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THE FUTURE OF FOOTNOTE FOUR

*Dan T. Coenen**

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I. INTRODUCTION

The Supreme Court's decision in *United States v. Carolene Products Co.* generated the most famous footnote—and perhaps the most famous passage—in all of the American Judiciary's treatment of constitutional law. Among other things, Footnote Four suggested that "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."¹ The importance of this principle cannot be

¹ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). In particular, the footnote highlighted the potential need for special protection of "religious . . . or national . . . or racial minorities." *Id.* In its entirety, the footnote reads:

There may be narrow 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 ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg v. California*, 283 U.S. 359, 369–70; *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 Fourteenth 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, 713–14, 718–20, 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, 373–78; *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 State Highway Department v. Barnwell Bros.*, 303 U.S. 177, 184, n.2, and cases cited.

Id. (parallel citations omitted). Those elements of this footnote that focus on explicit textual

overstated. It pervaded the work of the Warren Court² and has played a prominent role in constitutional discourse ever since.³

In this Article, I reflect on the “discrete and insular minorities” component of Footnote Four, denominating it in shorthand fashion as the “unempoweredness principle.” In doing so, I draw on the seminal work of my colleague Milner Ball and also touch on the work of other scholars, most notably Professor Cass Sunstein. I examine three main subjects. First, I speak of the possibility that the rising rhetoric and reality of constitutional “minimalism” may dilute long-vibrant understandings of the unempoweredness principle. Second, I investigate one form that dilution of the unempoweredness principle might take—namely, by way of transforming it (in whole or in part) from a rule of hard-and-fast constitutional law into a rule of statutory interpretation. Third, I consider whether the unempoweredness principle now faces the prospect of wholesale abandonment.

One theme of Milner Ball’s work concerns the centrality of narratives to understanding law and life. For this reason, I have woven a few stories into this Article. Here is one of them:

II. THE STORY OF NAMING THIS ARTICLE

Several months ago, Bret Hobson, who was then serving as editor in chief of the *Georgia Law Review*, asked me to write something that touched on the work of Milner Ball for inclusion in this special issue. I accepted the invitation and began to give the matter some thought. The subject I came up with (as I have noted) focuses on Footnote Four, judicial minimalism, the future of *Carolene Products* jurisprudence, what Milner might think of that, and the like. Having identified this half-baked topic, I tried to cook up a title. My

guarantees of rights (paragraph 1) and judicial protection of the proper operation of political processes (paragraph 2)—as opposed to judicial protection of “discrete and insular minorities” (paragraph 3)—are, for the most part, beyond the scope of this Article.

² See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75 (1980) (noting that the “Warren Court’s approach was foreshadowed” by Footnote Four).

³ *Accord*, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE* 128 (1991) (noting that these “remarks about ‘discrete and insular minorities’ . . . have been enormously influential in the development of American law over the last half-century”). See generally *infra* notes 111–56 and accompanying text.

initial thought was *Footnote Four, Milner Ball, and the Proper Judicial Role*. Not very informative, I concluded, and decided to move on. I fared little better with later-hatched ideas, such as *Where Footnote Four Is Headed and What Milner Ball Might Think* and *Discrete and Insular Minorities, Milner Ball, and the Direction of Constitutional Law*.

As this process unfolded, I began to think more systematically about what I wanted my title to accomplish. I decided that my goal was to honor Milner as best I could. Because one way to do so might be to include his name in the title, I came up with some additional possibilities, such as *Footnote Four from the Perspective of Milner Ball* or simply *Footnote Four: A Tribute to Milner Ball*. An alternate approach involved the tried-and-true tactic of alliteration. One idea was *Footnote Four's Future: Of Minorities, Minimalism, and Milner Ball*. (If only Cass Sunstein's name had started with an "M," I told myself, he might have made the list, too.)

In the end, I decided to go in another direction. I chose a title that did *not* mention Milner by name because I suspected that naming him might send the unintended message that there would not be much to read here apart from flattering fluff. I also decided to go short, rather than long, reasoning that a terse and suggestive title might draw readers in. In sum, I decided that the title that now identifies this Article would honor Milner more than a title that bore his name because it would maximize the chances that readers would peruse the piece and, in so doing, learn something, or something more, of Milner's remarkable work. My effort to draw in readers, of course, may prove unsuccessful, but the point is that I tried. And my effort did not focus on simply communicating information clearly. I had other designs. Indeed, one might say that I was intentionally using words in an effort *not* to communicate clearly, but instead to be vague and enticing.⁴

Fair enough, you might say, but what does this story have to do with Footnote Four? The answer is that—as Milner has taught us through a lifetime of work—words matter deeply. That is true whether they are used by Madison Avenue hucksters, political

⁴ To be a bit less dramatic (and a bit more accurate), perhaps I should say that I was trying to be as "enticing" as one can be in the title of a law review article.

spinmeisters, or legal academics. Of particular importance is the idea that words do far more work than simply communicating facts and ideas. They draw attention. They create a mood. They stir emotion. They generate beauty. They draw images from memory and etch new images there, too. Words steer human actions. They inspire acts of consequence, even fighting to the death. And they shape our law.⁵ Again, these effects occur not only because well-used words effectively convey important realities or concepts. Powerful effects occur in large part because the words themselves exert pushes and pulls—often at a subconscious or barely conscious level—and that is true with respect to the words offered in and about Footnote Four.

III. MILNER BALL'S CONCEPTION OF THE UNEMPOWEREDNESS PRINCIPLE

So what words has Milner Ball offered up on the meaning and significance of Justice Stone's allusion to "discrete and insular minorities"? In 1974, Milner was an assistant professor three years out of law school. Yet, at that early stage, he produced a remarkable paper entitled *Judicial Protection of Powerless Minorities*.⁶ Already well aware of the power of words, Milner opened his piece with the face-slapping rhetoric of political activist Dick Gregory. "The cats wearing the white sheets took our rights away from us," Gregory wrote, so "it's only natural that the cats in the black robes should give them back."⁷ Milner was off and running with an article that would consider both the origins and the implications of the unempoweredness principle.

⁵ For an example of the potentially profound effects of subtle changes in word use, see Garry Wills, *At Ease, Mr. President*, N.Y. TIMES, Jan. 27, 2007, at A17 (noting now common reference to the phrase "our commander in chief," but urging that: "[T]he President is not our commander in chief. He certainly is not mine. I am not in the Army.").

⁶ Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059 (1974).

⁷ *Id.* at 1059.

A. OF ORIGINS

Milner's article covered much ground in defending and developing this principle. According to him, Footnote Four taught that "[j]udicial attention is appropriate because of the assumption that prejudice may have prevented those within the political processes from protecting those without."⁸ Common sense and simple justice suggested that "those who cannot defend themselves . . . are to be shielded by the courts."⁹ Indeed, "one of the components of the act of founding was recognition of the need to nourish minorities. To protect the powerless is, then, a way to recur to the originating vision"¹⁰

Milner emphasized that the unempoweredness principle had its roots in thinking from the framing period, particularly as reflected in *The Federalist*.¹¹ In *The Federalist No. 10*, for example, James Madison focused squarely on the potential created in systems founded on democratic rule for self-interested legislation by "the most numerous party, or, in other words, the most powerful faction" and "[the] opportunity and temptation . . . given to a predominant party, to trample on the rules of justice."¹² Majoritarian tyranny, according to the Father of the Constitution, threatened both "the public good, and private rights,"¹³ including "sacred rights,"¹⁴ "religious rights,"¹⁵ and "civil rights."¹⁶ As a result, the framers' goal had been to create "a government which will protect all parties, the weaker as well as the more powerful,"¹⁷ in part because "no man can be sure that he may not be to-morrow the victim of a spirit of

⁸ *Id.* at 1063.

