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## ARTICLES

# Filled Milk, Footnote Four & the First Amendment: An Analysis of the Preferred Position of Speech After the *Carolene Products* Decision

Elizabeth J. Wallmeyer\*

### INTRODUCTION

In 1923, Congress passed the “Filled Milk Act,” (hereinafter the “Act”)<sup>1</sup> which prohibited interstate shipment of skimmed milk made with anything other than milk fat.<sup>2</sup> A company was indicted under the Act for manufacturing and shipping a product called Milnut, which contained skimmed milk and coconut oil.<sup>3</sup> When the case reached the Supreme Court, all the producers of Milnut wanted to do was to be able to continue to produce and ship its product across state lines. The producers argued that the Act violated Congress’s power to regulate interstate commerce.<sup>4</sup> The

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<sup>1</sup> Filled Milk Act, Pub L. No. 67-513, 42 Stat. 1486 (1923) (codified at 21 U.S.C. §§ 61–63 (2000)).

<sup>2</sup> See 21 U.S.C. §§ 61–63. The Act defined filled milk as milk, cream, or skimmed milk to which any fat or oil other than milk fat had been added, which resulted in a product that imitated milk. See *id.* § 61. The congressional rationale underlying the Act was that filled milk constituted an adulterated food, the sale of which was fraud to the public and injurious to the public health. See *id.* § 62.

<sup>3</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 146 (1938).

<sup>4</sup> See *id.* The Milnut producers argued that the Act invaded the field of action reserved for state regulation by the Tenth Amendment of the Constitution, which states that powers neither delegated to the federal government by the Constitution nor prohibited by

producers lost their argument,<sup>5</sup> but their case impacted constitutional jurisprudence in a manner which far transcended the realm of economic regulation. The resulting decision affected individual liberties, civil rights, and general questions concerning judicial activism and standards of review.

This profound impact arose not from the text of the decision, but the now-famous Footnote Four of *United States v. Carolene Products Co.*<sup>6</sup> Written by Justice Harlan Fiske Stone, the footnote has been labeled the most famous footnote in constitutional law.<sup>7</sup> Justice Stone proposed the idea that a bifurcated standard of review existed for legislation, and that a narrower presumption of constitutionality existed when legislation appeared to fall within a specific prohibition of the constitution.<sup>8</sup> In the context of First Amendment jurisprudence, this concept of heightened constitutional review became known as the “Preferred Position Doctrine,”<sup>9</sup> meaning that attempted regulation of First Amendment freedoms was presumptively unconstitutional.<sup>10</sup> The notion of a preferred position was embraced by the Court in First Amendment cases, although not without controversy, for about a decade after

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the Constitution to the states are reserved for the states. *See id.* *See also* U.S. CONST. amend. X.

<sup>5</sup> *See Carolene Prods.*, 304 U.S. at 154. The Court held that the Act was a constitutional exercise of Congress’s power to regulate interstate commerce.

<sup>6</sup> *Id.* at 152 n.4.

<sup>7</sup> *See* Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusk and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 277 (1995). Linzer suggests that only two other footnotes have had such an impact on constitutional law: footnote eleven of *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954), which cited social science and psychological research supporting that the segregated education was not “separate but equal,” and footnote ten of *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966), in which Justice William Brennan proposed the theory that Congress could expand the constitutional guarantees of the Thirteenth, Fourteenth, and Fifteenth Amendments (the Enabling Clauses), but could not contract them. *See Linzer, supra*, at 277 n.2.

<sup>8</sup> *See Carolene Prods.*, 304 U.S. at 152 n.4.

<sup>9</sup> *See* MATTHEW D. BUNKER, JUSTICE AND THE MEDIA 24 (1997); Linzer, *supra* note 7, at 290.

<sup>10</sup> *See* BUNKER, *supra* note 9, at 24.

the *Carolene Products* decision, until it faded away after a scathing attack of the doctrine by Justice Frankfurter in a 1949 case.<sup>11</sup>

This Article will briefly examine the status of the First Amendment and standards of review used before the *Carolene Products* decision in Part I. In Part II, the *Carolene Products* decision, along with the history of the writing of Footnote Four, will be explained. Part III will examine the cases during the 1940s that utilized the preferred position doctrine. Part IV will examine the First Amendment in the 1950s, when the Court appeared to retreat from the preferred position doctrine. Next, Part V will look at the various theories that have emerged in an attempt to explain the rationale behind Justice Stone's famous footnote. Finally, Part VI will examine the current standard of strict scrutiny in an attempt to analyze whether it embraces similar values as the preferred position doctrine, or is a distinct means of examining First Amendment questions.

#### I. THE FIRST AMENDMENT PRIOR TO *CAROLENE PRODUCTS*

Today, freedom of speech appears to be treated as special, both "constitutionally and culturally."<sup>12</sup> The First Amendment, however, received little attention from the federal courts prior to World War I, and occupied a marginal status in constitutional law.<sup>13</sup> In fact, until 1931, no one had won a First Amendment case in the Supreme Court.<sup>14</sup> A notion of a special status for the First Amendment began to gradually emerge in the Supreme Court prior to *Carolene Products*' Footnote Four, although the emergence of such a status was more implicit than in the later preferred position cases.<sup>15</sup> This Part will briefly outline key Supreme Court cases impacting the First Amendment near the turn of the twentieth century and prior to *Carolene Products*.

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<sup>11</sup> The "preferred position" label was first used in Justice Stone's dissent in *Jones v. Opelika*, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting). Justice Frankfurter's attack appeared in *Kovacs v. Cooper*, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring).

<sup>12</sup> G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 300 (1996).

<sup>13</sup> See *id.*

<sup>14</sup> See Linzer, *supra* note 7, at 300.

<sup>15</sup> See White, *supra* note 12, at 301-02. See also BUNKER, *supra* note 9, at 21.

A few notable Supreme Court decisions around the turn of the twentieth century did not address the First Amendment directly, yet provide insight into how the Court might interpret individual liberties and regulations of those liberties. In *Robertson v. Baldwin*,<sup>16</sup> the Court addressed the constitutionality of a statute conferring jurisdiction on justices of the peace to apprehend missing seamen and return them to their vessels.<sup>17</sup> The Court considered whether the statute might violate the Thirteenth Amendment, which abolished slavery and involuntary servitude.<sup>18</sup> The Court concluded that by abolishing slavery, Congress did not intend for the Thirteenth Amendment to apply to servitude to the Navy.<sup>19</sup> The Court stated that the law was well settled that the framers of the Constitution did not intend for the Bill of Rights to present novel ideas, but instead codified the “guaranties and immunities which we had inherited from our English ancestors.”<sup>20</sup> The Court went on to state that the Bill of Rights included exceptions to those principles.<sup>21</sup> As an example, the Court cited the First Amendment.<sup>22</sup> This amendment, the Court explained, provided for freedom of speech yet implicitly incorporated exceptions for speech that was libelous, blasphemous, obscene, indecent, or injurious to public morals or private reputations.<sup>23</sup> These exceptions were those that the Court recognized in the common law prior to the adoption of the First Amendment.<sup>24</sup> Therefore, any regulation concerning these presumably incorporated exceptions would not require a special or exacting judicial scrutiny, but would be justified restraints on speech.

This idea that a restraint or regulation on a liberty such as freedom of speech would only be examined under a reasonableness standard was affirmed in the 1905 case of *Jacobson v.*

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<sup>16</sup> 165 U.S. 275 (1897).

<sup>17</sup> *Id.* at 277.

<sup>18</sup> *Id.* at 280–81.

<sup>19</sup> *See id.*

<sup>20</sup> *Id.* at 281.

<sup>21</sup> *See id.*

<sup>22</sup> *See id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See id.*

2003] PREFERRED POSITION POST CAROLINE PRODUCTS 1023

*Massachusetts*.<sup>25</sup> There, the Supreme Court addressed whether mandatory state vaccinations were a constitutional infringement on individual liberty.<sup>26</sup> The Court held that individual liberties, while important, “may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations . . . .”<sup>27</sup> While this case may contain “the germ of the idea that civil liberties could be restricted only with some showing of necessity”<sup>28</sup> because of the “great dangers” language, it nonetheless also asserts that such regulations must only be reasonable.

