

THE *CAROLINE PRODUCTS* FOOTNOTE  
AND THE PREFERRED POSITION OF  
INDIVIDUAL RIGHTS: LOUIS  
LUSKY AND JOHN HART ELY vs.  
HARLAN FISKE STONE

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We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . .

Rehnquist, C.J., for the majority in *Dolan v. City of Tigard*,  
114 S. Ct. 2309, 2320 (1994)

Footnote four to *Carolene Products v. United States*<sup>1</sup> is the most famous footnote in constitutional law.<sup>2</sup> Since its appearance in Justice Harlan Fiske Stone's 1938 opinion for the Supreme Court, its meaning has been much debated. Early on, it was interpreted to mean that "personal" rights were to be preferred to economic rights,<sup>3</sup> but in recent years, largely through

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1. 304 U.S. 144, 152 n.4 (1938).

2. Its only competitors seem to be footnote 11 to *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954), (the infamous doll test footnote), and footnote 10 to *Karzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966), (in which Justice Brennan put forth his "ratchet" theory that Congress could expand constitutional guaranties under the Enabling Clauses of the 13th, 14th and 15th Amendments, but could not contract them).

3. In his recently published biography of Learned Hand, Professor Gerald Gunther describes Footnote Four as foreshadowing a battle in the early forties

whether judicial restraint—broad deference to legislative resolutions of policy debates—should be the across-the-board position of the justices as to *all* types of laws, or whether there should be something of a double standard under which the justices would keep their hands off economic regulations and at the same time scrutinize more carefully those laws attacked as impinging on personal liberties.

Gerald Gunther, *Learned Hand: The Man and the Judge* 563 (Alfred A. Knopf, 1994). See also Herbert Wechsler, *Stone and the Constitution*, 46 Colum. L. Rev. 764, 795-800 (1946). Shortly before Stone died, Edwin Borchard wrote, without direct reference to

the efforts of Louis Lusky and John Hart Ely, it has been interpreted more narrowly, justifying judicial activism only when the majoritarian democracy does not work: Ely describes it as “representation-reinforcement,” a process-based notion that the courts should use judicial review aggressively only when the electoral process has broken down or is tampered with or when litigants are deemed not to have a fair chance to achieve change at the ballot box, either because of hostile laws or because of prejudice against them. Louis Lusky, who was Stone’s law clerk when the footnote was written, differs somewhat from Ely in that he emphasizes the substantive side of the footnote, especially its role as a protection of minority rights. Nonetheless, he has published two books arguing that Footnote Four has been used improperly by the Supreme Court as a roving commission for judicial activism.

Lusky and Ely bring daunting credentials to the debate, and there can be no doubt that the footnote is, in part, concerned both with representation and with the protection of minorities. In rereading Stone’s contemporaneous opinions and those of his colleagues, however, I have become convinced that the process-based orientation underestimates the substantive content of the footnote, and that the revisionist attack on the “preferred position” of non-economic rights needs to be refuted. The topic is much bigger than the *Carolene Products* footnote, and I expect to have more to say on it. This look at what Harlan Fiske Stone, Charles Evans Hughes, Wiley Rutledge and the other members of the Court said about Footnote Four in its early years is, however, a good place to start.

## I. *CAROLENE PRODUCTS* AND FOOTNOTE FOUR

*Carolene Products v. United States* involved an attack on an old federal law forbidding the interstate shipment of something

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Footnote Four, that Stone “early took the view that the burden of proof in economic relations is on the one who contests constitutionality, whereas in civil liberties the burden of proof is shifted.” Edwin Borchard, Book Review, 46 *Colum. L. Rev.* 334, 336 (1946).

Fifty years later, this question of the preferred position of individual rights to economic rights, and the related issue whether this justifies finding unwritten rights in “fundamental” personal matters like sex, family and procreation, is still unresolved. It surfaced at the close of the past term of the Supreme Court in a caustic exchange between Chief Justice Rehnquist and Justice John Paul Stevens in the important new takings case, *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), with Rehnquist accusing Stevens of trying to relegate the Takings Clause of the Fifth Amendment “to the status of a poor relation” compared with the First or Fourth Amendments. *Id.* at 2320. While *Carolene Products* was not mentioned by name in *Dolan*, each of the opinions seemed well aware of it and of Footnote Four. See note 6 and accompanying text.

called "filled milk," a now-forgotten product that sounds something like liquid margarine that you were supposed to put in your coffee.<sup>4</sup> One year earlier, in 1937, the Court had ended the New Deal constitutional crisis by adopting a deferential attitude to congressional and legislative regulation of business. In *Carolene Products* Justice Stone, speaking for the Court, rejected an attack on the rationality of the ban on filled milk, relying in part on Congress's findings and committee reports. He continued by stating a broad rule of deference:

Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.<sup>5</sup>

This stated a basic presumption of constitutionality—at least "for regulatory legislation affecting ordinary commercial transactions."<sup>6</sup> But at this point Stone affixed a footnote, numbered four, and reading, in its entirety, as follows:

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4. It is described in the opinion, quoting from congressional findings, as "milk compounds made of condensed milk from which the butter fat has been extracted and an equivalent amount of vegetable oil, usually coconut oil, substituted." 304 U.S. 144, 149 n.2. The underlying 1923 statute, the Filled Milk Act, is strongly criticized as special interest legislation in Miller, *The True Story of Carolene Products*, 1988 Sup. Ct. Rev. 397. In 1972, after a district court held the Filled Milk Act unconstitutional as denying due process, *Milnot Co. v. Richardson*, 350 F. Supp. 221 (S.D. Ill. 1972), the Food and Drug Administration abandoned both the appeal and the Filled Milk Act. Milnot Co. was the successor to Carolene Products Co., and the impetus for the changed judicial attitude was the government's different treatment of non-dairy creamers. See Frank R. Strong, *A Post-Script to Carolene Products*, 5 Const. Comm. 185 (1988). (Curiously, the product was, and apparently still is, called "Milnut," but the company's name is "Milnot.")

5. 304 U.S. at 152.

6. It was this basic presumption of constitutionality for legislation regulating business that was at issue in *Dolan*, 114 S. Ct. 2309 (1994), and which led to the remarks quoted at the beginning of this article. *Dolan* was a takings case. The owner of a chain of hardware stores had been required to dedicate land for a bicycle path as a condition of a zoning variance permitting her to expand one of the stores. The majority held that the City had not carried the burden of showing that the bicycle path would actually carry some of the increased traffic created by the expansion. Chief Justice Rehnquist commented that:

Justice STEVENS' dissent relies upon a law review article for the proposition that the city's conditional demands for part of petitioner's property are "a species of business regulation that heretofore warranted a strong presumption of constitutional validity" . . . But simply denominating a governmental measure as a "business regulation" does not immunize it from constitutional challenge on the grounds that it violates a provision of the Bill of Rights. . . . We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the 14th. See *Stromberg v. California*, 283 U.S. 359, 369-370; *Lovell v. Griffin*, 303 U.S. 444, 452.

It is unnecessary to consider now whether legislation which restricts those political processes, which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the [14th] Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; on restraints upon the dissemination of information, see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-714, 718-720, 722; *Grosjean v. American Press Co.*, 297 U.S. 233; *Lovell v. Griffin*, *supra*; on interferences with political organizations, see *Stromberg v. California*, *supra*, 369; *Fiske v. Kansas*, 274 U.S. 380; *Whitney v. California*, 274 U.S. 357, 373-378; *Herndon v. Lowry*, 301 U.S. 242; and see *Holmes, J.*, in *Gitlow v. New York*, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see *De Jonge v. Oregon*, 299 U.S. 353, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Farrington v. Tokushige*, 273 U.S. 284, or racial minorities, *Nixon v. Herndon*, *supra*; *Nixon v. Condon*, *supra*: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare *McCulloch v. Maryland*, 4 Wheat. 316, 428; *South Carolina v. Barnwell Bros.*, 303 U.S. 177, 184, n.2, and cases cited.<sup>7</sup>

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114 S. Ct. at 2320 (internal citations omitted). Justice Stevens, joined in his dissent by Justices Blackmun and Ginsburg, responded:

The city's conditions are by no means immune from constitutional scrutiny. The level of scrutiny, however, does not approximate the kind of review that would apply if the city had insisted on a surrender of Dolan's First Amendment rights in exchange for a building permit.