⁹ *Id.* at 1060 n.3.

¹⁰ *Id.* at 1070-71.

¹¹ See *id.* at 1065 (noting, for example, James Madison's concern for minority protection because of possibilities that "a majority of the people might employ the government to oppress a minority of the people").

¹² See THE FEDERALIST NO. 10, at 60 (James Madison) (Jacob E. Cooke ed. 1961). See generally THE FEDERALIST NOS. 10, 51 (James Madison) (describing methods of controlling factions).

¹³ THE FEDERALIST NO. 10 (James Madison), *supra* note 12, at 61 (noted at Ball, *supra* note 6, at 1066).

¹⁴ THE FEDERALIST NO. 14 (James Madison), *supra* note 12, at 88.

¹⁵ THE FEDERALIST NO. 51 (James Madison), *supra* note 12, at 351.

¹⁶ *Id.*

¹⁷ *Id.* at 352.

injustice, by which he may be a gainer to-day.”¹⁸ These passages, according to Milner, gave rise to a core idea: “[P]rotection of minorities is not a matter of accommodation, tolerance, or concession on the part of the majority. Rather, it is the practice of human maturity, the recognition of what ultimately constitutes self-interest.”¹⁹

Milner was right to look to *The Federalist* in seeking support for Footnote Four. In fact, the essays include many warnings about the need to protect minorities against the “oppression”²⁰ and “passions”²¹ of short-sighted majorities.²² As Milner recognized, however, it is not entirely clear that the authors of the essays envisioned a direct *judicial* role in safeguarding minority interests.²³ Rather, the focus of *The Federalist* was on the use of political structures—the expanded republic, bicameralism and presentment, the continued empowerment of states, and the filtration of public opinion through properly chosen representatives—as antidotes to majority overreaching.²⁴ Did “Publius” (the self-named author of the pseudonymous *Federalist* essays²⁵) also envision that judicial interventions would help protect groups wrongly excluded from having a say in the halls of political power?

There are signals he did, at least if commonly used tools of structural inference are brought to bear. For example, *The Federalist No. 10*, spoke of achieving fairness and stability through a dynamic, continuous process of dialogue and accommodation

¹⁸ THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 12, at 528.

¹⁹ Ball, *supra* note 6, at 1067.

²⁰ THE FEDERALIST CONCORDANCE 369 (Thomas S. Engeman, Edward J. Erler & Thomas B. Hofeller eds., Univ. of Chi. Press 1988) (1980) (listing seventeen occurrences of word “oppression”).

²¹ *Id.* at 391 (listing forty-three occurrences of word “passions”).

²² See generally Dan T. Coenen, *Of Pitcairn’s Island and American Constitutional Theory*, 38 WM. & MARY L. REV. 649, 658–60 (1997) (summarizing framers’ fear of majority factions).

²³ See Ball, *supra* note 6, at 1068 (noting that Madison focused on how majority tyranny could be dampened by proper structuring of the representative branches).

²⁴ See THE FEDERALIST NO. 10 (James Madison) (describing advantages of republics over pure democracies in controlling majority tyranny). See generally Coenen, *supra* note 22, at 666–71 (listing political structures of American Constitution designed to neutralize majority factions).

²⁵ See Jacob E. Cooke, *Introduction to THE FEDERALIST*, at xi (Jacob E. Cooke ed., 1961) (noting that essays were written under name “Publius”).

among an ever-evolving universe of minority interest groups.²⁶ The image created by Madison's words is one of broad inclusion,²⁷ with interest-group strength reflecting at least a rough proportionality to interest-group numbers. But what if one group is systematically excluded by effective alliances among other "factions," or given far less practical leverage than its numbers fairly justify? Such a result would throw the entire Madisonian machinery out of whack. And who else could protect such a group except for federal judges?

What is more, the authors of *The Federalist* conceived of the Judiciary as a part of, rather than apart from, the democratic institutions of government.²⁸ If the Senate was designed to reflect the long view of public policy,²⁹ the Judiciary was designed to take an even longer view on behalf of "We the People."³⁰ Given this outlook, it is far from clear that the authors of *The Federalist* would condemn judicial intervention on constitutional grounds as anti-democratic. And it would be all the more difficult to apply that label when courts were acting to protect persons excluded in systematic fashion from the give-and-take of interest-group jostling that *The*

²⁶ See THE FEDERALIST NO. 10 (James Madison), *supra* note 12, at 60 (noting that because causes of factions cannot be removed, relief must be sought by controlling effects).

²⁷ See THE FEDERALIST NO. 39 (James Madison), *supra* note 12, at 251 (deeming it "essential to [republican] government, that it be derived from the great body of the society, not from an unconsiderable proportion or favored class of it").

²⁸ See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 12, at 525 (noting the critical role of the Court in implementing the popular will as expressed in the Constitution). As Milner noted:

If one begins with the premise that majority rule is the comprehensive and dominant feature of the American scheme, then judicial review will be perceived as an intervention or intrusion. On the other hand, if, with the present approach, one adopts the premise of Madison and Hamilton that the American republic is a mode for securing minority rights while at the same time preserving the form and substance of popular government, then judicial review protective of minority rights will present itself as consonant with the normal functioning of the machinery of our government.

Ball, *supra* note 6, at 1072-73.

²⁹ Dan T. Coenen, *The Story of the Federalist: How Hamilton and Madison Reconceived America* 132 (Apr. 21, 2006) (unpublished book manuscript, on file with author).

³⁰ *E.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 12, at 525-27 (noting that in conflict between the will of legislature and will of people as expressed in the Constitution, judges should be governed by the latter). This idea has found modern expression in the work of Bruce Ackerman, among others. See generally ACKERMAN, *supra* note 3.

Federalist saw as key to the operation of republican self-government.³¹

In any event, the Fourteenth Amendment changed everything.³² By way of that amendment, the Judiciary received an official charge to ensure "the equal protection of the laws" to "any person within [state's] jurisdiction."³³ The term "equal protection" is not self-defining. It seems natural enough to say, however, that its meaning

³¹ See ELY, *supra* note 2, at 80–84 (developing connection between the Madisonian vision of factions and judicial protection of the "technically represented" but "functionally powerless"). Milner made much the same point in these words:

The Court exercises authority in judging, so long as its judgments recur to the beginning of the republic as well as carry forward the vision which was embodied in the Constitution. As was discussed previously, one of the components of the act of founding was recognition of the need to nourish minorities. To protect the powerless is, then, a way to recur to the originating vision, to redeem its pledge, and thus to exercise authority.

Ball, *supra* note 6, at 1070–71. There is a great deal more to be said on this large topic, particularly with respect to the *Federalist* essays that specifically consider the judicial power. For some suggestive comments, see generally Sotirios A. Barber, *Judicial Review and The Federalist*, 55 U. CHI. L. REV. 836 (1988).