The First Amendment was explicitly tested in *Patterson v. Colorado*,<sup>29</sup> when a newspaper publisher was convicted for publishing cartoons and an article seen as embarrassing to the Colorado Supreme Court in its consideration of pending cases.<sup>30</sup> The Court treated the case as a Fourteenth Amendment due process claim, and viewed the regulation as an exercise of state police power, and thus not a violation of the First Amendment.<sup>31</sup> Justice Oliver Wendell Holmes, however, speaking for the majority, stated in dicta that the purpose of the First Amendment was to prevent prior restraint, and not the subsequent punishment of speech.<sup>32</sup>

An interpretation more analogous to current views of the position of the First Amendment began to emerge during the World War I era,<sup>33</sup> when Congress passed legislation aimed at

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<sup>25</sup> 197 U.S. 11 (1905).

<sup>26</sup> *See id.* at 12.

<sup>27</sup> *Id.* at 29.

<sup>28</sup> BUNKER, *supra* note 9, at 21.

<sup>29</sup> 205 U.S. 454 (1907).

<sup>30</sup> *See id.* at 458–59.

<sup>31</sup> *See White, supra* note 12, at 311 (noting that the Fourteenth Amendment had not yet been read to incorporate the First Amendment to include state regulation abridging freedom of speech or freedom of the press). *But see Patterson*, 205 U.S. at 464–65 (Harlan, J., dissenting) (asserting that a First Amendment claim was a national claim).

<sup>32</sup> *See Patterson*, 205 U.S. at 462 (dicta).

<sup>33</sup> *See White, supra* note 12, at 312. White credits Zechariah Chafee, Jr., as supplying First Amendment jurisprudence with its new philosophical rationale for protecting speech, by turning the focus away from the individual interest in self-expression towards a social interest in protecting democracy by facilitating truth in the marketplace of ideas. White draws these conclusions from Chafee’s 1920 treatise *Freedom of Speech*. *Id.* at 316.

criminalizing speech designed to undermine the war effort.<sup>34</sup> The Espionage and Sedition Acts led to a number of freedom of speech cases that made their way to the Supreme Court, and gave the justices the opportunity to focus on the First Amendment. It is these World War I cases that began to lay the roots for the notion of a preferred position for freedom of speech.<sup>35</sup>

In *Schenck v. United States*,<sup>36</sup> Justice Holmes, writing for the majority, formulated the clear and present danger test.<sup>37</sup> The case involved an anti-war group which mailed pamphlets to men eligible to serve in the military, asserting that the draft violated the Thirteenth Amendment's abolition of involuntary servitude.<sup>38</sup> The government argued that such pamphlets violated the Espionage Act, which forbade obstruction of military service.<sup>39</sup> Justice Holmes upheld the convictions because he believed that they presented a threat to national security. In justifying the conviction, however, Justice Holmes went beyond the standard of mere legislative reasonableness.<sup>40</sup> Instead, he dictated that the question is

in every case . . . whether . . . the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.<sup>41</sup>

Justice Holmes continued to refine this test in a dissenting opinion in *Abrams v. United States*.<sup>42</sup> The majority upheld the conviction of a group who distributed pamphlets criticizing the

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<sup>34</sup> See Espionage Act, ch. 30, Pub. L. No. 65-24, 40 Stat. 217 (1917); Sedition Act, ch. 75, Pub. L. No. 65-150, 40 Stat. 553 (1918). This legislation occurred during a period in American history known as the First Red Scare.

<sup>35</sup> See BUNKER, *supra* note 9, at 21; Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U. L. REV. 462, 465-66 (1977).

<sup>36</sup> 249 U.S. 47 (1919).

<sup>37</sup> *Id.* at 52.

<sup>38</sup> See *id.* at 49-51.

<sup>39</sup> See *id.*

<sup>40</sup> See BUNKER, *supra* note 9, at 22.

<sup>41</sup> See *Schenck*, 249 U.S. at 52 (emphasis added).

<sup>42</sup> 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

2003]     *PREFERRED POSITION POST CAROLINE PRODUCTS*     1025

United State's involvement against Russia's Communist Party.<sup>43</sup> In reaching this decision, the majority utilized a "bad tendency" test which punished speech if it was of a type that would tend to bring about harmful results. This bad tendency was less protective than Justice Holmes's clear and present danger test.<sup>44</sup> At the time of the case the United States was at war with Germany, not Russia; Holmes noted this fact in his dissent arguing that the Court should have overturned the convictions because the pamphlets did not constitute a clear and present danger.<sup>45</sup>

In *Abrams*, Holmes opined that the government could only restrict speech if there was a "present danger of immediate evil or an intent to bring it about . . . Congress certainly cannot forbid all effort to change the mind of the country."<sup>46</sup> In addition, Justice Holmes introduced the marketplace of ideas theory as a justification for protecting speech. He wrote that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."<sup>47</sup>

The Supreme Court again upheld the conviction of an individual associated with the Communist Party in *Whitney v. California*.<sup>48</sup> Justice Brandeis, joined by Justice Holmes, wrote a concurring opinion that read more like a dissent than a concurrence.<sup>49</sup> Brandeis advocated the use of the clear and present danger test, and stated that the enactment of a statute did not foreclose the application of such a standard.<sup>50</sup> He implied that a court could require more than a showing of reasonableness in its analysis of the constitutionality of a statute that might violate free speech. Justice Brandeis voted to uphold the conviction on a

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<sup>43</sup> *Id.* at 623–24.

<sup>44</sup> *See id.* at 628–29 (Holmes, J., dissenting).

<sup>45</sup> *See id.* (Holmes, J., dissenting).

<sup>46</sup> *Id.* at 628 (Holmes, J., dissenting).

<sup>47</sup> *Id.* at 630 (Holmes, J., dissenting).

<sup>48</sup> 274 U.S. 357 (1927) (involving prosecution under a California statute prohibiting the teaching, aiding, or abetting of violence to affect political change, and not prosecution under a federal act).

<sup>49</sup> *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1011 (5th ed. 1995).

<sup>50</sup> *See Whitney*, 274 U.S. at 372 (Brandeis, J., concurring).



technicality, however, since Mrs. Whitney had appealed her conviction on due process grounds, and not as a violation of the First Amendment.<sup>51</sup>

Despite that a majority of the Court did not immediately embrace the clear and present danger test,<sup>52</sup> the two justices' continued advocacy of the test as if it were law raised a heightened awareness of the role of the First Amendment in both society and the law. By introducing the theory of the marketplace of ideas—an idea introduced by early philosophers such as John Stuart Mill that truth would best be discovered through robust debate of all opinions—into the realm of the First Amendment, Justices Holmes and Brandeis were able to open the door to a stricter analysis for any government infringement on the freedom of speech. Based upon the market theory, if the government regulated speech, it would hinder debate and therefore hinder the search for the truth. Such a notion provided a basis for the assertion that First Amendment scrutiny should involve more than a rational or reasonableness test,<sup>53</sup> as was explicitly articulated in Footnote Four of *Carolene Products*.<sup>54</sup>

Outside of the scope of the clear and present danger test, the Supreme Court had the opportunity to address the unconstitutionality of prior restraints in *Near v. Minnesota*,<sup>55</sup> a decision which also influenced the *Carolene Products* Footnote Four.<sup>56</sup> In *Near*, a newspaper publisher printed articles with anti-Semitic overtones criticizing local officials.<sup>57</sup> The publisher was convicted under a state statute which allowed a court to enjoin from publication any malicious, scandalous, or defamatory

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<sup>51</sup> *Id.* at 379 (Brandeis, J., concurring).

<sup>52</sup> *See White, supra* note 12, at 321. Despite the efforts of Holmes and Brandeis, a majority of the Court continued to equate the clear and present danger test with the more traditional bad tendency test.

<sup>53</sup> *See BUNKER, supra* note 9, at 22 (citing C. WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* 247 (1986)).

<sup>54</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>55</sup> 283 U.S. 697 (1931).

<sup>56</sup> *See Carolene Prods.*, 304 U.S. at 152 n.4 (citing *Near*, 283 U.S. at 713–14, 718–20, 722).

<sup>57</sup> *See Near*, 283 U.S. at 704.

periodical.<sup>58</sup> The Supreme Court reversed the conviction as an infringement upon the First Amendment and labeled the statute “the essence of censorship.”<sup>59</sup> The Court recognized that one of the primary purposes of the First Amendment was to prevent prior restraints; therefore, there could be very few exceptions to this principle.<sup>60</sup> Implicit in this pronouncement was that any prior restraint would be presumed to violate the First Amendment, and would therefore require a much higher standard than rational review to overcome this presumption.<sup>61</sup>

Up to this point, the Court had flirted with the notion that regulations affecting the freedoms guaranteed by the First Amendment or protection of the values it espoused<sup>62</sup> would require a more exacting standard of judicial review. It would take the Court’s grappling with economic issues for this idea to be enunciated in Footnote Four of *Carolene Products*, which will be discussed in the following Part.

