

## The Two-Tiered System of Rights

*Prout v. Starr* held that all constitutional clauses and amendments have equal weighting. Justice George Shiras wrote, “The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity.”

Since *Prout v. Starr* is not considered a landmark decision, it is prudent to evaluate an example of how the Courts violate Shiras’ jurisprudence of equality or symmetry between constitutional clauses and amendments.

According to Shiras, the Ninth Amendment is equal to all the other amendments and therefore, one may conclude that unenumerated rights protected by the Ninth Amendment are on equal footing with enumerated rights. Hence, one may deduce that decisions such as *Carolene Products v. United States (1938)* and its infamous Footnote 4, encroach upon the sound jurisprudence put forth by Justice Shiras.

Footnote 4 provides four instances when the Supreme Court’s practice of judicial restraint may be ignored. Judicial restraint is the Supreme Court’s practice of upholding state laws and allowing states to experiment with legislation. One instance of importance noted in Footnote 4 is when the Bill of Rights (first eight amendments) is violated. Thus, Footnote 4 implies, for instance, that the right to free speech (First Amendment) has more importance than rights not found in the Bill of Rights (unenumerated) such as the right to work a lawful profession, the right to obtain knowledge, or the right to travel.

As it stands, courts protect enumerated fundamental rights with more vigor than those unenumerated fundamental rights. Even more troubling, Footnote 4 led directly to the Supreme Court standard set by Justice William O. Douglas in *Williamson v. Lee Optical* to deny the right to work a lawful profession in 1954 that businesses such as Lens Crafters perform today.

In *Lee Optical*, Douglas suggested that if the Court found any conceivable or hypothetical reason for a law, it would be held constitutional. What law, no matter how intrusive, would not pass this standard? Proponents for the scrutiny levels defined in Footnote 4 and the low bar for legal legislation set in *Lee Optical* will argue these standards were a necessity to limit lawsuits that are a burden on the judiciary. The number of lawsuits can be properly addressed by better defining fundamental rights and the criteria necessary for fundamental rights to earn constitutional protection. It is not acceptable, however, to protect the workload of the judicial system in lieu of protecting the fundamental rights of the public.