³² *Accord, e.g.*, ELY, *supra* note 2, at 86 ("Whatever may have been the case before, the Fourteenth Amendment quite plainly imposes a judicially enforceable duty of virtual representation."). So, perhaps, did the Ninth Amendment, as Professor Ely has argued. See *id.* at 32–33 (suggesting that the Court's protection of racial minorities against discrimination by the federal government is properly rooted in the Ninth Amendment). The intersection of the Ninth Amendment and the "discrete and insular minorities" principle is beyond the scope of this Article, as is the intersection of that principle with the Guarantee Clause, as well as Amendments I through VIII, including the Fifth Amendment's Due Process Clause. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that racial segregation in public schools operated under federal authority violated Due Process Clause). Also essentially beyond the scope of this paper is the possibility of inferring the unempoweredness principle from constitutional "structures and relationships," see generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (Ox Bow Press 1985) (1969), or the "tacit postulates" of the Constitution, see *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), under authorities like *McCulloch v. Maryland*. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). It is noteworthy in this regard that (as Professor Ely and others have observed) the "discrete and insular minorities" component of *Carolene Products* methodology bears a kinship to the nontextual principle of federal government tax immunity embraced by the Court in *McCulloch*. In particular, both principles gain impetus from *The Federalist's* strong endorsement of the idea that "[n]o man is allowed to be a judge in his own cause." THE FEDERALIST NO. 10 (James Madison), *supra* note 12, at 59. The basic thrust of Footnote Four, after all, is that the self-serving majorities that systematically exclude or unreasonably dampen minority voices in the political process will systematically favor themselves in the process of determining where legislatively created benefits and burdens should flow. For this reason, it is hardly surprising that Justice Stone alluded to *McCulloch* in Footnote Four itself. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (quoted *supra* note 1).

³³ U.S. CONST. amend. XIV, § 2.

should flow, at least in part, from the animating premises of our entire system of republican self-governance. Accepting this proposition, the Fourteenth Amendment—when conjoined with *The Federalist*—lends support to the vital principle that members of groups systematically disadvantaged in our political processes require protection from an independent judiciary that (precisely because it is independent) is uniquely well suited to safeguard their interests.

B. OF IMPLICATIONS

In his article on Footnote Four, Milner did more than defend the unempoweredness principle on functional, structural, and originalist grounds. He also emphasized the need to give that principle a practical significance. Milner noted, for example, that “the existence of prejudice will not always be readily discernible,” since legislators seldom publicly celebrate their schemes of self-interested oppression.³⁴ It followed that “the responsibility of the judiciary” includes “the duty to make a rigorous examination” to determine if legislation had “its origin in prejudice.”³⁵ Again with an eye to practical justice, Milner recognized that a proper list of “discrete and insular” minorities must reach beyond groups defined by racial and religious characteristics. In keeping with Hamilton’s admonition that judicial elaboration of principles embodied in an enduring Constitution would have to unfold over time,³⁶ Milner observed that “other minorities will continue to emerge into recognition.”³⁷ Milner also emphasized that judges charged with protecting minorities would have to act with the sort of damn-the-torpedoes courage that the Constitution’s structuring of the judicial

³⁴ Ball, *supra* note 6, at 1063. Again, *The Federalist* is informative on this point, since it specifically emphasized the risk that lawmakers would hatch “plans of oppression” born of “unjust or dishonorable purposes” in a behind-the-scenes manner. THE FEDERALIST NO. 10 (James Madison), *supra* note 12, at 64.

³⁵ Ball, *supra* note 6, at 1063.

³⁶ See THE FEDERALIST NO. 82 (Alexander Hamilton), *supra* note 12, at 553 (“‘Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent whole.”).

³⁷ Ball, *supra* note 6, at 1060 n.3.

branch was designed to foster.³⁸ At least in this field, a court's "function is to offer assessments about performance instead of to win adherents."³⁹ It followed that courts applying the unempoweredness principle could not "delay the making of hard decisions,"⁴⁰ far less capitulate to majority prejudices by fixing their sights on "the misleading criteria of statesmanship, success, and self-preservation."⁴¹

Finally, Milner sought to bring new clarity to this field. He noted that the term "discrete and insular" holds the potential to mislead because, for example, "[a] minority may flourish in chosen isolation."⁴² The term "minorities" also could steer one off course because "powerlessness rather than size is decisive," as illustrated—at least historically—by the case of women.⁴³ Milner directed special attention to the poor, emphasizing that one's impoverished status (on top of negative stereotypes and over-generalized assumptions held by elites who seldom visit the world in which the poor actually find themselves) of itself impedes equal access to the levers of power.⁴⁴ He went on to explore the connection

³⁸ See *infra* notes 40–41 and accompanying text.

³⁹ Ball, *supra* note 6, at 1076.

⁴⁰ *Id.* at 1077–78.

⁴¹ *Id.* at 1075. The latter passage took aim at Professor Alexander Bickel's then-recently-expressed admonitions regarding judicial restraint. See ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 38 (1970) (arguing, for example, that "judicial judgment [is] statesmanship superimposed on the democratic political process").

⁴² Ball, *supra* note 6, at 1080.

⁴³ *Id.* Milner also emphasized that powerlessness is contextual in the sense that a group may be voiceless in one setting but not another. To prove this proposition, Milner cited the dormant Commerce Clause cases. National trucking firms, he suggested, are not normally thought of as discrete and insular minorities. But they at least had a plausible case for judicial intervention when a single state (perhaps for protectionist reasons) substantially impeded their operations. *Id.* at 1080–81.

⁴⁴ See *id.* at 1084 (emphasizing that "[p]overty . . . is . . . [a] shared characteristic causally related to powerlessness"). Lest the point be overlooked, Milner's views on this subject were (as usual) nuanced and attentive to real-world complexities. He acknowledged, for example, that "[p]racticality may argue against the elevation of poverty to the status of a shared characteristic" that inevitably warranted heightened scrutiny. *Id.* at 1086. At the same time, he emphasized that "[d]evotion to 'free enterprise' cannot be allowed to override the commitment of enlightened self-interest to nourish minorities whether poor or racial or otherwise." *Id.* at 1087 n.145. Attentive to the particular power of words emanating from our nation's highest tribunal, he urged that at least "[t]he Court should not forbear to remind of this commitment." *Id.* Drawing on the Court's own precedents, he emphasized the continuing judicial duty to give some measure of protection to the "basic needs" of those laboring under the scourge of poverty. *Id.* at 1087. In this regard he noted that "what and

of Footnote Four to *Roe v. Wade*,⁴⁵ offering a range of observations,⁴⁶ some of which anticipated justificatory insights provided only later by the author of the opinion himself.⁴⁷

Milner has lost battles along the way. For example, he urged that heightened scrutiny should extend to at least some forms of de facto discrimination, given the inevitability that legislators will too easily overlook "the deserving interests of a politically voiceless and invisible minority," whether on purpose or not.⁴⁸ The Court, however, rejected such a disparate-impact approach in *Washington v. Davis*⁴⁹ and its progeny.⁵⁰ One also senses that the Court has not gone as far as Milner would prefer in protecting the poor under the unempoweredness principle.⁵¹

Even in these areas, however, ideas embraced by Milner have carried the day to some degree. The Court's willingness to consider

how much is fundamental to the protection of a minority" is a relative concept, contingent in part on "what the majority gathers to itself." *Id.* at 1088. He added that "[i]n order for minorities to sustain themselves or for members of minorities to make a way, if they choose, into the mainstreams of society, they must be adequately equipped according to contemporaneously realistic standards." *Id.* Finally, in keeping with his deep notion of inclusiveness, Milner emphasized that, in gauging fundamental rights, courts must ask: "[W]hat does the minority advance as necessary? A minority's own understanding of its felt needs must be attended to . . ." *Id.* (emphasis added).