## II. *CAROLENE PRODUCTS* AND BIFURCATED REVIEW

The Supreme Court’s decision in *United States v. Carolene Products* was significant in its implications for both economic regulations and individual liberties. This Part will briefly outline the economic history leading to the decision in order to put the case in context for the reader, and will then focus on the development of the famous Footnote Four.

### A. *The Economic Road to Carolene Products*

Since the Supreme Court’s 1905 decision of *Lochner v. New York*,<sup>63</sup> the Court had embraced a laissez faire attitude towards

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<sup>58</sup> *Id.* at 701–02.

<sup>59</sup> *Id.* at 713.

<sup>60</sup> *See id.* at 716 (noting possible exceptions might include information affecting national security, obscenity, or incitement to violence).

<sup>61</sup> *See BUNKER, supra* note 9, at 23.

<sup>62</sup> As mentioned in the prior discussion, the marketplace of ideas had begun to be used as a theory for protecting the freedom of speech. In addition, the Court enunciated that a core purpose of the First Amendment was to protect against prior restraints. *See Near*, 283 U.S. at 733.

<sup>63</sup> 198 U.S. 45 (1905).

regulation of the economic market. The *Lochner* Court struck down a statute which limited the number of hours a baker could work.<sup>64</sup> The Court found the statute unconstitutional, as it interfered with the liberty to contract between an employer and an employee.<sup>65</sup>

The majority rejected the state's arguments that the regulations were underscored by legitimate health and safety concerns, and had a rational basis.<sup>66</sup> Justice Holmes, dissenting, believed that the Court was imposing its own economic theory upon the state by invalidating the statute.<sup>67</sup> Such an action would arguably fall under the guise of legislating, not adjudicating, and thus violate the separation of powers doctrine. Justice Harlan, the other dissenter, accepted the statute as a valid health regulation, citing the legislative evidence supporting the measure.<sup>68</sup>

The principle that emerged from *Lochner* was that the Court would willingly void any legislation that it saw as infringing upon free enterprise.<sup>69</sup> Such an approach, known as the substantive due process doctrine, is the means by which the Court voided economic and social legislation that affected the liberty to contract.<sup>70</sup> Substantive due process refers to the practice of a court determining that a given regulation is invalid not because it violates a specific constitutional provision, such as the First Amendment, but because it deprives individuals of life, liberty, or property without due process.<sup>71</sup> The doctrine of substantive due process became a powerful tool of judicial review for the Court, for it allowed the Court to infer an unconstitutional process for laws that violated substantive due process, thereby curtailing Congressional authority.<sup>72</sup> As states and the federal government

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<sup>64</sup> *Id.* at 63.

<sup>65</sup> *See id.* at 64.

<sup>66</sup> *See id.* at 53.

<sup>67</sup> *See id.* at 65 (Holmes, J., dissenting).

<sup>68</sup> *See id.* at 71 (Harlan, J., dissenting).

<sup>69</sup> *See* NOWAK & ROTUNDA, *supra* note 49, at 376.

<sup>70</sup> *See id.* at 375.

<sup>71</sup> *See generally id.* at 346–62 (providing a discussion of the doctrine of substantive due process).

<sup>72</sup> This practice has been criticized as overstepping the Court's boundaries and entering into the realm of legislation. For example, when the Court ruled that the government did

attempted to regulate economic and social life in America, many of the justices believed they had an obligation to protect the economic marketplace from intrusion, and substantive due process gave them the means by which to accomplish this goal.<sup>73</sup>

The Great Depression marred the laissez faire economic market and challenged the tenets of an unregulated market.<sup>74</sup> In 1933, President Franklin D. Roosevelt introduced the “New Deal,” which provided an abundance of social and economic government regulations and controls. This economic activism, however, ran headlong into the Court’s adoption of substantive due process, creating a legislative and judicial showdown. The spring before *Carolene Products* reached the Supreme Court, the makeup of the Court changed, and “the grip of the Court’s business-protecting block was irretrievably broken,”<sup>75</sup> leading the way for a shift in the judiciary’s economic position. The *Carolene Products* decision, discussed in detail below, ushered in the Court’s new approach to economic legislation. This approach essentially abandoned prior notions of substantive due process.

### B. *The Carolene Products Decision and Its Impact on Individual Liberties*

In *Carolene Products*, the Court faced the constitutionality of the Filled Milk Act, which prohibits the interstate transportation of

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not possess the power to establish a maximum number of hours that an employee can work in a week, it decided on the grounds that Congress passed the law by an unconstitutional process. Therefore, any government regulation involving the ability of employers and employees to set the terms of employment would be void under the constitution, thus eliminating the ability of the state or federal government to deal with these employment-related problems. *See id.* at 375–76.

<sup>73</sup> *See id.*

<sup>74</sup> *See* BUNKER, *supra* note 9, at 17.

<sup>75</sup> Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1094 (1982). Lusky, a clerk for Justice Stone at the time of the *Carolene Products* decision, noted that Justice Black succeeded Justice De Vanter. *Id.* In addition, the Court during this period ran into President Roosevelt’s “Court Packing Plan,” an attempt to allow Roosevelt to appoint more justices who embraced his policy of economic activism by appointing a new justice every time a judge of retirement age chose to stay on the bench. While this proposal was still pending, the Court made an apparent retreat from its position on the constitutionality of the economic legislation. This retreat has become known as the “switch in time that saved nine.” *See* BUNKER, *supra* note 9, at 18.

filled milk products.<sup>76</sup> Under the outdated notions of substantive due process, the Court almost certainly would have found the Act unconstitutional, as it infringed on the free economic marketplace. In fact, the trial court found that the indictment against *Carolene Products* failed to state a claim, based on the authority of another case in the same court.<sup>77</sup> In *Carolene Products*, the defendant argued that the statute was beyond the power of Congress to regulate interstate commerce.<sup>78</sup>

The Court found that the regulation was in fact a valid exercise of legislative power and upheld the statute.<sup>79</sup> It cited congressional findings that included evidence of an extensive commerce in substances made of condensed milk from which the butterfat had been extracted.<sup>80</sup> In its place, vegetable oil was substituted, and the resulting substance looked and tasted like milk.<sup>81</sup> The product was lower in cost, but lacked the vitamins and nutritional elements found in regular milk.<sup>82</sup> This substitution was therefore fraudulent and endangered the health of the public, thus making the Act a reasonable response to the problem at hand.<sup>83</sup>

The Court justified the constitutionality of the Act based on the extensive congressional record.<sup>84</sup> The Court broadened the reach of the opinion, however, and pronounced a general presumption of constitutionality for commercial legislation.<sup>85</sup> Justice Stone, for the majority, wrote:

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

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<sup>76</sup> See 21 U.S.C. §§ 61–63 (2000).

<sup>77</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 146 (1938).

<sup>78</sup> See *id.*

<sup>79</sup> See *id.* at 147.

<sup>80</sup> See *id.* at 149 n.2.

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> See *id.* at 149.

<sup>85</sup> See *id.* at 152.

2003] *PREFERRED POSITION POST CAROLINE PRODUCTS* 1031

rests on some rational basis within the knowledge and experience of the legislators.<sup>86</sup>

Justice Stone attached his Footnote Four to this statement. The footnote consists of three main ideas: first, that a narrower presumption of constitutionality exists when legislation addresses a specific prohibition of the Constitution, such as those set forth in the Bill of Rights; second, that legislation restricting the political process of bringing about the repeal of undesirable legislation might be subject to a narrow presumption of constitutionality; and third, legislation aimed at insular minorities might be subject to stricter judicial review. The first paragraph of the footnote is most relevant to the instant discussion of the First Amendment. The text of the entire footnote is as follows:

There may be a 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 Fourteenth.

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 Fourteenth Amendment than are most other types of legislation.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or national, or racial minorities; 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.<sup>87</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 152 n.4 (citations omitted).

