistically to work . . . now."<sup>63</sup> Whatever ambiguities were left ended three years later when *Swann v. Charlotte-Mecklenburg Board of Education*<sup>64</sup> held that "results" meant integration. The Court's protections of blacks moved west to invalidate California's referendum repeal of its fair housing laws<sup>65</sup> and north to invalidate Akron's singling out fair housing as specially calling for a referendum.<sup>66</sup> The run reached its zenith in *Keyes v. School District Number 1, Denver, Colorado*<sup>67</sup> where the Court decided that it would give the North the benefits that *Swann* was bestowing upon the South. The extension of busing to the North was one of the most vitamin-enriched determinations the Court had ever made. (Of course its force was blunted a year later by *Milliken v. Bradley*.<sup>68</sup>) Indeed, the breadth and scope of the Court's commitment to blacks only underscores the losses in *Swain v. Alabama*<sup>69</sup> and *Adderley v. Florida*.<sup>70</sup>

The Court even tried to make poverty fit within Footnote Four. Although it was a false start, *Harper v. Virginia Board of Elections*<sup>71</sup> actually equated the poor with race as having immutable characteristics. The high tide of activism for the poor because they were poor came with *Goldberg v. Kelly*.<sup>72</sup> Little noticed is the fact that with *Shapiro v. Thompson*<sup>73</sup> even Earl Warren jumped off. Then *Dandridge v. Williams*<sup>74</sup> signaled a halt

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59. 377 U.S. 533 (1964).

60. 384 U.S. 641 (1966).

61. 395 U.S. 621 (1969).

62. *Goss v. Board of Educ.*, 373 U.S. 683 (1963).

63. 391 U.S. 430, 439 (1968) (emphasis in original).

64. 402 U.S. 1 (1971).

65. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

66. *Hunter v. Erickson*, 393 U.S. 385 (1969).

67. 413 U.S. 189 (1973).

68. 418 U.S. 717 (1974).

69. 380 U.S. 202 (1965).

70. 385 U.S. 39 (1966).

71. 383 U.S. 663 (1966).

72. 397 U.S. 254 (1970).

73. 394 U.S. 618 (1969).

74. 397 U.S. 471 (1970).

that *San Antonio Independent School District v. Rodriguez*<sup>75</sup> made official.

Still, the poor in the criminal justice process were big winners for a while. The Court initiated a wave of constitutional reform of the criminal justice system, first by federalizing it through incorporation of the Bill of Rights and then by attempting to spread lawyers throughout the system to effectuate the new guarantees. *Douglas v. California*<sup>76</sup> illustrates the latter with its use of equal protection to require counsel on first appeals for indigents. Although one could see *Douglas* as building on the due process indigency principle of *Griffin v. Illinois*,<sup>77</sup> the latter looked, as had *Betts v. Brady*,<sup>78</sup> to judges figuring out for the defendant what his claim might be (by their reading of the transcript); *Douglas*, like *Gideon v. Wainwright*,<sup>79</sup> was about lawyers, and their ability to alert overworked and possibly uncaring judges about the basics of the defendant's case. Giving defendants lawyers was the only realistic hope of transforming the antiquated system. Additionally, *Fay v. Noia*<sup>80</sup> transformed the federal courts into tribunals to review state criminal convictions. All of these reflected the political reality that states were not going to legislate added protections for criminal defendants. The Warren Court had concluded that the full force of the criminal justice system rarely fell on the more affluent; therefore by adding procedural barriers and lawyers to raise them, the Court could reduce the disparities between the rights of the rich and poor. Possibly the culmination of this was the Court's 1972 conclusion that the nation was ready to rid itself of the barbaric death penalty.<sup>81</sup>

Reducing disparities offers a good explanation for *Griswold v. Connecticut* as well. While the case can be characterized as a throwback to *Lochner v. New York*, Planned Parenthood, the real defendant, was an organization whose donors did not need its services. But it believed that those lacking affluence were likely to need them; so, I think, did the Court.

*Roe v. Wade* is susceptible to a similar analysis. Prior to *Roe*, legal abortions were increasing geometrically,<sup>82</sup> and *Roe*, like

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75. 411 U.S. 1 (1973).

76. 372 U.S. 353 (1963).

77. 351 U.S. 12 (1956).

78. 316 U.S. 455 (1942).

79. 372 U.S. 335 (1963).

80. 372 U.S. 391 (1963).

81. *Furman v. Georgia*, 408 U.S. 238 (1972).