*Id.* at 2328. Justice Souter, also in dissent, argued that the majority had placed the burden of producing evidence about the bicycle path on the city "despite the usual rule in cases involving the police power that the government is presumed to have acted constitutionally." *Id.* at 2331.

7. 304 U.S. at 152 n.4.

Thus, in broad terms the first paragraph deals with express rights, the second with the political process and the third with unpopular minorities.

## II. A THRICE-TOLD TALE: THE WRITING OF FOOTNOTE FOUR

In his books, *By What Right?*<sup>8</sup> and *Our Nine Tribunes*<sup>9</sup> and in a 1982 Columbia Law Review article, *Footnote Redux: A Carolene Products Reminiscence*,<sup>10</sup> Professor Louis Lusky has described the process by which the footnote was created.<sup>11</sup> Harlan Fiske Stone had for many years been the Dean of Columbia Law School and during his twenty-one years on the Supreme Court his clerkship generally went to Columbia's star graduate.<sup>12</sup> During the 1937 Term Lusky was Stone's law clerk, and he wrote the first draft of the footnote.<sup>13</sup> The first sentence of Lusky's original draft set its tone:

Perhaps the attacking party bears a lighter burden where the effect of the statute may be to hamper the corrective political processes which would ordinarily be expected to bring about repeal of unwise legislation.<sup>14</sup>

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8. Louis Lusky, *By What Right?: A Commentary on the Supreme Court's Power to Revise the Constitution* 108-14 (Michie, 1975).

9. Louis Lusky, *Our Nine Tribunes: The Supreme Court in Modern America* 119-32 (Praeger Publishers, 1993).

10. Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 Colum. L. Rev. 1093 (1982).

11. Still earlier, Alpheus T. Mason had given a similar but less detailed version, based on correspondence with Lusky. See A.T. Mason, *Harlan Fiske Stone Pillar of the Law* 513-16 (Viking Press, 1956). Lusky expanded his version in *By What Right?* (cited in note 8), and in 82 Colum. L. Rev. (cited in note 10), which has appended to it correspondence between Stone and Chief Justice Hughes and a note from Hugo Black to Stone. Lusky's newest version, in *Our Nine Tribunes* (cited in note 9), is essentially that of *Footnote Redux* with fewer footnotes, but in addition to the correspondence Lusky appended copies of the original drafts. The versions are all consistent, but the two recent ones are more useful, particularly the appendix to *Our Nine Tribunes* at 177-90.

My description is based directly upon the documents in the appendix to *Our Nine Tribunes* unless attributed to Lusky himself.

12. Among them were Walter Gellhorn, Herbert Wechsler, Alfred McCormack, Milton Handler, Harold Leventhal, Alexis Coudert, and Eugene Nickerson. A complete list appears in Mason, *Harlan Fiske Stone* at 875 (cited in note 11). On the experience, see Alfred McCormack, *A Law Clerk's Recollections*, 46 Colum. L. Rev. 710 (1946).

13. In his most recent version Lusky reports that he had been assigned to read the printer's proof on Justice Stone's draft of the *Carolene Products* opinion, and, working into the night, wrote Footnote Four and was so pleased with his handiwork that he nearly had it set in type, until dissuaded by his fellow clerk, Harold Leventhal, later a distinguished federal judge. Lusky, *Our Nine Tribunes* at 177-78 (cited in note 9).

14. *Id.* at 183, 185.

Stone struck this out,<sup>15</sup> but did write a footnote that kept most of Lusky's ideas and most of the remainder of Lusky's draft.<sup>16</sup> Stone then circulated his printed draft of the *Carolene* opinion, with a footnote four that was substantially similar to what became the second and third paragraphs in the finished product. In place of Lusky's opening, Stone began:

Different considerations may apply, and one attacking the constitutionality of a statute may be thought to bear a lighter burden, when the legislation aims at restricting the corrective political processes which can ordinarily be expected to bring about repeal of undesirable legislation.<sup>17</sup>

Like Lusky's draft, Stone's draft suggested the appropriateness of closer judicial scrutiny when there was a failure of "corrective political processes," either through restrictions on political activity or because of prejudice against "discrete and insular minorities" who would thus not be able to use the political processes.

When Stone circulated the draft, Chief Justice Hughes responded with a very basic objection:

I am somewhat disturbed by your Note 4 . . . . Is it true that "different considerations" apply in the instances you mention? Are the "considerations" different or does the difference lie not in the *test* but in the nature of the right involved? When we say that a statute is invalid on its face, do we not mean that, in relation to the right invoked against it, the legislative action raises no presumption in its favor and has no rational support? Thus, in dealing with freedom of speech and of the press, as in the recent *Lovell* case, the legislative action putting the press broadly under license and censorship is directly opposed to the constitutional guaranty and for that reason has no presumption to support it. . . .<sup>18</sup>

Stone replied to Hughes on the next day and said that he had revised the footnote "[i]n view of your letter."<sup>19</sup> The rest of Stone's letter gives us insight into his thinking:

15. *Id.* at 185.

16. *Id.* at 186. Lusky added the famous "discrete and insular minorities" language to Stone's draft and Stone included it in the later versions. *Id.*

17. *Id.* at 187.

18. Letter from Charles Evans Hughes to Harlan Fiske Stone, April 18, 1938, reprinted in Lusky, *Our Nine Tribunes* at 179 (cited in note 9); Lusky, 82 *Colum. L. Rev.* at 1106 (cited in note 10). The *Lovell* case is *Lovell v. Griffin*, 303 U.S. 444 (1938), one of Hughes's great First Amendment opinions.

19. Letter from Harlan Fiske Stone to Charles Evans Hughes, April 19, 1938, reprinted in Lusky, *Our Nine Tribunes* at 180 (cited in note 9); Lusky, 82 *Colum. L. Rev.* at 1107 (cited in note 10).

You are quite right in saying that the specific prohibitions of the first ten amendments and the same prohibitions when adopted by the Fourteenth Amendment leave no opportunity for presumption of constitutionality where statutes on their face violate the prohibition. There are, however, possible restraints on liberty and political rights which do not fall within those specific prohibitions and are forbidden only by the general words of the due process clause of the Fourteenth Amendment. I wish to avoid the possibility of having what I have written in the body of the opinion about the presumption of constitutionality in the ordinary run of due process cases applied as a matter of course to those other more exceptional cases. For that reason it seemed to me desirable to file a caveat in the note, without, however, committing the Court to any proposition contained in it. The notion that the Court should be more alert to protect constitutional rights in those cases where there is danger that the ordinary political processes for the correction of undesirable legislation may not operate has been announced for the Court by many judges

. . . .<sup>20</sup>

Stone then made three major changes: he added the first paragraph of Footnote Four, he substituted “[t]here may be narrower scope for operation of the presumption of constitutionality” for the earlier discussion of burdens of proof, and he made somewhat clearer the tentative nature of his comments (“[i]t is unnecessary to consider now whether,” “[n]or need we enquire whether”). While both Lewis Powell<sup>21</sup> and Lusk himself<sup>22</sup> have made much of the tentative nature of the footnote, I will show below that Stone and his contemporaries on the Court several times treated Footnote Four as stating a positive, not tentative, thesis, and one that dealt not merely with process but with substantive constitutional rights.

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20. Lusk, *Our Nine Tribunes* at 180 (cited in note 9); Lusk, 82 Colum. L. Rev. at 1107 (cited in note 10). In the remainder of the paragraph Stone gave the examples of Chief Justice Marshall in *McCulloch v. Maryland* and cases collected in his footnote 2 in *South Carolina v. Barnwell Bros*, 303 U.S. 177, 185 (1938). Both citations were already in the draft he had circulated and both appear in the third paragraph of the final version of Footnote Four. (Incidentally, Professor Lusk also drafted the *Barnwell* footnote, which certainly can be seen today as a lineal ancestor of Footnote Four.)