The second two paragraphs of the footnote appeared as the entire Footnote Four that Justice Stone initially circulated to the justices.<sup>88</sup> The first version did not mention the Constitution, but spoke to the dynamics of government and the interplay of the Court's appropriate place in the scheme of government.<sup>89</sup> Chief Justice Hughes responded to the draft, asking whether the considerations were really different, or whether the "difference lies not in the test but in the nature of the right invoked?"<sup>90</sup> Hughes's implicit assumption was that the recognition of certain rights by the Framers might legitimize a more intrusive standard of judicial review.<sup>91</sup> As a result of this comment, Stone revised the footnote to its published form.<sup>92</sup>

Footnote Four was adopted by only four members of a reduced Court, with Justices Cardozo and Reed taking no part in the decision,<sup>93</sup> but this vote of four gave the opinion and the footnote a majority in a Court of seven. Justice Butler concurred in the result, affirming the conviction for violation of the Act, but did not concur in the reasoning of the majority.<sup>94</sup> Justice Black, a newly appointed justice who would eventually become known as a First Amendment absolutist,<sup>95</sup> concurred in the majority opinion but for the third section, which contained Footnote Four.<sup>96</sup> Justice Black expressed concern that such judicial action might exceed the

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<sup>88</sup> See Lusky, *supra* note 75, at 1096. Lusky, as Justice Stone's law clerk, drafted this first version of the footnote. See also Linzer, *supra* note 7, at 281. Lusky's original draft began by stating, "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." *Id.* (citing LOUIS LUSKY, *OUR NINE TRIBUNES: THE SUPREME COURT IN MODERN AMERICA* 183, 185 (1993)). Stone struck out this sentence, but kept the remainder of Lusky's ideas. See *id.*

<sup>89</sup> See Lusky, *supra* note 75, at 1096.

<sup>90</sup> *Id.* at 1097.

<sup>91</sup> See *id.* at 1097–98 (suggesting that because of this specific mention, Justice Hughes meant that the ordinary dynamics of government and scope of judicial review did not play a role in their review).

<sup>92</sup> See *id.* at 1098.

<sup>93</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 155 (1938).

<sup>94</sup> See *id.* (Butler, J., concurring).

<sup>95</sup> See NOWAK & ROTUNDA, *supra* note 49, at 994.

<sup>96</sup> See *Carolene Prods.*, 304 U.S. at 155 (Black, J., concurring).

Court's powers of review.<sup>97</sup> Justice McReynolds dissented without writing a separate opinion.<sup>98</sup> Therefore, only Justices Stone, Hughes, Brandeis, and Roberts expressly adopted the language of Footnote Four, and Justice Brandeis would retire before the preferred position doctrine had a chance to be implemented in any subsequent First Amendment cases.

### III. THE EMERGENCE OF A PREFERRED POSITION IN FIRST AMENDMENT JURISPRUDENCE

Justice Stone's notion of a preferred position for certain rights began to impact the Court shortly after its pronouncement. The position grew stronger and was mentioned frequently in the decade following *Caroline Products*, only to fall out of grace after Justice Frankfurter's attack on the footnote in his concurrence in *Kovacs v. Cooper*.<sup>99</sup> Throughout the decade, controversy arose over the authority to administer a heightened scrutiny standard, most notably in the sparring between Justice Stone and Justice Frankfurter.<sup>100</sup> While Justices Stone and Frankfurter provided the most prominent division on the Court over the role of judicial review in relation to the First Amendment, other justices also played key roles in the adoption and subsequent apparent dismissal of the doctrine.

The first use of the Footnote Four principle occurred the very next year in the Court's 1939 decision in *Schneider v. State*.<sup>101</sup> By an eight to one vote, the Court invalidated a series of local ordinances preventing the distribution of handbills on streets and sidewalks.<sup>102</sup> Justice Roberts, a member of the four-person *Caroline Products* majority, wrote the opinion.<sup>103</sup> His reasoning did not explicitly mention *Caroline Products*, but it embraced the

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<sup>97</sup> See Lusky, *supra* note 75 at 1097 n.20 (citing correspondence from Justice Black to Justice Stone expressing concern over the scope of judicial review).

<sup>98</sup> See *Caroline Prods.*, 304 U.S. at 155.

<sup>99</sup> 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring).

<sup>100</sup> See David P. Currie, *The Constitution in the Supreme Court: The Preferred Position Debate, 1941-1946*, 37 CATH. U. L. REV. 39, 70 (1987).

<sup>101</sup> 308 U.S. 147 (1939).

<sup>102</sup> See *id.* at 165.

<sup>103</sup> See *id.* at 153.



principles set forth in Footnote Four. He wrote that a municipality may enact regulations in the interest of public health, safety, or convenience, but it could not abridge individual liberties secured by the Constitution.<sup>104</sup> If legislation did infringe on these liberties, the Court “should be astute to examine the effect of the challenged legislation,”<sup>105</sup> and should “appraise the substantiality of the reasons advanced in support of the regulation.”<sup>106</sup> Therefore, the Court implicitly adopted the idea that legislation impeding upon First Amendment rights does not carry with it a presumption of constitutionality. Justice Reed, who took no part in the *Carolene Products* decision, appeared to latch on to the *Carolene* majority’s approach to judicial review, as did Justice William O. Douglas and surprisingly, Justice Felix Frankfurter, both new members of the Court. Justice Butler also joined the majority in both result and reasoning. As in *Carolene Products*, Justice McReynolds dissented without opinion.<sup>107</sup> After this initial decision, the bulk of the Court appeared to embrace the principle of a heightened standard of judicial review for the First Amendment, which would continue in the Court’s next examination of First Amendment legislation.

The first explicit mention of Footnote Four came in 1940, in *Thornhill v. Alabama*.<sup>108</sup> In *Thornhill*, a man involved in a labor dispute was convicted of violating an Alabama statute that forbade picketing.<sup>109</sup> In overturning the conviction and finding the statute void on its face,<sup>110</sup> Justice Frank Murphy, again for an eight-justice majority, cited the *Carolene Products* Footnote Four in discussing the importance of free speech in democracy.<sup>111</sup> In addition, Murphy noted that when rights such as those embraced by the First Amendment are claimed to have been abridged, the Court must

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<sup>104</sup> See *id.* at 160.

<sup>105</sup> *Id.* at 161.

<sup>106</sup> *Id.*

<sup>107</sup> See *id.* at 167.

<sup>108</sup> 310 U.S. 88, 95 (1940).

<sup>109</sup> See *id.* at 91.

<sup>110</sup> See *id.* at 101.

<sup>111</sup> See *id.* at 95 (“[S]afeguarding of [First Amendment] rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government.”).

appraise the substantiality of the “reasons in support of the challenged legislation.”<sup>112</sup> Justice McReynolds, in his last First Amendment case for the Court, again dissented.<sup>113</sup>

While *Thornhill* implicitly stated that First Amendment rights should be viewed under stricter scrutiny than economic rights with the “substantiality” language, the term “preferred position” was first utilized by Chief Justice Stone in a dissent in 1942.<sup>114</sup> In *Jones v. Opelika* (hereinafter “*Jones I*”),<sup>115</sup> the Court narrowly upheld the application of a sales tax to the sale of printed materials by Jehovah’s Witnesses.<sup>116</sup> The Court found that when members of the religious group utilize ordinary methods of sales to raise money, the application of a general tax did not prohibit the free exercise of religion or abridge speech under the First Amendment.<sup>117</sup> The majority held that general taxation did not fall into the realm of the infringement of the exercise of a fundamental right.<sup>118</sup>

Chief Justice Stone, however, speaking for Justices Murphy, Black, and Douglas in his dissent, found that the taxation did indeed invade the freedoms guaranteed by the First Amendment.<sup>119</sup> In coining the “preferred position” phrase without specifically mentioning the *Caroline Products* footnote, Justice Stone wrote:

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 Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend at least to every form of taxation which, because it

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 106.

<sup>114</sup> *Jones v. Opelika*, 316 U.S. 584, 608 (1942) [hereinafter *Jones I*] (Stone, C.J., dissenting), *rev’d on reh’g*, 319 U.S. 103 (1943).

<sup>115</sup> *Id.* The case combines three cases that deal with the application of similar city ordinances as they are applied to Jehovah’s Witnesses.

<sup>116</sup> *See Jones I*, 316 U.S. at 584.

<sup>117</sup> *See id.* at 597.