⁴⁵ 410 U.S. 113 (1973).

⁴⁶ See, e.g., Ball, *supra* note 6, at 1091-94 (discussing relation of powerlessness principle to both women and fetuses).

⁴⁷ With regard to Milner's observations about women's rights and *Roe*, see *supra* note 46. With regard to Justice Blackmun's subsequent insights, see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part, concurring in judgment, dissenting in part) ("A State's restrictions on a woman's right to terminate her pregnancy . . . implicate constitutional guarantees of gender equality."). Compare *Maier v. Roe*, 432 U.S. 464, 483 (1977) (Blackmun, J., dissenting) (noting that "a distressing insensitivity to the plight of impoverished pregnant women is inherent in the Court's analysis"), with Ball, *supra* note 6, at 1092 n.179 (suggesting that "[i]t may be that poor women were the real minority whose interests were vindicated by the Court" in *Roe*).

⁴⁸ See Ball, *supra* note 6, at 1083 n.117 (suggesting that de facto discrimination may be as problematic as de jure discrimination).

⁴⁹ 426 U.S. 229 (1976).

⁵⁰ See, e.g., *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (viewing a facially neutral law as invalid under Equal Protection Clause only if traceable to discriminatory purpose); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (refusing to deem official action unconstitutional "solely because it results in a racially disproportionate impact").

⁵¹ See, e.g., Ball, *supra* note 6, at 1091 n.173 (inviting the Court to reconsider earlier rulings in *Dandridge v. Williams*, 397 U.S. 471 (1970), and *Lindsey v. Normet*, 405 U.S. 56 (1972)).

discriminatory effects in inferring discriminatory purpose, for example, may provide some measure of protection against the vice of legislative blindness to the just claims of protected minorities.⁵² In similar fashion, the Court has remained open to protecting the poor when the state threatens to deprive them of at least some sorts of fundamental interests.⁵³ For these reasons and others, the unempoweredness principle continues to stand today as a significant force in American constitutional law. Will things remain that way? We turn now to that question.

IV. THE FUTURE OF FOOTNOTE FOUR

A. OF MINIMALISM AND DILUTION OF THE UNEMPOWEREDNESS PRINCIPLE

Stories are not the only forms of words that pack heat. As any political operative knows, slogans, labels, and “sound bite” phrases shape thought and stir action in critical ways. In constitutional law, one term of modern-day importance is “minimalism”—a concept closely tied to the important and deeply thoughtful work of Professor Cass Sunstein.⁵⁴ The word denotes an approach to constitutional decisionmaking that favors “narrow” and “shallow” judicial actions,⁵⁵ in other words, when courts issue constitutional

⁵² See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 623–24 (1982) (holding that a voting system’s operation in such a way that no black had ever been elected supported finding of discriminatory purpose). As Justice Stevens has emphasized, the seemingly strong line between de jure and de facto discrimination is blurred by the Court’s insistence that proof of the latter provides support for an inference of the former. *Id.* at 645–50 (Stevens, J., dissenting); see also *Davis*, 426 U.S. at 253 (noting that “most probative evidence of intent . . . [may] be objective evidence of what actually happened”).

⁵³ See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996) (recognizing right of indigent mother, threatened with termination of parental rights, to free access to appellate review). Milner was particularly prescient in predicting that the absence of an “absolute deprivation” of education was key to the Court’s decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 37 (1973). Thus, in *Plyler v. Doe*, the Court relied heavily on this very distinction in invalidating a state tuition requirement imposed on children of undocumented aliens. See generally 457 U.S. 202 (1981).

⁵⁴ See generally CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005) (discussing four approaches, including minimalism, that dominate constitutional debates).

⁵⁵ Professor Sunstein observes that minimalists “favor narrow rulings over wide ones,” in the sense that “[t]hey like to decide cases one at a time.” *Id.* at 29. Also, “[t]hey favor

rulings, they should (at least typically) do so in an "incompletely theorized" way that sidesteps "broad pronouncements."⁵⁶

It merits emphasis that the word "minimalism" carries a self-promoting power. It is short and catchy. It summons up celebrated ideas of modesty, humility, and unselfishness. For those on the left, it provides a welcome alternative to "originalism"—or what Professor Sunstein (using another loaded term) prefers to call "fundamentalism."⁵⁷ For those on the right, it suggests a no less welcome alternative to the sort of "activism" by "liberal judges" said to have produced such rulings as *Roe*.

"Minimalism," in short, is a word that helps to sell minimalism by conjuring up positive images, at least among the large number of citizens who style themselves "moderates" (another term marked by positive appeal).⁵⁸ Of course, "minimalism" is more than a clever word. In powerful fashion, Professor Sunstein has made the case for it on normative grounds as the best available interpretive methodology.⁵⁹ He also reports—with much accuracy—that minimalist thinking has exerted a strong influence within the Supreme Court in recent years.⁶⁰

So what does minimalism have to say about the unempoweredness principle? The answer to this question is complex, and my purpose is not to capture that answer in all its dimensions. Rather, I want to show how the rhetoric of minimalism matters, how it might subtly (or not so subtly) shape thinking about the Judiciary's proper role, and how it could invite a significant retrenchment with respect to Footnote Four. More particularly, I

shallow rulings over deep ones, in the sense that they seek to avoid taking stands on the biggest and most contested questions of constitutional law." *Id.* at 27.

⁵⁶ *Id.* at 27–30.

⁵⁷ *Id.* at 26 (asserting that fundamentalists "believe that 'originalism' is the proper approach for constitutional interpretation").

⁵⁸ In Western culture, the virtues of moderation are traceable back at least as far as the time of Aristotle. See ARISTOTLE, *NICOMACHEAN ETHICS* 111 (H. Rackham trans., 1962) (n.d.) (stating "that moral virtue is a mean, and in what sense this is so, namely that it is a mean between two vices, one of excess and the other of defect; and that it is such a mean because it aims at hitting the middle point in feelings and in actions").

⁵⁹ See generally SUNSTEIN, *supra* note 54 (arguing for "minimalism"); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) (same).

⁶⁰ SUNSTEIN, *supra* note 54, at 245.

will explore some of what Professor Sunstein has had to say about this subject and some of what Professor Ball might say in response.