21. Lewis F. Powell, *Caroline Products Revisited*, 82 Colum. L. Rev. 1087, 1090-92 (1982). See also Mason, *Harlan Fiske Stone* at 513 n.\* (cited in note 11).

22. Lusk, *Our Nine Tribunes* at 125-26 (cited in note 9); Lusk, 82 Colum. L. Rev. at 1098-99 (cited in note 10).

## III. THE LUSKY THESIS

Lusky has clearly been annoyed these many years at what he sees as Hughes's meddling with an elegant and limitable system based only on the need for judicial protection of the political process and minority rights. In a 1942 Yale Law Journal article discussion of Footnote Four, *Judicial Protection of Minority Rights*,<sup>23</sup> he did not even mention the first paragraph, and in his 1975 book, *By What Right?* he described the footnote as containing "the germs of two distinct theories for expanding the Court's protection of individual freedoms and immunities."<sup>24</sup> One is a principle of implied judicial power. He describes it, approvingly, in speaking of Stone's circulated draft:

Justice Stone points to two situations in which legislative miscalculations of the public welfare are likely to remain uncorrected unless the Court steps in. One is that where a legislature insulates itself from demands for change in the law by hampering political expression, political organization, or voting. The other is where, although the political processes are fully operative, prejudice against socially isolated minorities may render the legislature unresponsive to their grievances.<sup>25</sup>

In contrast, he described Hughes's position as a thought that "some rights are more *important* than others, that . . . they occupy a 'preferred position' . . ."<sup>26</sup> According to Lusky, when Stone added the first paragraph ("and won the Chief Justice's concurrence"<sup>27</sup>), he made a grave change in the footnote, "quite foreign to the principle of implied judicial power":<sup>28</sup>

The Court's authority to override policies approved by legislatures depends, says this paragraph, not on its special fitness for particular tasks, but on two other circumstances: the words of the Constitution, and the Court's election to apply them in a way the Constitutors did not expect. . . . In effect, the position is that the Court is licensed to disregard the fundamental principle of interpretation (which is to give words the meaning

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23. 52 Yale L.J. 1, 19-21 (1942). Lusky has written that he concentrated on the third paragraph because he was about to go overseas and perceived that the third paragraph "had not been accepted by the Court." To remedy this he "wrote an article explaining the background and conceptual underpinning of the Footnote, with special emphasis on paragraph 3." Lusky, *Our Nine Tribunes* at 131 (cited in note 9).

24. Lusky, *By What Right?* at 111 (cited in note 8).

25. *Id.* at 109-110.

26. *Id.* at 110 (emphasis in original).

27. *Id.*

28. *Id.* at 111.



their authors would have given them in the context of the instant case) whenever the Court thinks a different meaning would better serve the public welfare.<sup>29</sup>

This led to massive expansions of judicial power in areas like criminal procedure,<sup>30</sup> speech and press<sup>31</sup> and church-state relations.<sup>32</sup> Most seriously to Lusky, it led to the concept of fundamental rights, which he attributes to the first paragraph, and abhors.<sup>33</sup> Recently, in *Our Nine Tribunes*, Lusky has expanded his criticism to all judicial activism<sup>34</sup> that cannot be tied to interference with the political process or discrimination against racial, religious and ethnic groups.<sup>35</sup>

#### IV. REPRESENTATION REINFORCEMENT

Underlying the modern debate over Footnote Four is the question of the role of original intent in constitutional law. Under the rubric "interpretivism," this was the hot topic of the mid-seventies and early eighties, though eventually most constitutional scholars grew bored and agreed with Paul Brest<sup>36</sup> that it

29. *Id.*

30. *Id.* at 161-66, 331-34.

31. *Id.* at 319-30.

32. *Id.* at 167.

33. See *id.* at 311-14. See also Lusky, *Our Nine Tribunes* at 76-86 (cited in note 9) (discussion of "neo-privacy"). In a letter that he sent me Lusky wrote:

As I have tried to make clear, my trouble with the "preferred position" doctrine is not that it can be and has been [able] to reach a sound *result* in some cases, but that it is both over-inclusive and under-inclusive, and therefore proved to be unhelpful in distinguishing between areas where the Court should assume primary responsibility and areas where it should not. In other words, I think it announces unsound *doctrine*. . . .

34. I do not wish to overstate Lusky's opposition to judicial activism. He describes "activism" as "readiness to invent new constitutional rules not directly derivable from the text of the Constitution," and says that what he sees as a "shift toward 'activism'" has had beneficial consequences, "but, because of the manner in which the Court has brought it about, it has also damaged the Court and the institution of judicial review over which it presides." Lusky, *Our Nine Tribunes* at 13 (cited in note 9). He contends that his new book is an attempt to find "a set of limiting principles that will preserve judicial review by stopping its excesses." *Id.*

35. *Id.* at 132. Lusky complains that the term "discrete and insular minorities" has been given too expansive a meaning, and insists that it should be limited to the three categories mentioned in paragraph three. On the page just cited he chides Justice Lewis Powell for including aliens within it in his article on Footnote Four. (Whether Powell actually says this isn't clear, see Powell, 82 *Colum. L. Rev.* at 1090-91 (cited in note 21)). Lusky also writes that among the "latter-day misconceptions" about the footnote

is that it demands judicial remedies for all chronic losers in the political arena, while still other misconceptions involve various novel meanings of "discrete and insular": meanings not to be found in any dictionary, as far as I am aware.

*Id.* at 131.

36. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. Rev.* 204 (1980).

was a pretty phony issue: The obvious answer was that "intent of the framers" is surely relevant, but hardly should bind the courts hundreds of years later, since a) we rarely know the original intent very clearly; b) times change and people writing constitutions know that and expect their product to be used in unimagined contexts; c) it's not that clear who "the framers" really were, given collective authorship and elaborate ratification processes; and d) it's even less clear why some men who died long ago should bind us today at all; none of us were there, and even if our ancestors were, many of them were excluded from the electoral process.<sup>37</sup> Today, the term "originalist" seems to have replaced the awkward "interpretivist," and while the debate has become muted, there still is a continuum of approaches to constitutional interpretation. Lusky's discussion of the first paragraph of Footnote Four shows him to be a pretty strict originalist, though he claims to reject the more extreme forms of interpretivism, and agrees that "'intent' has no simple and understandable referent."<sup>38</sup> Some others are still at the other end of the spectrum,<sup>39</sup> but today, most writers are somewhere in the middle.

The best known middle of the road theory, and one of the dominant constitutional theories of this generation, is that of representation-reinforcement, put forth by John Hart Ely, most notably in his influential book, *Democracy and Distrust*.<sup>40</sup> The first part of Ely's book is spent on a paradox: he feels obliged to reject interpretivism,<sup>41</sup> but scorns the ability of courts to discover fun-

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37. This is my restatement, but Brest said most of this fifteen years ago. See Brest, 60 B.U. L. Rev. 204 (cited in note 36). And sixty years before that, Cardozo had written:

The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of lawmakers whose collective will has been declared. It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law. Codes and other statutes may threaten the judicial function with repression and disuse and atrophy. The function flourishes and persists by virtue of the human need to which it steadfastly responds. Justinian's prohibition of any commentary on the product of his codifiers is remembered only for its futility.

Benjamin N. Cardozo, *The Nature of the Judicial Process* 17-18 (Yale U. Press, 1921).

38. Lusky, *By What Right?* at 46 (cited in note 8); Lusky, *Our Nine Tribunes* at 133-40 (cited in note 9).

39. See, e.g., Stanley Fish, *Working On the Chain Gang*, 60 Tex. L. Rev. 551, 562 (1982). Stanley Fish's theory is too subtle to categorize as merely non-interpretive, but he occupies a position far to one side of the debate.

40. See John Hart Ely, *Democracy and Distrust* 73-116 (Harv. U. Press, 1980). In a real sense, the final two-thirds of Ely's book is about representation-reinforcement, *id.* at 73-183.