<sup>118</sup> *See id.*

<sup>119</sup> *See id.* at 600 (Stone, C.J., dissenting).

is a condition of the exercise of the privilege, is capable of being used to control or suppress it.<sup>120</sup>

The *Jones I* decision fractured a Court that had appeared to agree on a heightened level of scrutiny in examining legislation infringing upon the First Amendment. This case forced the Court to examine general legislation with a secondary effect on constitutional rights, which was apparently not as clearly unconstitutional as legislation addressed solely at speech. The majority, led by Justices Roberts, Reed, and Frankfurter, who had supported the Footnote Four proposition in *Thornhill* and *Schneider*, retreated to a more rational level of review in *Jones I*. In addition, two new members of the Court, Justices Byrnes and Jackson, joined the majority opinion.

A year later, in 1943, the Jehovah's Witnesses were granted a rehearing.<sup>121</sup> The makeup of the Court had changed, with Justice Rutledge replacing Justice Byrnes,<sup>122</sup> giving Stone a five-person majority for his preferred position argument concerning the taxation. Justice Douglas announced the opinion in the rehearing (hereinafter "*Jones II*"),<sup>123</sup> and like Stone's dissent in *Jones I*, the Court relied on the preferred position argument.<sup>124</sup>

The Court also decided two other cases addressing the First Amendment on the same day as the *Jones II* decision.<sup>125</sup> Each case was decided with the same five to four majority that embraced the preferred position doctrine in *Jones II*. *Murdock v. Pennsylvania* addressed a situation factually similar to that in *Jones I*.<sup>126</sup> Instead of consolidating the case with the *Jones II* rehearing, the Court decided *Murdock* on the grounds that because *Jones I* had been vacated, the Court was free of its precedent and could "restore to

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<sup>120</sup> *Id.* at 608 (Stone, C.J., dissenting).

<sup>121</sup> See *Jones v. Opelika*, 318 U.S. 796 (1943).

<sup>122</sup> See *Currie*, *supra* note 100, at 49.

<sup>123</sup> See *Jones v. Opelika*, 319 U.S. 103 (1943) [hereinafter *Jones II*] (per curiam).

<sup>124</sup> See *id.* (relying on the decision in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), which the Court used to consolidate the *Jones* rehearing and two other cases because they involved the same issues).

<sup>125</sup> See *Murdock*, 319 U.S. at 105; *Martin v. City of Struthers*, 319 U.S. 141 (1943).

<sup>126</sup> *Murdock*, 319 U.S. at 106–07.

2003]     *PREFERRED POSITION POST CAROLINE PRODUCTS*     1037

their high, constitutional position the liberties”<sup>127</sup> of those disseminating their religious beliefs through the distribution of literature.<sup>128</sup> This case and *Jones II*, more so than the third case of *Martin v. City of Struthers* discussed below, allowed the Court to establish the idea that was general legislation with a secondary affect on First Amendment liberties was subject to heightened scrutiny. Justice Douglas, for the majority, made that point clear: “it could hardly be denied that a tax laid specifically on the exercises of [the First Amendment] freedoms would be unconstitutional. Yet the license tax imposed by this ordinance is in substance just that.”<sup>129</sup>

In *Martin v. City of Struthers*, the third preferred position case decided on May 3, 1943, the Court addressed the constitutionality of a city ordinance which prohibited knocking on a door or ringing a doorbell to distribute leaflets or other circulars.<sup>130</sup> A Jehovah’s Witness was convicted for knocking on doors to distribute her religious literature.<sup>131</sup> The city attempted to justify the regulation on the grounds that the city was an industrial community, and many of its inhabitants worked nights and slept days. Therefore, solicitors would cause a disturbance.<sup>132</sup> While not expressly mentioning the preferred position doctrine, the majority declined to defer to the legislative findings supporting the ordinance, and invalidated it.<sup>133</sup> Justice Black, for the majority, wrote that the freedom to distribute information is vital to the preservation of a free society and must be fully preserved.<sup>134</sup>

Justices Frankfurter and Reed each filed their own dissenting opinions. In passing over the legislative findings, Justice Frankfurter accused the court of overstepping its judicial boundaries of review and entering the realm of legislation.<sup>135</sup> Frankfurter determined that the ordinance served a legitimate and

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<sup>127</sup> *Id.* at 117.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 108.

<sup>130</sup> *See Martin*, 319 U.S. at 141.

<sup>131</sup> *See id.*

<sup>132</sup> *See id.* at 144.

<sup>133</sup> *See id.* at 147.

<sup>134</sup> *See id.*

<sup>135</sup> *See id.* at 154 (Frankfurter, J., dissenting).

reasonable end, and thus should be upheld.<sup>136</sup> Justice Reed dissented on the grounds that the First Amendment is not absolute, citing obscenity, disloyalty, and provocation as established exceptions.<sup>137</sup> He saw this regulation as an exception to, and not a violation of, the First Amendment.<sup>138</sup> Justices Roberts and Jackson joined in Reed's dissent.

Later in 1943, the Court again addressed the preferred position of the First Amendment in *West Virginia State Board of Education v. Barnette*.<sup>139</sup> The case arose out of a mandatory flag salute at public schools. Again dealing with Jehovah's Witnesses, students of the faith were expelled from school for failing to salute the flag.<sup>140</sup> The students' religion taught that the obligation of law imposed by God is superior to the government's law, and considered solution the flag to be a violation of God's law.<sup>141</sup> They argued that the regulation denies freedom of speech and of religion.<sup>142</sup>

In invalidating the regulation, the six-justice majority held that the Bill of Rights withdrew certain subjects from the realm of politics in order to "place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."<sup>143</sup> Furthermore, "[o]ne's right to life, liberty, property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election."<sup>144</sup> In making this bold statement, the Court held that legislation affecting First

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<sup>136</sup> See *id.* (Frankfurter, J., dissenting).

<sup>137</sup> See *id.* at 155 (Reed, J., dissenting).

<sup>138</sup> See *id.* at 154 (Reed, J., dissenting).

<sup>139</sup> 319 U.S. 624 (1943). This case overruled an earlier case upholding a mandatory pledge of allegiance in public schools. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

<sup>140</sup> See *Barnette*, 319 U.S. at 630.

<sup>141</sup> See *id.* at 629. Jehovah's Witnesses adopt a literal version of Exodus, Chapter 20: "Thou shalt not make unto thee any graven image . . . : Thou shalt not bow down thyself to them nor serve them." *Exodus* 20:4-5 (King James). The Jehovah's Witnesses consider the flag to be an image within the context of the Exodus passage. *Barnette*, 319 U.S. at 629.

<sup>142</sup> See *id.* at 630.

<sup>143</sup> *Id.* at 638.

<sup>144</sup> *Id.*

2003]     *PREFERRED POSITION POST CAROLINE PRODUCTS*     1039

Amendment rights must substantially advance a interest that the state may lawfully protect.<sup>145</sup> Justice Jackson, a dissenter in the *Jones II* triumvirate of cases, joined Justice Stone and strengthened the hold of Stone's majority on the Court. *Barnette*, in retrospect, would mark the high point of the Court explicitly embracing a preferred position for the First Amendment.

Once again, Justice Frankfurter dissented, and disagreed with the active role the majority took in reviewing the legislation. He saw his duty as a judge not to impose his own policy, but to "decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience."<sup>146</sup> The only question for judicial debate was whether the legislators reasonably had enacted the law in question.<sup>147</sup> He admonished the majority for failing to exercise judicial self-restraint, and did not believe that the Court had the authority to decide that it possesses greater veto power when dealing with one liberty over another.<sup>148</sup> Legislators, and not the courts, should be the ultimate guardians of liberties.<sup>149</sup>

The final case of the decade decided under the *Caroline Products* Footnote Four preferred position for First Amendment rights was *Kovacs v. Cooper*,<sup>150</sup> taken by the Court nearly six years after the busy 1943 session of preferred position cases. The court upheld a conviction under an ordinance that prevented the use of sound trucks on public streets.<sup>151</sup> The Court found that the ordinance was a justifiable exercise of the city's authority to prevent disturbing noises.<sup>152</sup>

The majority opinion is not remarkable; essentially, it declares the ordinance a time, place, and manner restriction that does not prohibit the exercise of First Amendment rights. The tenuous

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<sup>145</sup> See Currie, *supra* note 100, at 55.

<sup>146</sup> See *Barnette*, 319 U.S. at 647 (Frankfurter, J., dissenting).