The story centers on *Korematsu v. United States*,⁶¹ a case that upheld the exclusion of Japanese-Americans from the West Coast during World War II and that Professor Sunstein considers in a book section entitled "Minimalism in surprising places."⁶² By way of background, Professor Sunstein claims that there are three currently dominant competing schools of constitutional thought: "minimalism" (which, as we have seen, focuses on judicial modesty and adherence to precedent),⁶³ "fundamentalism" (which focuses on the framers' intentions at a high level of specificity, and is associated with the "Constitution in Exile" movement),⁶⁴ and "perfectionism" (which involves making the open-ended clauses in the Constitution "the best they can be" according to broad principles of justice and sound political theory).⁶⁵ Professor Sunstein posits that Justice Scalia and (even more so) Justice Thomas are (or at least purport to be) fundamentalists.⁶⁶ He notes that perfectionists can be either "liberal" or "conservative";⁶⁷ identifies Justices Brennan and Marshall as prominent perfectionist liberals;⁶⁸ but

⁶¹ 323 U.S. 214 (1944).

⁶² SUNSTEIN, *supra* note 54, at 186–88.

⁶³ *See id.* at 27–30 (describing attributes of "minimalism").

⁶⁴ *See id.* at 25–27 (discussing attributes of "fundamentalism").

⁶⁵ *See id.* at 31–34 (discussing attributes of "perfectionism"). Professor Sunstein associates perfectionism with the work of Professor Ronald Dworkin. *Id.* at 32. He also reports that there is a fourth school of interpretive thought—namely, "majoritarianism," which Professor Sunstein associates with Professor James Bradley Thayer and Oliver Wendell Holmes. *Id.* at 44–50. Professor Sunstein reports that majoritarianism, which celebrates a highly noninterventionist judicial role, has no active adherents on the Court today and few adherents in the academy as well. *Id.* at 44–50. For this reason, he gives the methodology little attention.

⁶⁶ *Id.* at 30. I say "purport to be" in the preceding sentence because a key theme in Sunstein's writing is that self-proclaimed fundamentalists are often "conservative perfectionists" in disguise. *See id.* at 32 (noting that "some conservatives are perfectionists in fundamentalist clothing"). He suggests, in particular, that would-be fundamentalists often ignore original intent when that intent does not square with their own conceptions of sound morals and good government. *Id.* According to Professor Sunstein, evidence in support of this conclusion comes from (among other places) the fields of affirmative action, nondelegation, gun control, campaign-finance regulation, commercial speech, Takings Clause law, and affirmative action. *Id.* at 34. Like many important subjects, this one falls beyond the scope of this Article.

⁶⁷ *Id.* at 32.

⁶⁸ *Id.*

says that no comparable perfectionists sit on the Court today.⁶⁹ Instead, the Court of recent years has had a minimalist cast, and many of its rulings are best understood in minimalist terms.⁷⁰

So what about *Korematsu*? In the view of Professor Sunstein, the Court's "overall approach" to the case "has an unmistakable minimalist feature" because the Court "emphasized that the exclusion order was based on a recent congressional enactment," rather than action undertaken by the President alone.⁷¹ For this reason:

[W]e can obtain a fresh perspective on how the Court was approaching the American government's acts of discrimination against Japanese-Americans. In short, the Court was rejecting National Security Fundamentalism and Liberty Perfectionism in favor of a distinctive form of minimalism. In none of these cases did the Court issue a broad ruling in favor of presidential authority. [Rather,] . . . the Court paid exceedingly careful attention to the role of legislation, and thus refused to rule that the Commander in Chief power allowed the President to act on his own. But in permitting the executive to implement . . . an exclusion order, the Court also rejected Liberty Perfectionism, indicating that it would yield to the shared judgments of the two democratically accountable branches.⁷²

Put another way, *Korematsu* and its companion cases "reflect an emphatically minimalist approach to civil liberties in wartime—an approach that both defers to, and insists on, agreement from both of the democratically accountable branches."⁷³

⁶⁹ *Id.* at 33.

⁷⁰ *See, e.g., id.* at 29–31, 107 (discussing approaches of Justices Ginsburg and O'Connor); *id.* at 188–90 (discussing minimalist opinion of Justice Souter); *id.* at 245 (associating minimalism with Justices O'Connor and Kennedy). Professor Sunstein's book, which was published in 2005, does not consider the interpretive styles of Chief Justice Roberts and Justice Alito.

⁷¹ *Id.* at 186–87.

⁷² *Id.* at 187–88.

⁷³ *Id.* at 188.

How would Milner Ball react to these words? My hunch is that he would share thoughts like these:

How in heaven's name can you talk about *Korematsu* this way? You're speaking of the forced relocation of more than 120,000 human beings—most of them lifelong American citizens. Based solely on their ethnicity! Driven from their homes, their work, their churches, their friends, their very lives—to distant and dismal places for years on end. What's more, this was done on a dragnet basis to every Japanese-American in California and much of Washington, Oregon, and Arizona. With no hearings afforded to anyone. In America. With the Supreme Court's blessing. "Minimalist"???? Who's kidding who?

He might add the following:

And don't you dare call me a "liberal perfectionist." Call me someone who cares about justice, who hates racism, who thinks—as I thought America taught the world—that "all men are created equal." Who cares if Congress joins a pact with the devil? Both elected branches—not just the President—must be watchdogged for excess. And that's especially true in times of war. You've missed a mountain range by peering at a mole hill. Read *The Federalist*. When Madison wrote about runaway passions, he was talking about the legislative branch.⁷⁴ Majority tyranny? If not in *Korematsu*, then when?

Comments of this sort, I suspect, would provide only a beginning. And whatever direction Milner's words might take, he would speak more eloquently than I could ever do on his behalf. Indeed, how Milner might use words in settings like this one is a major subject

⁷⁴ THE FEDERALIST NO. 10 (James Madison), *supra* note 12, at 57 (discussing factions "united and actuated by some common impulse of passion").

in and of itself. (For one potential source of insight see the "Wrath of Milner," set forth in APPENDIX A.)

In fairness to Professor Sunstein, his comments on *Korematsu* are critical of that decision in important respects. He observes that "[i]t is tempting, and probably right, to see the Court's decisions as cowardly and deplorable capitulations to intrusions on liberty that had no justification in national security concerns."⁷⁵ In addition, he notes that "reasonable people object to these rulings" and that "the Court should have emphasized the absence of unmistakable authorization from Congress."⁷⁶ I suspect, however, that these passages would only make Milner's blood boil more. "[T]empting"? "[P]robably right"? All the executive needed was an "unmistakable authorization"? Milner, I suspect, would recoil at these words, stressing that the unspeakable tragedy endured by countless Japanese-Americans is hopelessly lost in the lawyerly phrases and tones. At the very least, Milner would worry that there is something deeply insidious happening here, as words used to deal with an event of catastrophic sorrow serve to give the occasion at least a veneer of defensibility.

Professor Sunstein's musings about discrete and insular minorities range beyond the *Korematsu* case. In fact, he writes directly about Footnote Four in the following terms:

Some perfectionists invoke the Constitution itself to justify their approach; they speak as if the document, fairly read, necessarily generates the results they seek. But this is implausible. More candid perfectionists appeal to what they see as the requirements of democracy. Call them *democratic perfectionists*. These people believe that where the Constitution is ambiguous,

⁷⁵ SUNSTEIN, *supra* note 54, at 186.