41. His first two chapters are entitled "The Allure of Interpretivism" and "The Impossibility of a Clause-Bound Interpretivism," *id.* at 1-9, 11-41.

damental unwritten values in constitutional law.<sup>42</sup> Thus, he cannot accept the rigid interpretivism associated with Raoul Berger<sup>43</sup> or Robert Bork,<sup>44</sup> but also rejects the non-interpretivist view<sup>45</sup> as too free-wheeling. His solution is his representation-reinforcement theory.

Ely argued that judicial review is most justifiable when speech, political involvement or the political process itself is restricted in ways that deny voters the ability to use the democratic majoritarian process to effect change. In this circumstance judicial review reinforces representation and thus majority rule, instead of running counter to it. Footnote Four, or more accurately, its second and third paragraphs, are the major source of Ely's theory.<sup>46</sup> Building on Lusky's discussion in *By What Right?*, Ely describes the first paragraph as "pure interpretivism,"<sup>47</sup> and seems to read it as claiming only the power to enforce the literal words of the Constitution, particularly express prohibitions on government conduct.<sup>48</sup> He goes on to describe paragraphs two and three as "more interesting,"<sup>49</sup> and devotes the rest of his book to applying them to judicial review.

42. *Id.* at 43-72.

43. See Raoul Berger, *Government By Judiciary: The Transformation of the Fourteenth Amendment* 363-72 (Harv. U. Press, 1977).

44. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 143-60 (The Free Press, 1990).

45. See Michael J. Perry, *The Constitution, The Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* 101-02 (Yale U. Press, 1982). Perry has somewhat tempered his views in more recent times. See Michael J. Perry, *Morality, Politics, and Law: A Bicentennial Essay* 132 (Oxford U. Press, 1988).

46. See Ely, *Democracy and Distrust* at 73-77 (cited in note 40).

47. *Id.* at 76.

48. This puts Ely somewhat at odds with Lusky, whose main complaint is that the first paragraph cannot be so narrowly brigaded. See Lusky, *By What Right?* at 111 (cited in note 8) (emphasis added):

If the Constitution contains a "specific prohibition" against Federal action, such as the First Amendment ban on abridgement of speech and press, that prohibition will also be enforced against state action if it is "held to be embraced within the Fourteenth." For all that appears, the Court claims unrestrained authority to decide whether or not it is to be so held; no objective standard is prescribed for the Court's guidance. In effect, the position is that the Court is licensed to disregard the *fundamental principle of interpretation (which is to give words the meaning their authors would have given them in the context of the instant case)* whenever the Court thinks a different meaning would better serve the public welfare.

... There is virtually no limit to its ability to attribute new meaning to the "specific prohibitions," once it is liberated from the need to interpret them as the Constitutors [sic] expected.

49. Ely, *Democracy and Distrust* at 76 (cited in note 40). Two leading articles of recent years, both critical of the Footnote, have concerned themselves almost exclusively with the third paragraph. See Bruce Ackerman, *Beyond Caroline Products*, 98 Harv. L. Rev. 713 (1985); Lea Brilmayer, *Caroline, Conflicts, and the Fate of the "Inside-Outsider,"* 134 U. Pa. L. Rev. 1291 (1986). In addition, Lawrence Tribe used the second and third

I suggest that the first paragraph of the footnote has been undervalued, and Stone's own writings, particularly his dissents in *Minersville School District v. Gobitis*<sup>50</sup> and *Jones v. Opelika*,<sup>51</sup> and his concurrence in *Skinner v. Oklahoma*<sup>52</sup> show that there was much more to the footnote than just representation-reinforcement or even the protection of minority rights.

#### IV. WHAT JUSTICE STONE SAID

*Gobitis* involved a group of Jehovah's Witness children who refused to salute the flag as part of their daily classroom routine. They were expelled from school, and brought suit for reinstatement. The Court of Appeals held for them, but the Supreme Court reversed by an 8-1 vote. The majority opinion was by Felix Frankfurter, who saw the issue primarily as a religious group's demand for an exemption from a general public duty.<sup>53</sup> He briefly considered freedom of speech, but dismissed it quickly because there was a rational basis—the instilling of patriotism in time of world war—for the school board's requirement; no more was needed:

Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—*so long as the remedial channels of the democratic process remain open and unobstructed*—when it is ingrained in a people's habits and not enforced against popular policy by the coercion of adjudicated law.<sup>54</sup>

To this Frankfurter attached a footnote citing the leading cases in which speech and assembly rights had been upheld to that date, and commented that in those cases “the Court was concerned with restrictions cutting off appropriate means through which, in a free society, the processes of popular rule may effectively function.”<sup>55</sup> These are particularly interesting, since they presage Ely by forty years, but convey a similar interpretation of Stone's Footnote Four.<sup>56</sup>

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paragraphs as a starting point in his attack on process-based theories. See Lawrence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *Yale L.J.* 1063, 1063 n.1 (1980).

50. 310 U.S. 586 (1940).

51. 316 U.S. 584 (1942).

52. 316 U.S. 535 (1942).

53. *Gobitis*, 310 U.S. at 594.

54. *Id.* at 599 (emphasis added, footnote omitted).

55. *Id.* at 599 n. 6.

56.

The swift imprimatur on Paragraph 2 is amply shown by reference to a single remarkable fact. In June 1940, when Stone stood alone in the first *Flag Salute*

Stone, however, was not convinced, and dissented—alone.<sup>57</sup> Throughout his discussion ran two themes: that “the explicit guaranties of freedom of speech and religion” cannot be overridden by a legislative command of “compulsory expressions of loyalty,”<sup>58</sup> and that the rights of small minorities cannot be overridden by legislative judgments, even if backed by the bulk of the population,<sup>59</sup> and even if they are reasonable means to the end of national unity.<sup>60</sup> Stone responded directly to the Frankfurter language quoted above when he wrote, in a paragraph expressly citing Footnote Four, that “I am not persuaded that we should refrain from passing upon the legislative judgment ‘as long as the remedial channels of the democratic process remain open and unobstructed.’ This seems to me no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will.”<sup>61</sup>

To be sure, Stone focused in part on what he called at one point “the right of this small and helpless minority,”<sup>62</sup> and his concern for them can, as Lusky suggests<sup>63</sup>, be bottomed on the third paragraph. But it also appears that Stone was looking to the First Amendment itself:

The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist. For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at

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*Case*—explicitly relying upon Paragraph 3—Frankfurter, for the Court, tacitly but unmistakably invoked the logic of Paragraph 2.

Lusky, *Our Nine Tribunes* at 130 (cited in note 9) (emphasis in original).

57. *Gobitis*, 301 U.S. at 601. Justice McReynolds noted a concurrence in result. *Id.*

58. *Id.* at 605.

59. *Id.* at 604-07.

60. “The very terms of the Bill of Rights preclude, it seems to me, any reconciliation of such compulsions with the constitutional guaranties by a legislative declaration that they are more important to the public welfare than the Bill of Rights.” *Id.* at 605.

61. *Id.* at 605-06.

62. *Id.* at 606.

63. Lusky, *By What Right?* at 267 (cited in note 8):

This time, however, there was a vigorous though solitary dissent by Justice Stone, who invoked the principle articulated in the third paragraph of his 1938 *Caroline Products* footnote: “more searching judicial scrutiny” of statutes directed against (or, more precisely, in this case, failing to accommodate the needs of) “discrete and insular minorities.”

See also the passage quoted in note 56, *supra*.

least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of religious and racial minorities.<sup>64</sup>

Stone's *Gobitis* dissent shows that he was not prepared to rely only on process defects or discrimination to justify constitutional activism by the Court. He read the Bill of Rights itself as a charter for judicial activism.