<sup>147</sup> See *id.*

<sup>148</sup> See *id.* at 648.

<sup>149</sup> See *id.* at 649 (citing *Mo., Kan. & Tex. Ry. Co. v. May*, 194 U.S. 267, 270 (1904)).

<sup>150</sup> 336 U.S. 77 (1949).

<sup>151</sup> See *id.* at 78.

<sup>152</sup> See *id.* at 83.

majority in support of heightened scrutiny for any legislation affecting First Amendment rights, either directly or indirectly, again swung away from an across the board standard of a preferred position. Justice Jackson returned to Frankfurter's camp, and was joined by Justices Burton and Vinson, new members of the Court. Of interest in *Kovacs* is Justice Frankfurter's concurrence, where he once again attacked the authority and intelligence of delegating a preferred position of judicial review for certain rights. He began by calling the doctrine a "mischievous phrase"<sup>153</sup> that had "uncritically crept into some recent opinions of this Court."<sup>154</sup> He chastised the Court for adopting as doctrine an idea set forth for inquiry in a footnote.<sup>155</sup> Justice Frankfurter did not abandon the notion of more readily finding legislative invasion in the area of free speech than in economic regulations.<sup>156</sup> He noted that Justice Holmes frequently followed this path by respecting individual liberties more than "shifting economic arrangements."<sup>157</sup>

Justice Frankfurter's argument against the preferred position doctrine is not centered in a lack of respect for individual liberties. Instead, he rejects the notion of simplifying the "complicated process of constitutional adjudication by a deceptive formula."<sup>158</sup> In his mind, the two seemingly conflicting notions of respecting individual liberties and maintaining an appropriate level of judicial activism can be reconciled. His answer to the appropriate level of judicial review is not to enunciate a test, but instead to defer to the legislature's judgement so long as it does not discriminate or prescribe which ideas may be disseminated.<sup>159</sup>

After *Kovacs*, the Court ceased to embrace the *Carolene Products* Footnote Four or the notion of a preferred position for the First Amendment in its subsequent free speech cases. The next Part will examine what occurred in the First Amendment realm immediately after the *Kovacs* decision with the advent of the Cold

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<sup>153</sup> *Id.* at 90 (Frankfurter, J., concurring).

<sup>154</sup> *Id.* (Frankfurter, J., concurring).

<sup>155</sup> *See id.* at 91–92 (Frankfurter, J., concurring).

<sup>156</sup> *See id.* at 95 (Frankfurter, J., concurring).

<sup>157</sup> *Id.* at 95 (Frankfurter, J., concurring).

<sup>158</sup> *Id.* at 96 (Frankfurter, J., concurring).

<sup>159</sup> *See id.* at 97 (Frankfurter, J., concurring).

2003] *PREFERRED POSITION POST CAROLINE PRODUCTS* 1041

War, in an attempt to discern why the preferred position fell out of favor.

#### IV. THE SECOND RED SCARE AND THE RETURN TO CLEAR AND PRESENT DANGER

With the end of World War II, the United States was thrust into the beginning of the Cold War with the Soviet Union. Similar to the period immediately following World War I and the passage of the Espionage and Sedition Acts,<sup>160</sup> the country entered into a “red scare,” or a fear of all things communist. The antics of Senator Joseph McCarthy and his communist witch-hunt launched the nation into a paranoia. At the heart of this paranoia was a fear of speech critical of democracy or the United States government, and the country entered a period of First Amendment suppression.

In light of this historical backdrop, therefore, it is not surprising that the Court backed away from a preferred position of the freedom of speech and turned instead to perceived threats to national security through certain citizens’ speech. In making this shift, the Court, under the leadership of Chief Justice Vinson, returned to the Holmes-Brandeis clear and present danger test, forgotten for over a decade.<sup>161</sup> The Court brought back this test in *Dennis v. United States*.<sup>162</sup> Members of the Communist Party were convicted under the Smith Act for conspiring to organize to advocate the overthrow of the government.<sup>163</sup> The Court affirmed the convictions, but with no clear majority. Eight justices participated in the case. Justices Douglas and Black, the only remaining *Kovacs* dissenters on the Court, dissented, while Chief

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<sup>160</sup> See *supra* notes 33–48 and accompanying text for a discussion of this legislation and resulting cases.

<sup>161</sup> See *supra* notes 36–53 and accompanying text for a discussion of the Holmes-Brandeis clear and present danger test.

<sup>162</sup> 341 U.S. 494 (1951).

<sup>163</sup> The Smith Act of 1940 (also known as the Alien Registration Act of 1940) made it a crime to knowingly advocate the overthrow of the government, to print or publish information with the intent to cause an overthrow, or to organize a group with the purpose of overthrowing the government. See Pub. L. No. 76-670 § 2 (a)(1)–(3), 54 Stat. 670, 671.



Justice Vinson commanded the four-member plurality. Justices Frankfurter and Jackson also filed concurring opinions.

Justice Vinson reintroduced the clear and present danger test to the court,<sup>164</sup> but in a way that gave the First Amendment much less protection than the Holmes-Brandeis version.<sup>165</sup> Vinson would first require the government to demonstrate a substantial interest in restricting speech, and would then require a showing that the restricted speech constituted a clear and present danger.<sup>166</sup> This danger, however, need not be imminent and the government need not “wait until the *putsch* [rebellion] is about to be executed.”<sup>167</sup> Instead, a remote danger of a doomed attempt to overthrow the government would be enough for Vinson to justify suppression of speech.<sup>168</sup> The test that emerged, therefore, was “whether the gravity of the ‘evil’, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”<sup>169</sup>

Justice Frankfurter criticized the clear and present danger test as being too inflexible,<sup>170</sup> much as he criticized the preferred position doctrine in his *Kovacs* concurrence as establishing a presumption of invalidity for legislation touching communication.<sup>171</sup> He used his *Dennis* concurrence to once again criticize the Court’s past use of the preferred position doctrine in an effort to elevate the First Amendment to a level of heightened judicial review.<sup>172</sup> In fact, while brushing aside the preferred position doctrine as having been casually introduced in a footnote, he cited to the *Carolene Products* case to support his position that Congressional legislation should be considered constitutional if it had a rational basis for its adoption.<sup>173</sup> Free speech, he said, is not an exception to the rule that the Court’s job is not to legislate, and

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<sup>164</sup> *Dennis*, 341 U.S. at 501–05.

<sup>165</sup> See NOWAK & ROTUNDA, *supra* note 49, at 1014.

<sup>166</sup> See *Dennis*, 341 U.S. at 509.

<sup>167</sup> *Id.*

<sup>168</sup> See *id.*

<sup>169</sup> *Id.* at 510 (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)).

<sup>170</sup> *Dennis*, 341 U.S. at 524–25 (Frankfurter, J., concurring).

<sup>171</sup> *Kovacs v. Cooper*, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring).

<sup>172</sup> *Dennis*, 341 U.S. at 527 (Frankfurter, J., concurring).

<sup>173</sup> See *id.* at 525 (Frankfurter, J., concurring).

2003] *PREFERRED POSITION POST CAROLINE PRODUCTS* 1043

that Congress's acts should be respected unless legislation falls "outside the pale of fair judgment."<sup>174</sup>

In light of Frankfurter's concurrence, Vinson's plurality opinion appears to cling to a glimmer of a preferred position for the First Amendment by requiring a substantial interest in regulating the speech.<sup>175</sup> This preferred position, however, was watered down by Vinson's interpretation of what was required to show a clear and present danger. It was Justices Black and Douglas's dissents that continued to embrace the preferred position doctrine, even if such terminology was not expressly used.

Black asserted that judicial review for the First Amendment requires more than reasonableness, because without such a standard, the First Amendment would protect only orthodox speech that did not need protection from suppression.<sup>176</sup> He wrote from the perspective that a preferred position for freedom of speech was a well-established constitutional principle, essentially ignoring the past decade of debate. He concluded that: "There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."<sup>177</sup>

Justice Douglas, in his dissent, also acknowledged the "exalted position" of the First Amendment.<sup>178</sup> Black and Douglas's adherence to the notion of the First Amendment as deserving a higher standard of review is reminiscent of Holmes and Brandeis's continued reliance on the clear and present danger test as if it were established law during the 1920s. Eventually, a majority of the Court came to accept the clear and present danger test as a tool for judicial review, as evidenced by Vinson's use of the test in *Dennis*. Likewise, Black and Douglas's continued adherence to a special standard for the First Amendment eventually resulted in a heightened standard of review for restrictions on speech.

