

United States v. Carolene Products:

The Infamous Footnote Four

Patrick Bohan patrickbohan.com 2/27/23

[Justice Harlan Stone's](#) opinion in [United States v. Carolene Products](#) was dubious for two reasons. First, the decision was awful. Carolene Products was part of a long line of bad decisions by the Supreme Court during the [Franklin Delano Roosevelt](#) administration. FDR was not going to let a national emergency, the [Great Depression](#), go to [waste](#). FDR finally got the Supreme Court in his corner after he threatened to [pack](#) the Court with six more justices because he viewed them as hostile to his [New Deal](#) legislation. Shortly after the threat, the Supreme Court magically became a reliable rubber stamp with their seal of approval for FDR's controversial New Deal legislation.

The vehicle the Supreme Court used to approve intrusive legislation which either circumvented states' powers and or mitigated the fundamental rights of citizens was expanding the [Interstate Commerce Clause](#). The Founders definition of the Interstate Commerce Clause was to regulate the selling of merchandise between the states. Now the Interstate Commerce Clause covers everything which could be considered [economic](#) in nature including manufacturing, people, crime, endangered species, firearms, energy, and labor laws. The gradual [expansion](#) of the Interstate Commerce Clause [definition](#) started very early in American history with the [Gibbons v. Ogden](#) decision in 1824. Nevertheless, the Interstate Commerce Clause expansion was on [steroids](#) during the FDR administration.

Consider two other cases during the Great Depression timeframe: [Nebbia v. New York](#) and [Wickard v. Filburn](#). In Wickard, the Court held the federal government could dictate how much wheat a farmer can produce ([Agriculture Adjustment Act](#) of 1933), and growing any excess to feed his family and livestock was prohibited. In Nebbia, the Court caved to the powerful [dairy lobby](#) and jailed a store owner for selling milk for under nine cents a quart. During the Great Depression, people were desperate and starving, but the objective of the New York law, upheld in Nebbia, was to help the dairy lobby fix milk prices to inflate their profits.

In [Carolene Products](#), the [Filled Milk Act](#) banned filled milk from interstate commerce because filled milk was sold for three cents less a quart than ordinary milk. Again, the dairy lobby won at the expense of the starving public and small businesses. The government convinced the Court filled milk was unhealthy for the public when filled milk was indeed, healthier. As people lived in fear struggling to survive without work and food during the Great Depression, politicians used the crisis as an excuse to expand the scope and power of the federal government to protect the affluent, at the expense of the poor.

The second dubious aspect of the Carolene Products decision was the infamous [Footnote Four](#). Footnote Four 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 when the Supreme Court could intervene is when a state law violates the [Bill of Rights](#). Thus, Footnote Four implies the right to free speech (First Amendment) has more importance than rights not found in the Bill of Rights (unenumerated). Consequently, the right to work a lawful profession, the right to obtain knowledge, or the right to travel are not deemed as fundamental rights requiring judicial protection. Courts often rely on flawed jurisprudence set forth in Footnote Four to decide the fate of laws.

[*Prout v. Starr*](#) is an obscure [Eleventh Amendment](#) case decided by the Supreme Court in 1903. The Eleventh Amendment prevented citizens, who reside in another state, from suing a state which defaulted on a work contract. Following the Civil War, states often hid behind the Eleventh Amendment to default on contracts and hide behind the Eleventh Amendment which provided them sovereign immunity. After all, citizens residing in other states were powerless to sue and recover their money. One argument states would use in their defense was the newer Eleventh Amendment superseded the Constitution's [Contract Clause](#) which prevented states and people from defaulting on loans. [Justice George Shiras](#) astutely wrote in *Prout*, "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." In other words, states could not hide behind the Eleventh Amendment to violate the Contracts Clause.

Since *Carolene Products* did not overrule *Prout*, one may conclude the [Ninth Amendment](#) is every bit as important as the first eight amendments in the Bill of Rights. Hence, one may deduce decisions such as *Carolene Products* and its infamous Footnote Four, encroach upon the sound jurisprudence put forth by Shiras. Why? Because the unenumerated right to work a lawful job and the right to enter work contracts was denied to *Carolene Products* because those rights were deemed less important.

Today, without question, courts protect enumerated fundamental rights with more vigor than those unenumerated fundamental rights. A two-tier system of rights not only violates the Ninth Amendment but a hierarchy system of rights violates the equality property which fundamental rights should possess. Unfortunately, the Founders fear of a two-tiered system of rights has come to fruition primarily due to decisions such as *Carolene Products* and Footnote Four.

What can be even more troubling, Footnote Four led directly to another dubious Supreme Court standard set by [Justice William O. Douglas](#). In [*Williamson v. Lee Optical*](#), decided in 1955, Douglas denied the right of *Lee Optical* employees to work a lawful profession. *Lee Optical* was denied the right to provide a similar service to Oklahoma residents which is done nationally today by [Lens Crafters](#). In *Lee Optical*, Douglas suggested if the Court found any conceivable or hypothetical reason for a law, the law would be held Constitutional. What law, no matter how intrusive, would not pass the standard set in *Lee Optical*? The scrutiny levels defined in Footnote Four and the low bar for legal legislation set in *Lee Optical* were [reasoned](#) to be a necessity to limit the number of lawsuits which have become a burden on the judiciary. The judiciary workload issue could have easily been addressed by better defining fundamental rights and the criteria necessary for fundamental rights to earn Constitutional protection. Instead, the Court decided protecting the workload of the judicial system was more important than protecting the fundamental rights of the public.

The right to work suffered huge setbacks during the FDR years at the expense of the expanding Interstate Commerce Clause and by, of course, ignoring the Ninth Amendment. The unfortunate result of what happens when the government uses a national emergency to garner more power: the changes are not temporary, but instead, the damage can be permanent.