82. Rosenberg, *The Hollow Hope* at 178 (cited in note 15).

*Griswold*, provided opportunities for the less affluent to enjoy the rights their more affluent sisters were already exercising. Lest this analysis seem a bit revisionist, Lewis Powell, in a conversation in the faculty lounge at The University of Texas Law School, articulated it in the mid-1970s.

Between 1968 and 1973 the Court added three further groups to Footnote Four's embrace: illegitimates, aliens, and women. In a pair of 1968 decisions, the Court knocked out the part of Louisiana's wrongful death statutes that denied benefits to illegitimates and their mothers.<sup>83</sup> There was some backing and filling in *Labine v. Vincent*,<sup>84</sup> but *Weber v. Aetna Casualty & Sur. Co.*<sup>85</sup> proved that aberrational. Aliens, too, found their Footnote Four place. *Graham v. Richardson*<sup>86</sup> hinted at the promise that *In re Griffiths*<sup>87</sup> fulfilled. Finally, when the perceived role of women in society had changed so much for elites that both Lyndon Johnson and Richard Nixon supported the Equal Rights Amendment, the ERA sailed through the House of Representatives 350-15, only to falter in the Senate over the issue of whether ERA meant that women had to be drafted too. Taking its cue from the House, the Court responded with *Reed*,<sup>88</sup> thus preparing the ground for its own internal debate in *Frontiero v. Richardson*<sup>89</sup> about whether to preempt the Article V process by announcing that the Fourteenth Amendment already accomplished everything the ERA could do. Ultimately the Court decided to let ERA run its course. While women thus did not achieve full Footnote Four status, they were closer than ever before (or since).

Jehovah's Witnesses had apparently won all the rights they needed; their last appearance was in the 1950s. Just before Frankfurter's retirement the Court refused to exempt Jewish merchants (or anyone else) from the Blue Laws.<sup>90</sup> Yet in *Engle v. Vitale*<sup>91</sup> it banned prayer in the schools, and one year later Bible reading as well.<sup>92</sup> Finally, by the end of the Warren era, Ar-

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83. *Levy v. Louisiana*, 391 U.S. 68 (1968).

84. 401 U.S. 532 (1971).

85. 406 U.S. 164 (1972).

86. 403 U.S. 365 (1971).

87. 413 U.S. 717 (1973).

88. *Reed v. Reed*, 404 U.S. 71 (1971).

89. 411 U.S. 677 (1973).

90. *Braunfeld v. Brown*, 366 U.S. 599 (1966).

91. 370 U.S. 421 (1962).

92. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

kansas' monkey law was held unconstitutional.<sup>93</sup> (Although its prior existence did not seem to harm a young Bill Clinton.)

As this brief blitz of the post-Frankfurter cases shows, there is much to be said for Footnote Four's descriptive abilities. Though the congruence is not perfect, that probably asks too much. And there are no glaring examples, such as the Japanese Americans or the communists, which make belief in Footnote Four's dominance implausible in this era.

### III

Yet maybe there is an alternative view that explains equally well. The Footnote Four explanation requires a fairly precipitous break in 1962. There is an alternative that is about as plausible and requires no major break. It can be summed up easily: "our [federal] government right or wrong."<sup>94</sup>

The New Deal appointees rubber stamped all federal economic legislation. Indeed in the same memo that wondered about the Court's function, Jackson also noted that the government lawyers no longer took a threat of unconstitutionality seriously.<sup>95</sup> The *Japanese Exclusion Cases* were tough on the justices because the injustice was so plain, but this was their government and its racism was explained away. In the first communist case<sup>96</sup> Jackson articulated a theory that communists weren't like us and the initial results were easy; only later did the injustices seem plain. When the Court was put to the difficult choice of picking between branches, it took the politically popular option<sup>97</sup> and rejected Truman's claims to seize the domestic steel industry.<sup>98</sup> The Court of Roosevelt's first term had sailed against the political gale; the New Deal appointees glided effortlessly with the wind. Thus when they misanticipated the mood on the flag salute in *Gobitis*, *Barnette* swiftly followed.

These cases, augmented by World War II, represented a fundamental shift favoring national power. Although *Brown* is more complicated, it is the beginning of the second stage of that

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93. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

94. A slight modification of Stephen Decatur's famous 1816 toast: "Our country! In her intercourse with foreign nations may she always be in the right—but our country, right or wrong." *Stephen Decatur* in 6 *The United States Encyclopedia of History* 1054, 1057 (Curtis Publishing Co., 1967).