In 1942, two years after *Gobitis*, the Court decided *Jones v. Opelika*,<sup>65</sup> another of the many Jehovah's Witnesses cases that pushed the civil liberties envelope in the late thirties and early forties. *Jones* involved several municipalities' attempts to require street or door-to-door sellers of religious literature to pay for peddlers' licenses. The majority, in an opinion by Justice Stanley Reed, rejected the defendants' First Amendment claims "because we view these sales as partaking more of commercial than religious or educational transactions."<sup>66</sup> The majority noted that none of the taxes or license fees had been aimed at the Jehovah's Witnesses or at religious or ideological publications.<sup>67</sup>

Stone, now Chief Justice, dissented in an opinion joined by Justices Black, Douglas and Murphy. While he did not mention the *Carolene Products* footnote, Stone wrote words that many associated with the first paragraph of Footnote Four:

The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position.<sup>68</sup>

Stone's dissent is of some embarrassment to the Lusky position on two accounts: Stone here coined the phrase "preferred position," and his words show that he did not limit the presumption of unconstitutionality to the discriminations and interferences within the political process, that he took the first paragraph seri-

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64. 310 U.S. at 606-07. The reference to recent holdings is presumably to three cases that Stone cited in the preceding paragraph, which also cited Footnote Four and is clearly concerned with "discrete and insular minorities." The cases are *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Farrington v. Tokushige*, 273 U.S. 284 (1927). Each of these cases is cited in the third paragraph of Footnote Four. Thus, what Stone seems to be saying is that a claim under the First Amendment is entitled to the same judicial protection and activism as a claim that the political process does not protect a discrete and insular minority.

65. 316 U. S. 584 (1942).

66. *Id.* at 598.

67. *Id.* at 596-98.

68. *Id.* at 608 (dissenting opinion).

ously.<sup>69</sup> This is pointed up by his concurrence in *Skinner v. Oklahoma*,<sup>70</sup> decided one week before *Jones v. Opelika*.

*Skinner* is largely remembered today as a way station to the right of privacy, and it is Justice Douglas's opinion for the Court that is usually discussed. In some ways, however, Stone's concurrence is more interesting, especially since he refers to Footnote Four and the reference is central to his opinion.

*Skinner* involved an Oklahoma eugenics statute that required involuntary sterilization of "habitual criminals." Justice Douglas treated the case as one involving equal protection. Those convicted of white collar crimes like embezzlement were excluded from the definition of habitual criminal, while those committing similar crimes like larceny were included. Because the legislation involved "one of the basic civil rights of man,"<sup>71</sup> because "[m]arriage and procreation are fundamental to the very existence and survival of the race,"<sup>72</sup> strict scrutiny of the classification was required. This led Douglas to the conclusion that the classification was an invidious discrimination, and thus had to be struck down.

Stone concurred in result, but rejected the use of the Equal Protection Clause, saying that the question was not one of equal protection, but "whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process."<sup>73</sup>

There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned (see *United States v. Carolene Products* [citing Footnote Four]) and where the presumption is resorted to only to dispense with a procedure which the ordinary dictates of prudence would seem to demand for the protection of the individual from arbitrary action.<sup>74</sup>

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69. Lusky admitted this in *By What Right?* at 313 (cited in note 8). He has written that

Stone himself, though he was as dedicated to sound doctrine as any Supreme Court Justice who ever sat, was primarily a fighter for *decisions* he thought were correct. When endeavoring to win over his colleagues on an issue he deemed important, he was a redoubtable advocate; he threw at the opposition whatever he thought would be most effective (including the Footnote).

Lusky, *Our Nine Tribunes* at 126 (cited in note 9).

70. 316 U.S. 535 (1942).

71. 316 U.S. at 541.

72. *Id.*

73. *Id.* at 544.

74. *Id.*

Stone said that because Skinner was not given an individualized hearing on the inheritability of his criminal tendencies, he had been denied procedural due process.<sup>75</sup>

This fits neither in paragraph two (no one seemed to be arguing that habitual criminals fit there because they were denied the right to vote) nor paragraph three (habitual criminals, at least in 1942, were not viewed as a religious, racial, national or other kind of discrete and insular minority<sup>76</sup>). The only reason that Skinner would be entitled to an individualized hearing was that a personal liberty was affected, a liberty not expressly mentioned in the Constitution, yet one that Stone found to be within the ideas that he had put forward in Footnote Four. Stone made no effort to explain where this "liberty of the person" came from. He seemed to have considered it self-evident that taking away someone's ability to have children invaded it, and his citation of Footnote Four suggests that he was prepared to derive substantive unwritten fundamental rights from the "specific provisions in the Constitution" that he had referred to in the first paragraph of Footnote Four.<sup>77</sup>

## V. THE OTHER JUSTICES

As far as I can tell, that exhausts Stone's judicial references to Footnote Four,<sup>78</sup> but there were several other references by fellow justices in and near his lifetime. Stone was not always on the same side as the justice citing the footnote, so we cannot au-

75. *Id.* at 545. The majority did not reach this question. *Id.* at 538.

76. Today, of course, we might note that a disproportionate number of habitual criminals are non-white.

77. It must be noted that Stone was not saying that no one might be sterilized involuntarily. Neither he nor Justice Douglas reached the question whether a better drafted sterilization law would be constitutional. Nonetheless, Stone's approach seems to presage Justice Douglas's later concept of penumbras of the Bill of Rights, put forth in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the well-spring of modern privacy doctrine.

Another concurrence, by Justice Jackson, though it did not mention Footnote Four, made an argument that did make reference to the majoritarian process:

There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes.

*Id.* at 546.

78. In another case he cited the text to which the footnote is attached for the proposition that the Court must assume any state of facts which would sustain a statute assailed as unconstitutional. *Alabama Federation of Labor v. McAdory*, 325 U.S. 450, 466 (1945). Contrast the Rehnquist position in *Dolan v. City of Tigard*, cited in notes 3 and 6. *McAdory* involved state labor restrictions attacked as preempted by the federal labor laws and unconstitutional under the First Amendment. The Court, per Stone, rejected both arguments and dismissed the writ of certiorari because the case was deemed unripe for the requested declaratory judgment.



tomatically assume that he would have agreed, but in none of the cases did Stone note any disagreement with the dicta about Footnote Four.

The first use of Footnote Four by the Court came in *Thornhill v. Alabama*,<sup>79</sup> a 1940 case that struck down an Alabama statute restricting labor picketing. Frank Murphy, writing for an eight-justice majority that included Stone, cited the footnote for the importance of free speech to the processes of popular government, a proposition squarely within its second paragraph.<sup>80</sup> In the 1944 case of *Prince v. Massachusetts*, however, Murphy cited it in dissent for the lack of "any strong presumption" of constitutionality in dealing with statutes "which directly or indirectly infringe religious freedom,"<sup>81</sup> a reading that seems to rely on the first paragraph. Felix Frankfurter also seemed to be referring to the first paragraph when he cited the footnote in 1941 to support his statement that the right to free discussion is a right "to be guarded with a jealous eye."<sup>82</sup> But in his 1943 dissent in *West Virginia State Board of Education v. Barnette*,<sup>83</sup> which overruled his opinion in *Gobitis*, Frankfurter gave it a crabbed reading: "This Court has recognized, what hardly could be denied, that all the provisions of the first ten Amendments are 'specific' prohibitions [citing Footnote Four]."<sup>84</sup>

Of the Justices who sat with Stone during his lifetime it was Wiley Rutledge who used the footnote most clearly to support the preferred position concept.<sup>85</sup> *Thomas v. Collins*<sup>86</sup> involved a

79. 310 U.S. 88 (1940).

80. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. Compare *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153n.

310 U.S. at 95. The opinion also owes an (unstated) debt to the famous Brandeis concurrence in *Whitney v. California*, 274 U.S. 357, 373-78 (1927), which is cited in the second paragraph of Footnote Four.

81. 321 U.S. 158, 173 (1944) (Murphy, J., dissenting). *Prince* involved the application of the child labor laws to children selling Jehovah's Witnesses literature, and Stone was in the majority of five, which found that the state's power to forbid child labor outweighed both the parental rights and the child's own religious rights. The case was difficult for Justices who had only recently helped win the fight to uphold the child labor laws, and the lineup defies any easy political or activist classification. The majority opinion, upholding the restriction, was by Wiley Rutledge, joined by Stone, Black, Reed and Douglas. Murphy's dissent was joined by Justices Jackson, Roberts and Frankfurter.

82. *American Federation of Labor v. Swing*, 312 U.S. 321, 325 (1941).

83. 319 U.S. 624, 646 (1943).

84. *Id.* at 648.