⁷⁶ *Id.* at 188. It also should be noted that Professor Sunstein rightly highlights the special dangers posed by the sort of starkly minority-targeting government action at issue in *Korematsu*. See *id.* at 170-71 (noting that people in fear are "far more likely to tolerate government action that abridges the freedom of members of some 'out-group'" and that minority-targeting "infringements on liberties [do not] receive the natural political checks that arise when majorities suffer").

judges should interpret it to promote democracy rather than to compromise it.⁷⁷

He continues:

Extending their democratic claims, they also insist that the Court should protect those groups that are least able to protect themselves in democratic arenas. For this reason, they believe that the Constitution's Equal Protection Clause should be interpreted to prevent discrimination against African-Americans, women, illegitimate children, disabled people, and (more recently) gays and lesbians. Perfectionists contend . . . a strong judicial role is . . . necessary to "perfect" democracy itself.⁷⁸

Again, there is much to say about all this, but the main point has to do with the power of words. Characterizing Footnote Four methodology as "perfectionist" creates no small risk that that methodology will be promptly pigeonholed as activist, utopian, and non-originalist. At best, this manner of labeling involves an oversimplification. In particular, we already have seen that judicial protection of discrete and insular minorities has roots in constitutional text and history.⁷⁹ For this reason alone, there are problems in tying the unempoweredness principle to open-ended efforts to make constitutional doctrines "the best they can be."⁸⁰ No less troubling is the suggestion that Footnote Four methodology stands at cross purposes with minimalism itself. In this regard, it bears emphasis that Professor Ely's theory of judicial review—at the heart of which lay the unempoweredness principle—was driven by a minimalist spirit. More specifically, Professor Ely's core purpose

⁷⁷ *Id.* at 38.

⁷⁸ *Id.* at 39.

⁷⁹ See *supra* notes 8–32 and accompanying text; see also Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 224 (1980) (asserting that "a moderate intentionalist could read the [Equal Protection Clause] to protect 'discrete and insular minorities' besides blacks").

⁸⁰ See *supra* note 65 and accompanying text.

was to steer courts toward a focus on protecting the proper functioning of republican processes, instead of protecting nontextual substantive values, such as the right of privacy invoked in *Roe*.⁸¹ In other words, Professor Ely was the minimalist of his own day, and his defense of the judicial role in protecting powerless minorities focused largely on reining courts in, rather than sending them forth to save the world. In short, describing Professor Ely's methodology as "perfectionist" seems deeply at odds with Professor Ely's own vision and goals in setting forth that methodology.

Put another way, the suggestion that a new "minimalist" approach should be substituted for an existing "perfectionist" approach to Footnote Four smacks of calling for the minimalizing of an already-minimalist methodology. One might criticize the preceding sentence as designed merely to score rhetorical points; more particularly, Professor Sunstein could fairly state that judges can pour into any principle—including the unempoweredness principle—an activist content. Fair enough. But the point remains. A celebration of minimalism threatens to dilute the unempoweredness principle in problematic ways. Professor Sunstein, for example, must labor mightily to reconcile *Brown v. Board of Education*⁸² with a minimalist viewpoint;⁸³ yet, as Professor David Strauss has written, "everyone agrees that *Brown* . . . was rightly decided."⁸⁴ No less important, Professor Sunstein's characterization of the unempoweredness principle as "perfectionist"⁸⁵ of itself heaps doubt on that principle, given his basic thesis that judicial work, if properly done, will favor minimalism over perfectionism. The point, again, is that words matter. And the words offered by Professor Sunstein—including in his handling of the *Korematsu* case⁸⁶—rub up hard against the unempoweredness principle as it has been traditionally understood.

⁸¹ See ELY, *supra* note 2, at 4–5 (noting that the "central problem" with judicial review lies in its "telling the people's elected representatives that they cannot govern as they'd like").

⁸² 347 U.S. 483 (1954).

⁸³ See SUNSTEIN, *supra* note 54, at 248 (noting that the decision can be defended on minimalist grounds because it "was the culmination of a long line of cases").

⁸⁴ David A. Strauss, *What Is Constitutional Theory?*, 87 CAL. L. REV. 581, 583 (1999).

⁸⁵ See SUNSTEIN, *supra* note 54, at 31–34 (describing perfectionist theory).

⁸⁶ See *supra* notes 61–76 and accompanying text.

This is not to say that all would be lost, with respect to the unempoweredness principle, in a minimalist world. Under Professor Sunstein's own preferred brand of minimalism, for example, precedent matters greatly.⁸⁷ It should follow that most minimalist jurists would neither abandon the unempoweredness principle nor overturn past judicial rulings founded on it. Other minimalists, however, may have other ideas, and one potential approach readily suggests itself. Under it, courts would transform the unempoweredness principle from one of constitutional law into one of statutory interpretation. I turn now to this subject.

B. OF RECASTING THE UNEMPOWEREDNESS PRINCIPLE AS A RULE OF "SOFT" CONSTITUTIONAL LAW

One important theme of the minimalist project concerns weaving together the work of statutory and constitutional interpretation.⁸⁸ Professor Sunstein, for example, praises the Court's Cold-War-era ruling in *Kent v. Dulles*.⁸⁹ There the issue was whether the executive branch could deny a passport to a citizen who sought to attend a conference in Finland on the ground that he was a member of the Communist Party.⁹⁰ In the end, the Court denied federal officials the power to take this action, but it simultaneously sidestepped the claimant's constitutional free-association, right-to-travel, and nondelegation-doctrine arguments.⁹¹ The Court worked this magic by holding that the controlling federal statute, properly interpreted, did not authorize denial of a passport.⁹² The Court had

⁸⁷ See SUNSTEIN, *supra* note 54, at 28–29 (“Minimalists celebrate the system of precedent. . . . Many fundamentalists will not much hesitate to reject precedents that they believe to be wrong. Minimalists are far more cautious about undoing the fabric of existing law.”).

⁸⁸ See, e.g., *id.* at 177–80 (“In a large number of cases . . . the Court has required a clear congressional statement before it would permit the executive to intrude on an interest that has a plausible claim to constitutional protection.”). See generally Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1604–18 (2001).

⁸⁹ 357 U.S. 116 (1958); see SUNSTEIN, *supra* note 54, at 177–80 (commending Court's minimalist approach in the case).

⁹⁰ *Kent*, 357 U.S. at 117.

⁹¹ See SUNSTEIN, *supra* note 54, at 178–79 (noting that Court “left unanswered the larger questions about the meaning of the Constitution”).

⁹² *Kent*, 357 U.S. at 127–28 (reasoning that, in the past, Congress had approved the

to engage in some major league gymnastics to reach this result because the statute stated that passports should issue "under such rules as the President shall designate and prescribe."⁹³ Even so, the Court found enough wiggle room in the text to bar passport denials except for reasons that executive branch decisionmakers had traditionally invoked.⁹⁴ This result was supported by the " 'clear statement' principle"⁹⁵ under which a court, whenever fairly possible, must avoid "passing upon . . . constitutional questions pressed upon it for decision if it can do so by interpreting the statute narrowly."⁹⁶

Kent can be seen as an unempoweredness-principle case. The individual targeted by the government was a political dissident, an unabashed outsider, and a person pejoratively tarred with the label "communist" in the Red Scare days of the 1950s. Even if *Kent* were not viewed as such a case, however, the point that is coming is not hard to miss: Flying the flag of minimalism, courts could shift Footnote Four's special treatment of disempowered minorities away from serving as a principle of hard-and-fast constitutional law to instead serving, mainly or even entirely, as a principle of statutory construction.