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<sup>174</sup> *Id.* at 539–40 (Frankfurter, J., concurring).

<sup>175</sup> *Id.* at 501.

<sup>176</sup> *See id.* at 580 (Black, J., dissenting).

<sup>177</sup> *Id.* at 581 (Black, J., dissenting).

<sup>178</sup> *Id.* at 585 (Douglas, J., dissenting).

During the period of the Red Scare, however, the majority of the Court seemed to abandon any notion of a special position for speech, and instead appeared to weigh the perception of any risk of danger against the speech the government sought to suppress.<sup>179</sup> As Justice Black hypothesized would happen in his *Dennis* dissent, future Courts steered the First Amendment back to a “preferred” position.<sup>180</sup> It has been suggested that while the words “preferred position” fell out of use, the substance of Footnote Four still remained through the Court’s use of judicial tools such as a narrowed presumption of constitutionality, strictly construing statutes to avoid limited First Amendment freedoms, and relaxed standing requirements.<sup>181</sup> The next Part will examine three theories that have emerged to explain why the preferred position doctrine emerged and disappeared as it did, and what role it may still play in First Amendment jurisprudence today.

#### V. THEORIES SUPPORTING THE PREFERRED POSITION

Several theories have been advanced in an attempt to explain the rationale and meaning behind the emergence of the preferred position doctrine. This Part will explore three of those theories, as advanced by Louis Lusky, clerk to Justice Stone during the *Carolene Products* decision, and Peter Linzer and G. Edward White, both constitutional law scholars. Each theory contains common threads with the others, but offers different perspectives on the creation of, and continued relevance of, the famous Footnote Four.

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<sup>179</sup> See *Scales v. United States*, 367 U.S. 203 (1961) (affirming a conviction for violating the Smith Act based on the membership clause); *Yates v. United States*, 354 U.S. 298 (1957) (retreating from the broad doctrine of *Dennis*, yet not overruling the holding).

<sup>180</sup> Most relevant to the line of cases arising out of *Dennis* and *Yates* is *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). In *Brandenburg*, the Court reformulated the clear and present danger test to avoid any sort of balancing of free speech issues by holding that any advocacy of violence would be protected by the First Amendment unless inciting imminent action. This case has been cited as rejecting any deference to the government’s actions directed at speech that may have prevailed in the *Dennis* balancing years. See NOWAK & ROTUNDA, *supra* note 49, at 1017.

<sup>181</sup> See NOWAK & ROTUNDA, *supra* note 49, at 994.

*A. Louis Lusky*

Louis Lusky played an integral role in the creation of Footnote Four.<sup>182</sup> His unique perspective as a law clerk certainly can help provide insight into the mindset of the Court during the tumultuous period preceding *Carolene Products*, although his theory is not without its own biases.<sup>183</sup>

The economic turnaround of the New Deal era presented Stone and his like-minded colleagues an opportunity to become the majority and guide the Court into the next decade.<sup>184</sup> This shift raised a curious dilemma for the new majority.<sup>185</sup> While they had disagreed with the prior regime of “government by judiciary” which presumed the unconstitutionality of economic regulations, Stone and his colleagues had taken advantage of the Court’s adoption of substantive due process to win a few victories in the realm of civil liberties.<sup>186</sup> Here, as in the economic cases, a presumption of unconstitutionality was adopted, on the grounds that the liberties in the Bill of Rights deserved the same full protection as the liberty to contract.<sup>187</sup>

Faced with the new majority in *Carolene Products*, civil liberties became a much more difficult issue because the Court would no longer presume economic regulations unconstitutional. Stone chose to address this issue in Footnote Four.<sup>188</sup> Initially, however, Stone did not specifically mention the Bill of Rights in the footnote, but instead chose to focus on the dynamics of judicial review. His first draft affirmed the need for both government by the people and government for the “whole people.”<sup>189</sup> Stone

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<sup>182</sup> See *supra* notes 88–92 and accompanying text. As Justice Stone’s law clerk, Lusky was involved in the footnote’s evolution.

<sup>183</sup> See, e.g., Linzer, *supra* note 7, at 301 (asserting that Lusky’s personal involvement with the creation of the text of the Footnote Four “blinds” him in his subsequent discussions).

<sup>184</sup> See Lusky, *supra* note 75, at 1094.

<sup>185</sup> See *id.*

<sup>186</sup> See *id.* Lusky cites as examples of these civil rights victories *Near v. Minnesota*, 283 U.S. 697 (1931), *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), and *DeJonge v. Oregon*, 299 U.S. 353 (1937).

<sup>187</sup> See Lusky, *supra* note 75, at 1095.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 1096.

unhesitatingly added a paragraph to address Chief Justice Hughes's observation that textual rights might deserve more judicial attention than other rights.<sup>190</sup>

The final version of the footnote, according to Lusky, arose not as a settled standard of judicial review, but as a starting point for debate given the new economic scheme of the Court.<sup>191</sup> As the Court abandoned its prior use of substantive due process to invalidate economic legislation, questions would inevitably arise concerning the use of substantive due process in the realm of civil liberties. Instead of ending the debate, the footnote sought to identify the new questions emerging on the Court, and "the modest hope was that the Footnote would catalyze thoroughgoing analysis and discussion by bar, bench, academe, and that a complete and well-rounded doctrine would eventuate."<sup>192</sup> According to Lusky, however, this theory underlying the footnote was never actualized, leaving the footnote and the ideas it presented to evaporate as the Court became involved in the issues surrounding World War II.<sup>193</sup> Linzer's analysis of Footnote Four, to be discussed in the next sub-Part, uses Lusky as a point of departure for his analysis.

### B. Peter Linzer

Linzer's argument speaks primarily to Lusky's process-based theory of Footnote Four, and criticizes his reliance on why the footnote was developed instead of how it functioned to assess its viability today.<sup>194</sup> In closely examining the opinions passed down by Stone and his colleagues during the preferred position period,

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<sup>190</sup> *Id.* at 1097.

<sup>191</sup> *See id.* at 1098.

<sup>192</sup> *Id.* at 1099.

<sup>193</sup> *See id.* Lusky offers two reasons for the failure of the inquiry—the commencement of World War II and the advocacy by Stone of issues he felt were important. *Id.* Lusky asserts that Stone attempted to win over his opposition by whatever means would be effective when he felt an issue was important, instead of unwaveringly following the path of sound doctrine. *Id.* Surely a third factor could be asserted for the footnote's alleged failure—the untimely death of Justice Stone in 1946, leaving Frankfurter alone on the Court to resoundingly criticize the doctrine.

<sup>194</sup> *See* Linzer, *supra* note 7, at 278.

2003]     *PREFERRED POSITION POST CAROLINE PRODUCTS*     1047

however, Linzer draws the conclusion that Footnote Four and the ideas it encompassed were undoubtedly substantively based.<sup>195</sup>

Unlike Lusky, Linzer does not view the internal process of Stone's footnote rewrite to be an attempt at posing questions for future inquiry.<sup>196</sup> Linzer argues that Stone and the Court did not see the footnote as a procedural suggestion, but "treated Footnote Four as stating a positive, not tentative, thesis, and one that dealt not merely with process but with substantive constitutional rights."<sup>197</sup> In reaching this conclusion, Linzer places emphasis on the first paragraph of the footnote.<sup>198</sup> Instead of relying on process or discrimination to justify constitutional activism, as is suggested by paragraphs two and three, Stone relied on the Bill of Rights itself "as a charter for judicial activism."<sup>199</sup>

Despite Justice Frankfurter's criticism of the preferred position doctrine, culminating in his *Kovacs* decision, and the subsequent fading of the term, Linzer argues that the concept of a preferred position has survived.<sup>200</sup> The *Carolene Products* footnote helped to establish the enforcement of the First Amendment, a practice that became more widely accepted after the Stone Court.<sup>201</sup> Unlike Lusky, Linzer does not see the footnote as a starting point for inquiry posed by Justice Stone alone.<sup>202</sup> Instead, the footnote recognized a combination of all of the voices of the Court.<sup>203</sup> Stone began the footnote as an attempt to bury the outdated notion of substantive due process. Lusky, as his clerk, pointed out that

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<sup>195</sup> *See id.*

<sup>196</sup> *See id.* at 283.