85. Rutledge had been appointed in 1942 to replace James F. Byrnes, a conservative New Dealer who sat on the Court for just over a year. The story of the maneuvering over the vacancy is told in Chapter XIII of Gerald Gunther's biography of Learned Hand. Gunther, *Learned Hand* at 553-70 (cited in note 3). There was a massive behind the

Texas law requiring union organizers to register with the state before soliciting members. Thomas, a union executive, had been enjoined, *ex parte*, from soliciting members without first obtaining an organizer's card; he deliberately violated the injunction, was held in contempt, sought habeas corpus, and was vindicated by a 5-4 majority in an opinion by Rutledge, with Stone joining in a dissent by Owen Roberts. Texas argued that it was doing nothing more than regulating a line of work—union organizer—much as it regulated securities salesmen, insurance agents, real estate brokers and the like.<sup>87</sup> Rutledge described the issue this way:

The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. ["Cf." citation to three First Amendment cases.] That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States v. Carolene Products*, . . . .<sup>88</sup>

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scenes campaign in favor of Hand, at least partially orchestrated by Frankfurter. One of the major factors against Hand was his age—he was nearly 71 and Roosevelt had attempted in the Court-Packing Scheme to pressure Justices into retiring at 70. But another was that he was viewed as a potential ally of Frankfurter's in the increasingly acrimonious split among the Roosevelt appointees into a liberal/activist camp and a more conservative one led by Frankfurter. As Gunther puts it,

Frankfurter was correct in anticipating that FDR's selection of Byrnes's successor would be critical. Rutledge was a solid vote to join the Black-Douglas-Murphy-Stone side; Hand, by contrast, would probably have sided with Frankfurter on the civil liberties issues dividing the New Deal Court. Although a lifelong believer in the First Amendment, he, like Frankfurter, generally refused to embrace a double standard, a more interventionist judicial stance toward "personal" rights than to "property" ones.

*Id.* at 565.

In a memorial to Stone, *Chief Justice Stone's Conception of the Judicial Function*, 46 *Colum. L. Rev.* 696, 698 (1946), reprinted in Irving Dilliard, ed., *Learned Hand, The Spirit of Liberty* 201, 206 (U. of Chi. Press, 1977), Hand argued that Stone had rejected the preferred position approach: "He could not understand how the principle [of judicial deference to the legislature] which he had all along supported, could mean that, when concerned with interests other than property, the courts should have a wider latitude for enforcing their own predilections, than when they were concerned with property itself." Gunther comments that "the views Hand here ascribed to Stone were more truly his own." Gunther, *supra*, at 565 n.\*.

86. 323 U.S. 516 (1945).

87. *Id.* at 525.

88. *Id.* at 529-30. The cases cited in the "cf." citation were *Schneider v. State*, 308 U.S. 147 (1939), which struck down an anti-leafletting law; *Cantwell v. Connecticut*, 310

Rutledge also made clear that the freedoms of speech and assembly were not limited to their instrumental value in the electoral process: "The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest."<sup>89</sup> Rutledge applied the clear and present danger test and easily found the state's actions unconstitutional.

The Roberts dissent, joined by Stone, Reed and Frankfurter, began with a strong defense of freedom of speech,<sup>90</sup> but denied that it applied in the circumstances of the case, which it saw as a business regulation, the business of unions being organizing.<sup>91</sup> Like the application of the child labor laws to itinerant sellers of Jehovah's Witness literature in *Prince v. Massachusetts*, *Thomas v. Collins* involved a close question that could divide even justices with a strong commitment to the First Amendment, so one cannot tell if Stone disagreed with Rutledge's dictum as well as with his holding. Given Stone's creation of the preferred position concept in *Jones v. Opelika* less than three years earlier, however, it seems likely that he would have agreed with Rutledge's statement of the preferred position of free speech, although dissenting from its application.<sup>92</sup>

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U.S. 296 (1940), which struck down a requirement of a permit for a Jehovah's Witnesses parade-rally; and *Prince v. Massachusetts*, supra note 81, which upheld the application of child labor laws to young sellers of Jehovah's Witness literature. The citation to *Caroline Products* does not actually mention Footnote Four, but cites 304 U.S. 152-153, the pages on which the footnote appears. Pretty clearly Justice Rutledge was referring both to text and the footnote.

89. *Id.* at 531.

90. The right to express thoughts freely and to disseminate ideas fully is secured by the Constitution as basic to the conception of our government. A long series of cases has applied these fundamental rights in a great variety of circumstances.

*Id.* at 548 (footnote omitted).

91. *Id.* at 556-57.

92. In the course of the dissent, which Stone joined, Justice Roberts clearly rejected an argument that he puts in Thomas's mouth as follows:

He asserts that, under the Constitutional guarantees, there is a sharp distinction between business rights and civil rights; that in *discussion* of labor problems, and equally in *solicitation* of union membership, civil rights are exercised; . . . and that, consequently, *any* interference with the right to solicit membership in such organizations is a prohibited abridgement of these rights, even though the Act applies only to paid organizers.

*Id.* at 552 (emphasis in the original). I suppose that this could be read as a rejection of the preferred position concept, but it seems more an argument that labor unions were not immune to the regulations of business speech that had been upheld in cases like *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Compare Justice Jackson's concurrence in *Thomas*, 323 U.S. at 544, 548, in which he complains about the less protective First Amendment treatment that the Court had given to employers.

Stone died on April 22, 1946.<sup>93</sup> Rutledge cited Footnote Four, coupled with *Thomas v. Collins*, twice in separate opinions in the next two years. In February of 1947 Rutledge dissented in the bedrock establishment of religion case, *Everson v. Board of Education*,<sup>94</sup> joined by Justices Frankfurter, Jackson, and Burton. In a footnote near the end of his opinion Rutledge wrote:

In *Thomas v. Collins* . . . it was said that the preferred place given in our scheme to the great democratic freedoms secured by the First Amendment gives them "a sanctity and a sanction not permitting dubious intrusions." Cf. *Remonstrance*. . . . And in other cases it has been held that the usual presumption of constitutionality will not work to save such legislative excursions in this field. [Citing Footnote Four.]<sup>95</sup>

And in June of 1948 Rutledge, in a concurrence joined by Black, Douglas, and Murphy, cited Footnote Four, *Thomas v. Collins*, *Thornhill v. Alabama*, and *Schneider v. State*<sup>96</sup> in a long paragraph explaining why Congress's restrictions on union expenditures in elections could not constitutionally be applied to a union periodical. He began with a reference to the first paragraph of the Footnote:

As the Court has declared repeatedly, that [legislative] judgment does not bear the same weight and is not entitled to the same presumption of validity, when the legislation on its face or in specific application restricts the rights of conscience, expression and assembly protected by the [First] Amendment, as are given to other regulations having no such tendency.<sup>97</sup>

The Government, however, argued that Congress clearly had the power to regulate federal elections and that because of this the usual preeminence of the First Amendment disappeared and was outweighed by the clearly rational basis behind Congress's enactment. Rutledge noted that there was a question whether this argument might not be applicable to all powers of Congress "to destroy the principles stated for securing the preferential status of the First Amendment freedoms . . . ."<sup>98</sup> Passing that "ques-

93. Mason, *Harlan Fiske Stone* at 806 (cited in note 11).

94. 330 U.S. 1 (1947).

95. *Id.* at 62 n.61. The reference to "Remonstrance" is to Madison's Memorial and Remonstrance Against Religious Assessments, 2 *Writings of James Madison* 183, pars. 3, 9 (Hunt ed. 1901-10), which Rutledge appended in full to his opinion. *Id.* at 63. Rutledge also cited Herbert Wechsler's article *Stone and the Constitution*, 46 *Colum. L. Rev.* 764, 795 (1946).

96. 308 U.S. 147 (1939).

97. *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 140 (1948).