For three reasons, this outcome is not as unlikely as one might initially think. First, in recent years, some scholars on the left have backed the notion of abandoning judicial review altogether or requiring rights-based rulings to be "soft" in nature in the sense that those rulings would be legislatively reversible without recourse to the constitutional amendment process.⁹⁷ Analysts of this ilk might well lodge no objection to recasting any particular constitutional

Secretary of State's refusal of passports only when questions existed with regard to "citizenship or allegiance" or "criminal or unlawful conduct").

⁹³ SUNSTEIN, *supra* note 54, at 178.

⁹⁴ See *supra* note 92.

⁹⁵ SUNSTEIN, *supra* note 54, at 180.

⁹⁶ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

⁹⁷ See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, at x (1999) (generally advancing the argument for "populist constitutional law"). In particular, Professor Tushnet has challenged the soundness of a special judicial role in protecting discrete and insular minorities. See *id.* at 158-60; see also Mark Tushnet, *Subconstitutional Law: Supplement, Sham, or Substitute*, 42 WM. & MARY L. REV. 1871, 1872 (2001) ("Exactly what extra value does democratic self-governance get from conclusive judicial review? Pretty clearly, not all that much, in light of the scope of . . . subconstitutional doctrines.").

principle—including the unempoweredness principle—into a mere “clear statement” rule of statutory law.

Second, numerous doctrines already exist under which courts safeguard constitutional values in ways that the political branches can override in the absence of constitutional amendment;⁹⁸ precedent thus leaves an opening for arguing that the embrace of a “soft” rule in this context would comport with a time-honored judicial approach. Third, as leading scholars have observed, the Supreme Court (albeit without saying so) already has embraced a canon of statutory interpretation (apart from and in addition to the “constitutional avoidance” principle invoked in the *Kent* case) that favors so-called “*Carolene* groups.”⁹⁹

Pointing to this trifecta of modern developments, a dedicated minimalist might well say something like this:

Hey! Courts are already protecting discrete and insular minorities with subconstitutional rules of statutory interpretation, and cases like *Kent* show that judges can be plenty creative and ambitious in doing so. So why not go with just a rule of statutory interpretation here? That’s “democracy-forcing”—which is something we

⁹⁸ For a full-scale treatment of this subject, see generally Coenen, *supra* note 88 (describing numerous judicial doctrines that render constitutionally inspired rulings effectively reversible by political branches); Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281 (2002) (documenting recent decisions in this area and denominating relevant doctrines as constitutional who, why, when, and how rules).

⁹⁹ See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 602 (1992) (explaining that the Court, in “[r]esponding to the same concerns that arguably have inspired the Court’s willingness to subject certain ‘suspect classifications’ to stringent equal protection analysis, . . . interpret[ed] ambiguous statutes to benefit ‘discrete and insular minorities,’ ” or “*Carolene* groups”); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1032 (1989) (claiming that various interpretations of statutes reflect “special equal protection scrutiny applied by the Court” to protect “*Carolene* groups”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 473 (1989) (stating that “[a]ggressive construction of ambiguous statutes designed to protect disadvantaged groups provides a way for courts to protect the constitutional norm of equal protection in a less intrusive manner”); see also Coenen, *supra* note 88, at 1612–13 (observing that courts have used a “constitutionally inspired interpretive norm that favors so-called ‘*Carolene* groups’ . . . to protect (even in the absence of substantial constitutional questions) ‘discrete and insular minorities’ ”).

minimalists like.¹⁰⁰ A statutory canon designed to protect *Carolene* groups is good enough for me.

As usual, there is much to be said about all of this. Of particular interest is the possibility that our hypothetical minimalist's endorsement of a clear-statement approach might draw critiques from both the right and the left. I turn now to those possible responses.

1. *Critiques from the Left.* Does transforming Footnote Four's special treatment of discrete and insular minorities from a "hard" rule of constitutional law into a "soft" rule of statutory interpretation make good sense? One can almost hear Milner Ball howling out against the suggestion. The basic reason why is obvious. The essential point of Footnote Four is that legislative processes do not take fair account of the interests of unempowered groups. It thus makes no sense to protect the interests of those groups simply by requiring clarity from the legislative branch. To do so is to let the fox guard the henhouse. It is to create a "democracy-forcing" rule in the very setting where democracy does not work. If legislative officials are not to be trusted when dealing with the interests of *Carolene* groups, then they are not to be trusted, and this is so whether those legislative officials speak with punctilious elocution or with garbled tongues.

Some minimalists might accept this critique but nonetheless offer an alternative proposal for reform. On their view, courts should not abandon hard-and-fast review altogether. Instead such review should take hold in those cases that involve the most blatant infringements of the unempoweredness principle, while in other cases only the clear-statement rule of statutory interpretation should protect *Carolene* groups. Notably, Professor Sunstein himself never advocates a wholesale repudiation of the *Carolene Products* methodology as a tool for invalidating statutes (however clear they might be) when those statutes demonstrably trench too

¹⁰⁰ Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7 (1996) (praising minimalism as "democracy-forcing" in part because "it promotes reason-giving and ensures that certain important decisions are made by democratically accountable actors").

much on the interests of distinctively protected groups.¹⁰¹ He might even say that a *Carolene Products*-based clear-statement rule, coupled with a fixed level of full-fledged constitutional protection, safeguards protected groups to the greatest extent. On this view, a strong (though penetrable) front line of defense is provided by the clear-statement principle, while a impregnable bulwark is supplied by a hard-and-fast constitutional rule that protects powerless minorities in the cases of greatest urgency.

Patrons of the more traditional approach to Footnote Four will greet such reasoning with skepticism. They will worry about hidden motives, and they will fear unintended results. They will wonder, in particular, how this “cases of greatest urgency” conception of the irreducible minimum of protection provided by the *Carolene Products* principle will play out in the real world. Their main concern will be that, if judges come to see their *Carolene Products* role as largely one of requiring clear statements, they may soften their resolve to protect minorities with irreversible rulings of true constitutional law. Skeptics on the left will acknowledge that reasonable people will often disagree about whether political decisionmakers have dealt with *Carolene* groups in an intolerable way. But what is “intolerable”? The concern will be that a two-track approach will tend to shift attitudes toward tolerating more legislative behavior than was minimally tolerable before.

In short, many on the left will find unacceptable any “minimalization” of traditional, non-reversible judicial use of the unempoweredness principle by placing a new and heightened emphasis on tools of statutory construction. Old-fashioned hard-and-fast use of the principle, after all, generated *Brown* and all that came in its wake. For lawyers nurtured on the justness of those decisions, any reformulation of the principle said to underlie them will be a tough sell.¹⁰²

2. *Critiques from the Right.* There are two main lines of criticism of clear-statement-based protections of *Carolene* groups that might

¹⁰¹ See *id.* at 36–42 (discussing connection between minimalism and “the project of *Carolene Products* broadly understood”).