95. Mason, *Harlan Fiske Stone* at 594 (cited in note 6).

96. *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

97. William H. Rehnquist, *The Supreme Court* (Morrow, 1987).

98. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

national shift. The *White Primary Cases*<sup>99</sup> followed by *Sweatt v. Painter*<sup>100</sup> and *McLaurin v. Oklahoma State Regents for Higher Education*<sup>101</sup> had laid the groundwork for the imposition of enlightened—read elite Northern—values on the South. There was every reason to believe that with the Democratic Party (which controlled the South) committed nationally to civil rights and the Justice Department under both Truman and Eisenhower urging an end to school segregation, the South was isolated and ending segregation would be readily accepted elsewhere. Furthermore, it is conceivable that if Southerners had not been able to intertwine segregation with anticommunism following *Pennsylvania v. Nelson*<sup>102</sup> and the controversial 1956 Term that followed, thereby creating a strong congressional backlash against the Court,<sup>103</sup> the Court might not even have paused, as massive resistance forced it to do.

Indeed, the Court may have wrongly sensed a shift after McCarthy's downfall and thereby begun its procedural and statutory nitpicking of the loyalty security program to death between 1955 and 1957. But, like its later misreading of the mood on capital punishment, its cases created a tremendous legislative backlash, and the Court went into full retreat until the mid-1960s when there could be no claim that the federal government and popular opinion cared much about loyalty security any more.

The 1960 and, especially, the 1964 elections brought elite Northern opinion into political dominance nationally. The best and the brightest staffed the executive branch, and Congress, even after 1968, stayed in the hands of domestic liberals. Beginning with Kennedy and accelerating with Johnson, the Court had a very protective (and supportive) umbrella. Both presidents embraced Earl Warren and defended the Court on reapportionment and religion, while the Justice Department cued the Court that civil rights support was forthcoming. With its political support secure, the Court began its nationalizing trend with a vengeance. It is important to reiterate that I use nationalizing here to mean a vision of national values. The Court was eradicating what was different—backward—with the intent to replace it with what any right-thinking Ivy League graduate would believe.

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99. *Smith v. Allwright*, 321 U.S. 649 (1944).

100. 339 U.S. 629 (1950).

101. 339 U.S. 637 (1950).

102. 350 U.S. 497 (1956).

103. Murphy, *Congress and the Court* 182-83 (cited in note 45); McCloskey, *The American Supreme Court* at 197-200 (cited in note 3).

The South, necessarily and properly, would be a huge loser. Its distinctiveness was etched in the poisoning of its institutions by segregation, and the Court's assault never let up.<sup>104</sup> But rural Americans and those who did not belong to mainstream-liberal Protestant or Jewish denominations were also fit candidates for improvement. The same could be said for antiquated criminal justice systems whose values and procedures were mired in the era of the Wickersham Report.

Chief Justice Warren blamed rural voters for the plight of urban America; with the reapportionment decisions, he stripped them of their undeserved political power in both the Congress and the states. After a misstep in upholding Blue Laws (on the quaint theory that picking Sunday for a day of rest had nothing to do with Christianity), the Court banned prayer and Bible-reading from the public schools to the howls of more culturally conservative religions. But that was not their sole defeat. *Roth v. United States*<sup>105</sup> had begun the eradication of Victorian laws on pornography; the *1966 Trilogy*,<sup>106</sup> with *Redrup v. New York*<sup>107</sup> and *Stanley v. Georgia*<sup>108</sup> following, appeared to be a clean sweep in the name of sexual promiscuity. There was some backsliding in 1971,<sup>109</sup> but it was serious only in the sense it did not finalize the *Redrup-Stanley* solution that anything goes for consenting adults. Finally, over the opposition of police forces everywhere, the Court federalized criminal procedure. The culmination was *Furman v. Georgia*<sup>110</sup> with its intended elimination of capital punishment. And believing, probably not without reason, that state courts would be unreceptive to the new national vision, the Court refashioned federal habeas to allow direct federal judicial supervision of state court processes.

The surprise is that this trend continued into Richard Nixon's second term. But just as Nixon himself presided over a much more liberal domestic policy than was perceived at the time, so did the Court that knocked out capital punishment, come close to preempting the Article V ratification process with

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104. A startling exception was jury peremptory challenges. *Swain v. Alabama*, 380 U.S. 202 (1965), overruled by *Batson v. Kentucky*, 476 U.S. 79 (1986).

105. 354 U.S. 476 (1957).

106. *A Book Named John Cleland's Memoirs of a Women of Pleasure v. Attorney Gen. of Mass.*, 383 U.S. 413 (1966); *Ginzburg v. United States*, 383 U.S. 463 (1966); *Mishkin v. New York*, 383 U.S. 502 (1966).

107. 386 U.S. 767 (1966).

108. 394 U.S. 557 (1969).

109. *United States v. Reidel*, 402 U.S. 351 (1971); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971).