98. *Id.* at 141.

tion," he cited a number of First Amendment cases requiring specificity when First Amendment freedoms were constricted, and found that the federal statute "falls far short of meeting these requirements . . . ."<sup>99</sup>

By 1949, less than three years after Stone died, the preferred position concept had crept so far that it was used by Justice Stanley Reed, one of the most conservative members of the Vinson Court, even as he ruled against a First Amendment defense. In *Kovacs v. Cooper*,<sup>100</sup> a sound truck case, Reed wrote for a plurality of himself, Chief Justice Vinson and Justice Harold Burton, all of them relatively conservative on the First Amendment, to uphold a conviction for using a sound device that emitted "loud and raucous noises."<sup>101</sup> In the course of his opinion Reed wrote "[t]he preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience."<sup>102</sup> Among the authorities that Reed cited after the words "preferred position" was *Thomas v. Collins*, to the page on which Rutledge had cited *Caroline Products*.<sup>103</sup>

Reed's use of the phrase provoked a famous response from Frankfurter<sup>104</sup> in the form of one of the many irritating concurrences that he was fond of appending,<sup>105</sup> apparently to show that he was a former law professor. Frankfurter spent one paragraph on the merits, followed by seven pages making "additional observations" on Reed's use of the term, "preferred position," which he deemed "a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity."<sup>106</sup> Frankfurter went through a list of seven principal cases, beginning with *Herndon v. Lowry*<sup>107</sup> in 1937, to which he attributed the growth of the doctrine. The second entry on his list was the *Caroline Products* footnote, which he printed out in the margin.<sup>108</sup> His attack on Footnote Four is well-known:

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99. *Id.* at 142.

100. 336 U.S. 77 (1949).

101. *Id.* at 78. The plurality was joined by concurrences in result by Frankfurter and Jackson, who both had dissented in an earlier case striking down restrictions on sound devices. See *Saia v. New York*, 334 U.S. 558 (1948). Murphy, Rutledge, Black and Douglas dissented.

102. *Kovacs*, 336 U.S. at 88 (footnote omitted).

103. *Id.* at 88 n.14. See text accompanying note 88.

104. *Id.* at 89.

105. See Richard H. Field, *Frankfurter, J., Concurring*, 71 Harv. L. Rev. 77 (1957).

106. *Kovacs*, 336 U.S. at 90.

107. 301 U.S. 242, 258 (1937).

108. 336 U.S. at 90 n.1.

A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine, and the *Carolene* footnote did not purport to announce any new doctrine; incidentally, it did not have the concurrence of a majority of the Court. It merely rephrased and expanded what was said in *Herndon v. Lowry, supra*, and elsewhere. It certainly did not assert a presumption of invalidity against all legislation touching matters related to liberties protected by the Bill of Rights and the Fourteenth Amendment. It merely stirred inquiry whether as to such matters there may be "narrower scope for operation of the presumption of constitutionality" and legislation regarding them is therefore "to be subjected to more exacting judicial scrutiny."<sup>109</sup>

The seventh case on Frankfurter's list was *Thomas v. Collins*. Frankfurter conceded that *Thomas* contained "perhaps the strongest language dealing with the constitutional aspect of legislation touching utterance."<sup>110</sup> But Frankfurter claimed that *Thomas* was an opinion of only four Justices since Jackson had written a concurrence.<sup>111</sup> Based on his excursion through the cases, Frankfurter argued that

In short, the claim that any legislation is presumptively unconstitutional which touches the field of the First Amendment and the Fourteenth Amendment, insofar as the latter's concept of "liberty" contains what is specifically protected by the First, has never commended itself to a majority of this Court.<sup>112</sup>

Several points need to be noted about Frankfurter's concurrence in *Kovacs*. First, of all, the *Carolene Products* footnote did indeed have a majority. As Lusky explains, there were only seven Justices sitting on the case, because Cardozo was ill, and the newly-appointed Stanley Reed had recused himself. McReynolds dissented, Butler concurred in result only, and Hugo Black disassociated himself from the entire section of the opinion in which the footnote appeared. That left Stone, Hughes, Brandeis and Roberts, making a majority of four out of seven.<sup>113</sup> The Court has always treated a majority of those sitting as sufficient

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109. *Id.* at 90-92.

110. *Id.* at 94.

111. *Id.*

112. *Id.* at 94-95.

113. Lusky, *Our Nine Tribunes* at 124 (cited in note 9); Lusky, 82 *Colum. L. Rev.* at 1097 (cited in note 10). Black's unwillingness to join in Part III of the opinion seems to have had nothing to do with Footnote Four. See his letter to Stone, reproduced in *Our Nine Tribunes* at 182 (cited in note 9) and in Lusky, 82 *Colum. L. Rev.* at 1109 (cited in note 10).

to speak for the Court<sup>114</sup> and the Stone opinion was described in the Reports as the opinion of the Court. Similarly, Rutledge's opinion in *Thomas v. Collins*, which relied in part on the footnote to support the preferred position doctrine, was styled the opinion of the Court, and there is no indication that Jackson was concurring only in result. On top of that, Frankfurter admitted that several other cases referred to First Amendment freedoms as in a preferred position,<sup>115</sup> and simply dismissed them as "[a] number of Jehovah's Witnesses cases,"<sup>116</sup> as if that somehow undermined their constitutional force. Even Lusky, who dislikes the preferred position doctrine and is very sympathetic to Frankfurter's *Kovacs* concurrence, concedes that Frankfurter overstated his case.<sup>117</sup> And Rutledge concluded his dissent in *Kovacs* by saying

I would add only that I think my brother FRANKFURTER demonstrates the conclusion opposite to that which he draws, namely, that the First Amendment guaranties of the freedoms of speech, press, assembly and religion occupy preferred position not only in the Bill of Rights but also in the repeated decisions of this Court.<sup>118</sup>

The term "preferred position" seems to have gone out of fashion in the years after *Kovacs*,<sup>119</sup> but the concept has prevailed. Lawrence Tribe gives a major portion of his treatise to "The Model of Preferred Rights: Liberty Beyond Contract,"<sup>120</sup> and Gerald Gunther speaks of a "double standard" in his casebook's discussion of Footnote Four.<sup>121</sup> And even Frankfurter in his very concurrence attacking the concept, conceded that the underlying idea came from his idol, Holmes—that

without freedom of expression, thought becomes checked and atrophied. Therefore, in considering what interests are so fun-

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114. See Robert Stern, Eugene Gressman, & Stephen M. Schapiro, 2 *Supreme Court Practice* (7th ed. 1995).

115. E.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943): "Freedom of press, freedom of speech, freedom of religion are in a preferred position." (Douglas, J., for the Court). See *Kovacs v. Cooper*, 336 U.S. at 93.

116. *Kovacs*, 336 U.S. at 93.

117. Lusky, *Our Nine Tribunes* at 127-29 (cited in note 9); Lusky, 82 Colum. L. Rev. at 1100-02 (cited in note 10).

118. 336 U.S. at 106.

119. This is applauded by Lusky, *Our Nine Tribunes* at 129 (cited in note 9); Lusky, 82 Colum. L. Rev. at 1102 (cited in note 10).

120. Laurence Tribe, *American Constitutional Law* 769 (Foundation Press, 2d ed. 1988); Tribe's index gives the general citation of pages 769-1435 for the entry "Preferred Rights." *Id.* at 1771.

121. Gerald Gunther, *Constitutional Law* 462-65 (Foundation Press, 12th ed. 1991). See also note 3 and accompanying text.

damental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.<sup>122</sup>

Frankfurter said that his complaint with the concept of the preferred position was that it “expresses a complicated process of constitutional adjudication by a deceptive formula[,] a formula [that] makes for mechanical jurisprudence.”<sup>123</sup> He made similar comments in his concurrence in the 1951 Communist case, *Dennis v. United States*.<sup>124</sup> But what Frankfurter really showed was his lack of passion for civil liberties, especially those arising from the First Amendment. In an appropriate case Frankfurter would protect free speech,<sup>125</sup> but most of the time he temporized and found excuses to support the Government.<sup>126</sup> Footnote Four, especially as it was built upon by Rutledge and other members of the Court in the forties, called for passion in the defense of personal rights. And that makes a substantive difference.

## VI. WHAT DOES IT ALL MEAN?

It is important to remember that until 1931 nobody had ever won a First Amendment case in the Supreme Court.<sup>127</sup> The

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122. 336 U.S. at 95.

123. *Id.* at 96.

124. 341 U.S. 494, 526-27 (1951).