<sup>197</sup> *Id.*

<sup>198</sup> *See id.* at 288.

<sup>199</sup> *Id.* at 290. Linzer bases this conclusion on Stone's lone dissent in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). In *Gobitis*, the majority found a regulation compelling school children to recite the pledge of allegiance to be constitutional, a position later overruled in *West Virginia v. Barnette*, 319 U.S. 624 (1943). In dissent, Stone articulated that explicit guarantees of freedom of speech and religion cannot be overridden by a congressional command of loyalty. *See Gobitis*, 310 U.S. at 601 (Stone, J., dissenting).

<sup>200</sup> *See* Linzer, *supra* note 7, at 299 (citing Lawrence Tribe and Gerald Gunther as also supporting the notion that a preferred position of the First Amendment still exists).

<sup>201</sup> *See id.* at 301.

<sup>202</sup> *See id.*

<sup>203</sup> *See id.* at 301–02.

the presumptions that such a move would produce might, in some instances, undermine the democratic process. And finally, the Chief Justice demonstrated that this rational review, without clarification, might ignore the nature of certain textual rights, such as the First Amendment.<sup>204</sup> It is through this process that Linzer argues a substantive doctrine emerges that today functions implicitly in the widely-accepted notion that an action by government that restricts speech is presumptively unconstitutional.<sup>205</sup>

### C. G. Edward White

In White's analysis of the *Carolene Products* footnote and its progeny preferred position cases, he incorporates the Footnote into the larger question of what led the First Amendment to "come of age" when it did.<sup>206</sup> He postulates that *Carolene Products* did not bring about this evolution, but was instead merely a byproduct of a "modernist consciousness" concerning freedom of speech.<sup>207</sup> This new consciousness included elements of both democracy and capitalism, which he combines as elements of "modernity."<sup>208</sup>

According to White, the idea of speech as a special liberty deserving of special protection began to emerge in speech cases before *Carolene Products*.<sup>209</sup> Along with this development, therefore, came the evolution of a bifurcated standard of review.<sup>210</sup> The switch to the presumption of constitutionality of economic regulations made the emergence of the bifurcated standard possible, but not necessary.<sup>211</sup> This standard was enunciated, however, because a notion had already begun to exist that freedom of speech was a special liberty deserving of special attention.<sup>212</sup>

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<sup>204</sup> See *id.*

<sup>205</sup> See *id.* at 302.

<sup>206</sup> See White, *supra* note 12, at 300–01.

<sup>207</sup> See *id.* at 301.

<sup>208</sup> See *id.*

<sup>209</sup> See *id.*

<sup>210</sup> See *id.*

<sup>211</sup> See *id.* at 302.

<sup>212</sup> See *id.*

As speech became more and more connected to the idea of democracy, the Stone-Frankfurter debate during the preferred position period illustrated that democracy could either support majoritarian, popular policies restricting speech (the Frankfurter approach) or could support an individual's speech rights as the embodiment of freedom (the Stone approach).<sup>213</sup> Through the many Jehovah's Witnesses cases decided during that period, White asserts that it became clear that Stone's perception of speech rights "reinforced democracy in a way that economic rights did not."<sup>214</sup>

White's analysis indicates that a preferred position for speech really came to mean that First Amendment freedoms were closely associated with the model of democratic politics that prevailed in society.<sup>215</sup> Implied in this notion is that unregulated capitalism was less democratic and less preferred.<sup>216</sup> It is interesting to note that this shift occurred after the great depression, at a time when faith in the unregulated economic marketplace waned. From the judicial rubble, the notion of an intellectual marketplace of ideas surpassed the economic model, and the preferred position doctrine, under White's theory, appears to have legitimized the higher democratic values embodied in speech than in a free economy, at least during the decade following *Caroline Products*. White continues to analyze First Amendment theory throughout the twentieth century, and also accounts for a later shift away from the marketplace theory towards a rationale reflecting a self-fulfillment theory of speech.<sup>217</sup> What is important for the purpose of this analysis, however, is that the *Caroline Products* decision could be interpreted not as a major shift in First Amendment jurisprudence, but as part of the evolution of the role of speech in society as it "came of age." The notion that speech was special emerged well before Footnote Four, and the later abandonment of the preferred position doctrine does not signal an abandonment of a special

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<sup>213</sup> See *id.* at 334.

<sup>214</sup> *Id.* at 334–35.

<sup>215</sup> See *id.* at 341.

<sup>216</sup> See *id.*

<sup>217</sup> See *id.* at 354–57 (citing THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970)) (emphasizing the role of the First Amendment as a tool for self-fulfillment).



position for speech. Instead, Footnote Four was yet another rung on the ladder of First Amendment evolution.

#### VI. DOES THE PREFERRED POSITION DOCTRINE STILL EXIST TODAY?

Depending on which theory one espouses explaining the creation and evolution of the preferred position doctrine and Footnote Four, one could argue that Stone's preferred position has one of three statuses: (1) the doctrine, intended to be a fluid starting point for inquiry, was suffocated by its static application, and faded out with the advent of World War II; (2) the doctrine is merely a step along a continuum of First Amendment evolution that emerged due to changing thoughts about democracy and speech, and melded into a newer theory as perceptions of the value of speech continued to evolve; or (3) the doctrine is alive and well, but has become an implicit, rather than explicit, standard embraced by both society and the judiciary.

Some argue that the third status is the most accurate interpretation and see the preferred position doctrine as a precursor to the strict scrutiny standard of judicial review utilized today by the courts.<sup>218</sup> This notion is also supported by the general acceptance today that the First Amendment occupies a special place in society.<sup>219</sup> The relatively quick evolution of the First Amendment from a tool prohibiting prior restraint to an important individual liberty in a matter of a few decades is highlighted by the advent of the preferred position doctrine. Even if the doctrine does not explicitly still encase First Amendment questions, the ideas and values promoted in First Amendment decisions during the preferred position period continue to reappear today.

How one decides to interpret the question of a continued existence of the Footnote Four ideas will also be partially shaped

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<sup>218</sup> See, e.g., BUNKER, *supra* note 9, at 22. Bunker argues that the Holmes-Brandeis clear and present danger test provided some underpinnings of the preferred position doctrine, and that the strict scrutiny test and the clear and present danger test can be reconciled. *Id.* Logically, then, a relationship must also exist between the preferred position doctrine and strict scrutiny.

<sup>219</sup> See Linzer, *supra* note 7, at 301.

2003]     *PREFERRED POSITION POST CAROLENE PRODUCTS*     1051

by one's own notions of the appropriate standards of judicial activism. In this light, the debate over the preferred position shifts away from the substance of the First Amendment and becomes one of procedure. Such an inquiry extends beyond First Amendment implications, including notions of equal protection, unenumerated rights, substantive due process, and commerce clause powers. While a notion of heightened scrutiny for most First Amendment inquiries has become more widely accepted, the scope of the footnote extends beyond the freedom of speech to encompass all standards of judicial review.

On a theoretical level, however, White is correct in noting the fluid nature of First Amendment theory. Present trends toward less protection for hate speech, pornography, and indecency on the Internet cannot be explained by a static theory of the role of the First Amendment. Society has, arguably, moved away from a marketplace of ideas notion that the truth is best served by allowing all voices, no matter how repugnant the opinion. The *Carolene Products* footnote, on a theoretical basis, will only continue to be influential for as long as the theories that supported its creation continue to be espoused in some form.

In reality, the continued relevance of Footnote Four most likely falls between the second and third theories of its development—that the footnote was both a step on the evolutionary ladder of interpreting the First Amendment and an implicit element in any discussion of the First Amendment today. From a practical perspective, the footnote did help to illuminate substantive issues. Its reliance on the text of the Bill of Rights as a source for heightened judicial inquiry provides a reasonable explanation for the direction the Supreme Court has headed in First Amendment jurisprudence since the beginning of the twentieth century.

The many complexities of the issues raised by the *Carolene Products* Footnote Four escape concrete answers, but facilitate interesting and important debate concerning constitutional interpretation. The foundations provided by Footnote Four for modern First Amendment jurisprudence shed light on the theory and policy behind today's notions of the role of freedom of speech in society. One footnote in an economic regulations case brought to the forefront of debate questions both substantive and

1052            *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* [Vol. 13:1019

procedural, as well as questions concerning both the meaning and purpose of a specific amendment and broader questions as to the role of the Court and the legislature. And the inquiry began with just a glass of filled milk.