110. 408 U.S. 238 (1972).

ERA, was so enamored with the integrative possibilities of busing that it thrust it North, and saw in the persistent legislative victories of the pro-abortion forces a fatal slowness that required an immediate judicial solution. To be sure, the Court never followed Frank Michelman and made the Great Society a constitutional requirement, but it did substantially increase the constitutional protections of women, aliens, and illegitimates.

Sometime in 1973 this flood tide of creative constitutional decisionmaking ran its course. Thereafter, until Lewis Powell's retirement, the Court neither gave much nor took much. It trod within the constitutional status quo already established.

#### IV

If it were not for the decade beginning in 1963, I strongly doubt that scholars would be claiming that Footnote Four described the Court's behavior.<sup>111</sup> No other decade-long period so consistently mirrored what a Court believing in Footnote Four would do. With this key decade in place, it becomes possible to project both forward and backward and conclude that Footnote Four has had a good half century run.

The cases in that decade do look like they were decided by a Footnote Four court, and many were decided in the face of very significant public opinion. But that hostile public opinion was overwhelmingly located in the South and, following the passage of the Civil Rights Act of 1964, could be almost completely discounted. Parts of the North did concur with their isolated Southern brethren, especially on the religion and pornography decisions, and, of course, there was a regular drumbeat about the explosive criminal procedure cases like *Miranda v. Arizona*.<sup>112</sup>

The creative period ended when it was overwhelmed by both new reasons to dislike the Court and greater numbers of Americans adhering to an anti-Court position. *Furman* was a factor; *Swann* and *Keyes* contributed mightily by actually giving people the experience they were protesting; and, of course, there was *Roe* coupled with a strong contemporaneous claim of its illegitimacy.

Until busing and abortion combined to recreate a strong anti-Court constituency, Northern elites were solidly behind the Court's results and it was their opinion that counted (until something like what Richard Nixon called middle America could be

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111. An exception is McCloskey, who saw Footnote Four from the vantage point of 1960. For reasons already expressed I believe he is wrong.

112. 384 U.S. 436 (1966).

mobilized). Maybe educated Northerners were Footnote Four buffs without ever having read *Carolene Products*, but a better explanation, I think, is that, like the Court, they too favored ridding the country of backwards laws, to make the country one, and with the best—their—values available. That meant civil rights, reapportionment, religion in the closet (or at a civil rights demonstration), the government out of the bedroom and libraries, a better break for the poor, and, when women demanded justice, justice for them, too. Doing this was not because the winners were politically powerless, but because the outcomes were right and could be protected (unlike in the 1950s) from significant political backlash. This, I think, is a better explanation for the constitutional explosion following 1963 and this, in an important way, ties back into the nationalizing that was going on in the quarter century following the “switch in time that saved nine.” It’s not Footnote Four, although often it looks similar; instead, it was an attempt to make the nation one with a decidedly Northern cast to how that one would be made.

At least two questions arise. Am I correct and if so is there anything that accounts for the persistence of the belief in Footnote Four? As to the first, I readily acknowledge that there is enough mushiness in Footnote Four that the cases could be viewed somewhat differently than the way I cast them, and maybe be made to conform better descriptively. But I’ve listened to debates over a lot of years and I don’t think my understanding of how “Footnote Four” is used is off the mark.<sup>113</sup> If this needs bolstering, none of the colleagues I acknowledged in my own first footnote thought I misdescribed Footnote Four either. So we come to the second question: the persistence of the Footnote Four theory.

The explanation is rather straightforward. Footnote Four is the principal justification offered for the role of the Supreme Court in post-New Deal American politics.<sup>114</sup> It legitimates the Court’s determinations that certain laws are unconstitutional. Neither the Court nor academic commentators are willing to say that “oh, yes; that was struck down because elite Northern opinion holds a different view.” Instead, the Court and commentators explain, with or without a specific citations, “a law is never invalidated unless [it violates Footnote Four].” Because Foot-

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113. Doug Laycock, however, takes his sophisticated textualism from paragraph one of Footnote Four and thus believes that the common assumption that Footnote Four is “really” paragraphs two and three is erroneous.

114. In Jack Balkin’s religious imagery, *Carolene Products* plays St. Paul to *West Coast Hotel’s* Jesus. J.M. Balkin, *The Footnote*, 83 Nw. U. L. Rev. 275, 296 (1989).

note Four serves as a (and often the) legitimating theory for modern judicial review, it is important that the cases conform. To make the cases conform, theory becomes ideology with all the attendant blinders. Commentators can and do wish theory and results conformed, and they often grant their own wishes. But that doesn't make it so.