125. See, e.g., *American Federation of Labor v. Swing*, 312 U.S. 321 (1941).

126. See, e.g., his concurrence in *Dennis v. United States*, 341 U.S. 494 (1951). Curiously, even though Frankfurter appears to have been supportive of what later became known as representation-reinforcement, see notes 54-61 and accompanying text, he dissented bitterly in *Baker v. Carr*, 369 U.S. 186 (1962), the basic reapportionment case, which seems a paradigm in which the loaded political process could not give its victims an electoral remedy. See Ely, *Democracy and Distrust* at 120-21 (cited in note 40).

Frankfurter may have had greater passion for the constitutional protection of the rights of criminal defendants. See, e.g., *Rochin v. California*, 342 U.S. 165 (1952); Tribe, *American Constitutional Law* at 777 (cited in note 120). I have often wondered if his willingness to subordinate press rights to those of criminal defendants, see, e.g., *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 921-35 (1950) (separate opinion of Frankfurter, J.); Linzer, *The Meaning of Certiorari Denials*, 79 Colum. L. Rev. 1227, 1261 (1979), may be attributed to his experience defending Sacco and Venzetti in the 1920s. See Joseph P. Lash, *A Brahmin of the Law* reprinted in Joseph P. Last, ed., *From the Diaries of Felix Frankfurter 37-39* (Norton, 1975).

127. There were some victories before 1930 in what we would today consider free speech cases, but the rationales of those cases were based on due process, substantive or procedural. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Fiske v. Kansas*, 274 U.S. 380 (1927). For discussions of the conservative approach of the Supreme Court before the thirties, see Rabban, *The First Amendment in Its Forgotten Years*, 90 Yale L.J. 514 (1981); Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. Chi. L. Rev. 1207 (1983).



Hughes Court, first with *Stromberg v. California*<sup>128</sup> and *Near v. Minnesota*<sup>129</sup> in 1931 and then in 1937 with *DeJonge v. Oregon*<sup>130</sup> and *Herndon v. Lowry*,<sup>131</sup> led the way to protection of speech and press rights. But it was in the post-1937 Roosevelt Court, first under Hughes and then under Stone, that enforcement of First Amendment rights became the norm.<sup>132</sup> It was that Court which put forth the *Carolene Products* footnote, and it was that Court which built on it to produce the preferred position theory of individual rights.

When Louis Lusky noticed that *Carolene Products*' presumption in its text of the constitutionality of commercial legislation might take the Court too far out of the business of judicial review, he made an important contribution to constitutional law. No doubt Justice Stone agreed with Lusky's idea, which tied judicial activism to redress of the failures of the majoritarian electoral process and to prejudice against defenseless minorities. No doubt it was Charles Evans Hughes who changed the focus when he asked "does not the difference lie not in the *test* but in the nature of the right involved?"<sup>133</sup> And no doubt Stone wanted Hughes's vote so that he could have a four-man majority of the seven Justices sitting on the case. But Lusky allows his loyalty to the original structure of the footnote to blind him: Footnote Four wasn't Louis Lusky's work; it wasn't Harlan Fiske Stone's work; it wasn't Charles Evans Hughes's work. It was the Supreme Court's work.

The genesis and evolution of Footnote Four shows how an idea develops in a collegial body like the Supreme Court. Initially Stone was simply burying freedom of contract and substantive due process. Then his twenty-three year old law clerk showed him how the presumption of constitutionality in his text might undermine attacks on unfair legislation distorting the electoral process. Then the Chief Justice pointed out how this ignored the nature of the substantive rights involved, particularly

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128. 283 U.S. 359 (1931).

129. 283 U.S. 697 (1931).

130. 299 U.S. 353 (1937).

131. 301 U.S. 242 (1937).

132. The impact of the Roosevelt Court is apparent in the lip service that the more conservative Truman appointees had to pay to the First Amendment in the cold war case of *Dennis v. United States*, 341 U.S. 494 (1951), which upheld the prosecution of leaders of the American Communist Party over First Amendment objections. Even those supporting the Government conceded, in Chief Justice Vinson's words, that "we must pay special heed to the demands of the First Amendment marking out the boundaries of speech." *Id.* at 502-03.

133. See note 18 and accompanying text.

freedom of speech. Then Stone rewrote the footnote, making clear in his letter to Hughes that he had no disagreement, and wished to protect both explicitly protected rights and those which needed the more general protection of the due process clause. Only then did Footnote Four as we know it appear, and when it did, it spoke with the voice of the Court.

Equally, we can see that the members of the Court, including Stone, applied Footnote Four in the next decade primarily to protect freedom of speech, and to put forth the notion that individual rights are special, are more important than “shifting economic arrangements” (to use Frankfurter’s own words). Whether or not this is called the preferred position, it goes back even before *Carolene Products*, at least to Cardozo’s description of “freedom of thought and expression” in *Palko v. Connecticut*: “Of that freedom one may say that it is the matrix, and indispensable condition, of nearly every other form of freedom.”<sup>134</sup> Today, the notion that an action by government that restricts speech is presumptively unconstitutional is hardly a radical notion.<sup>135</sup>

Most important, though, is the fact that the *Carolene Products* Footnote is about values.<sup>136</sup> Louis Lusky, who genuinely cares about minority rights, had no doubt about their constitutional value,<sup>137</sup> though he opposed the extension of many others. In this respect he differed from John Ely,<sup>138</sup> who tried, unsuccessfully, to create a value-neutral system of judicial activism.<sup>139</sup> But

134. 302 U.S. 319, 326-27 (1937).

135. The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed. . . . Content-based regulations are presumptively invalid.

*R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992) (Scalia, J., for the Court) (citations omitted).

The notion seems to have been opposed by Robert Bork in his famous essay, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971); see also Robert Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash. U. L. Q. 695. But then, the egregiousness of Bork’s views in the late twentieth century was a major reason for the Senate’s rejection of his nomination to the Supreme Court.

136. Lea Brilmayer, who writes about Footnote Four from the point of view of a conflict of laws scholar, agrees, and shows at some length, *Lea Brilmayer*, 134 U. Pa. L. Rev. at 1306-15 (cited in note 49), that the third paragraph is value-laden, indeed, that it is based on what she calls “a natural law of process.” *Id.* at 1330-33.

137. See Lusky, *Our Nine Tribunes* at 132 (cited in note 9). In a real sense, Lusky’s whole life has shown a strong devotion to minority rights, and the thesis of *Our Nine Tribunes* is a call for “universal kinship.” See *id.* at 172-76. See also Lusky, 52 Yale L.J. 1 (cited in note 23).

138. “I have also noted the failure of John Hart Ely, in *Democracy and Distrust*, to recognize the substantive commitment to self-government and to racial, religious, and ethnic equality that the Footnote reflects.” Lusky, *Our Nine Tribunes* at 132 (cited in note 9).

139. I have no desire to get into a long discussion of Ely’s book, which is the most important, and probably the best, book on constitutional law of this generation. Suffice it

both of them, along with Felix Frankfurter and, in my view, the whole legal process/neutral principles school, suffer from an unwillingness to accept the notion that constitutional law cannot be reduced to a logic game.<sup>140</sup> From the Declaration of Independence, through the framing and amending of the Constitution itself, and through the two hundred years of decisions by the Court, values have been what constitutional law is about. This is not the place to explore how this squares with democracy, but it is the place to point out that the Court that produced Footnote Four seems to have understood that point, and that it seems to have meant what it said.

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to say that his attacks on both interpretivism and non-interpretivism are brilliant and convincing, but his solution, the second half of his book, left this reader, at least, asking what basis his solutions had other than his belief that they were important. For a couple of the many reviews suggesting this, see Laurence Tribe, 89 Yale L.J. 1063 (cited in note 49); and Gerald E. Lynch, Book Review, 80 Colum. L. Rev. 857 (1980).

140. In a letter passed on to me by a mutual friend, with Professor Lusky's approval, Lusky wrote of this passage: "I can only conclude that Professor Linzer has not noticed my assertion in the introduction to *Our Nine Tribunes* (p.xiii ff.) that I do not insist on 'rigid consistency and elegant simplicity.' "