¹⁰² See Coenen, *supra* note 98, at 1889–90 (questioning Professor Tushnet’s attempt to reconcile *Brown* with abandonment of legislatively irreversible judicial review).

come from the right. The first has its roots in text-centered approaches to statutory interpretation. The second focuses on concerns that "liberal" judges will manipulate canons of construction to achieve desired results.

a. *The Text-Centered Critique.* Analysts with a textualist bent might question any clear-statement rule designed to protect *Carolene* groups because it gives meaning to statutory language on grounds unrelated to the statutory language itself.¹⁰³ Justice Scalia, for example, has argued that courts should focus on the words of the legislature to discern legislative meaning, directing primary attention to principles like *ejusdem generis*, *expressio unius est exclusio alterius*, and *noscitur a sociis*.¹⁰⁴ He questions, for example, the notion that courts should honor the canon that favors interpreting statutes in light of the common law on the ground that it invites result-oriented reasoning.¹⁰⁵ Building on these notions, one might expect committed textualists to look skeptically at a free-floating interpretive principle designed to favor the interests of *Carolene* groups.¹⁰⁶

Milner Ball's focus on *The Federalist* suggests that there may be an "originalist" rejoinder to this would-be textualist critique. And, sure enough, there is. In *The Federalist* No. 78 Alexander Hamilton emphasized that "it is not with a view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society."¹⁰⁷ He continued:

These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the

¹⁰³ Cf. ANTONIN SCALIA, A MATTER OF INTERPRETATION 28 (1997) (suggesting that "artificial rules increase the unpredictability, if not the arbitrariness, of judicial decisions").

¹⁰⁴ *Id.* at 25–26 (discussing canons of construction).

¹⁰⁵ See *id.* at 17–18 (arguing these approaches allow judges to write their own desires and objectives into law).

¹⁰⁶ This is not to say that Justice Scalia himself would take such a skeptical view, although (as the text suggests) some of his observations might point in that direction. A full-scale study of Justice Scalia's view of statutory interpretation is well beyond the scope of this Article.

¹⁰⁷ THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 12, at 528.

judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they meditate, to qualify their attempts.¹⁰⁸

Translation: Whenever possible, courts should act to confine “the operation of . . . laws”—that is, interpret them narrowly—when those laws threaten to harm “particular classes of citizens”—that is disfavored groups—by treating them in an “unjust and partial” way—that is, in a way that is not impartial. These words of Hamilton lend strong support to the clear-statement rule of statutory interpretation invoked by modern courts to favor *Carolene* groups. At the very least, the passage cuts against the notion that there is no place for a non-linguistic equal-treatment-based canon of statutory construction in American law.

b. The Subterfuge Critique. An alternative challenge to any clear-statement rule that favors *Carolene* groups derives from assessments like the following:

“[C]lever judges” . . . invoke [clear-statement and related rules] when they predict that the legislature will be unable to enact legislation that contravenes the judges’ personal preferences. They thus “ ‘rig’ a desired substantive outcome.” They pretend to be exercising judicial restraint by declaring that the legislature may reinstate an invalidated law, all the while knowing that, as a practical matter, it cannot.¹⁰⁹

¹⁰⁸ *Id.*

¹⁰⁹ Dan T. Coenen, *Structural Review, Pseudo-Second-Look Decision Making, and the Risk of Diluting Constitutional Liberty*, 42 WM. & MARY L. REV. 1881, 1882 (2001) (quoting Professor Mark V. Tushnet and Professor Laurence Tribe).

Building on this logic, critics from the right might see a clear-statement rule designed to protect *Carolene* groups as a stealthy tool of judicial activism. Such a rule, on this view, operates as a vehicle for permanently dislodging appropriate legislative judgments behind a smokescreen of feigned judicial restraint.

I doubt this critique has merit, and at least one seemingly credible witness seems to support my assessment. During a recent talk at this law school, Justice Stephen Breyer reported that judges typically write opinions that set forth the real reasons for their decisions.¹¹⁰ If he is right, then worries about strategic misuse of clear-statement doctrines and other “soft” constitutional rules are misplaced.

In the end, I suspect that a meaningful two-track approach to protecting *Carolene* groups—coupling a clear-statement mandate with an undiluted quantum of constitutional protection—gets things about right. Milner Ball would be quick to add that courts must not reduce irreducible protections simply because an alternative tool of statutory interpretation is on the scene. To do so, he would be sure to point out, risks departing from the sort of “*searching* judicial inquiry” referenced by the words of Footnote Four itself.

C. OF POSSIBLE ABANDONMENT

We have seen two directions in which the future of Footnote Four might lie. First, courts could mute the call for special treatment of discrete and insular minorities by moving toward a more minimalist role. Second (and more particularly), courts could reshape the unempoweredness principle to work more (or entirely) as a “soft” clear-statement rule of statutory interpretation, rather than as a hard-and-fast rule of “true” constitutional law.¹¹¹ There is another possibility: The Supreme Court might junk the unempoweredness principle altogether.

The history of Footnote Four contains elements, which may be surprising to some observers, that make this possibility more real

¹¹⁰ Justice Stephen Breyer, Address at the University of Georgia School of Law (Jan. 20, 2007).

¹¹¹ See Coenen, *supra* note 88, at 1578–80 (describing “on-or-off” judicial rules).

than might first meet the eye. Potential surprise number one is that Footnote Four itself was not joined by a majority of the Court.¹¹² Potential surprise number two is that—although the *Carolene Products* case came down in 1938¹¹³—a majority of the Court never actually cited its language about discrete and insular minorities until 1973.¹¹⁴ Potential surprise number three is that, when the Court, in *Graham v. Richardson*,¹¹⁵ finally did invoke the unempoweredness principle to protect legal aliens against state discrimination, it did not rely exclusively on discrete-and-insular-minority reasoning; instead, the Court simultaneously emphasized the distinctive federal role (and resulting non-state role) in the field of immigration.¹¹⁶ Potential surprise number four is that the Court has not expressly relied on Footnote Four's discussion of minorities very often ever since. Indeed, apart from treatments of non-citizens,¹¹⁷ Justices have tended to cite Footnote Four only in the context of *rejecting* the claims of minority groups.¹¹⁸ Of particular

¹¹² See *Sugarman v. Dougall*, 413 U.S. 634, 656 (1973) (Rehnquist, J., dissenting) (noting that only four Justices joined Footnote Four).

¹¹³ See *supra* note 1 and accompanying text.

¹¹⁴ See *infra* notes 115–16 and accompanying text.

¹¹⁵ *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

¹¹⁶ See *id.* at 377 (noting that federal government has “broad constitutional powers in determining what aliens shall be admitted to the United States . . . and the terms and conditions of their naturalization” (quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948))).

¹¹⁷ See *Toll v. Moreno*, 458 U.S. 1, 21 (1982) (Blackmun, J., concurring) (noting that “alienage classifications . . . demand close judicial scrutiny”); *Foley v. Connelie*, 435 U.S. 291, 302–03 (1978) (Marshall, J., dissenting) (arguing that state statute limiting appointment of members to state police force to U.S. citizens should be held unconstitutional under strict judicial scrutiny); *Nyquist v. Mauclet*, 432 U.S. 1, 17–22 (1977) (Rehnquist, J., dissenting) (arguing that aliens should be deemed part of “discrete and insular minority” only to the extent that they are “categorized by a factor beyond their control”); *Sugarman*, 413 U.S. 634, 642 (1973) (noting that “standard of review of statutes that treat aliens differently from citizens requires a greater degree of precision”); *id.* at 655–57 (Rehnquist, J., dissenting) (discussing and questioning Footnote Four’s application to aliens).

¹¹⁸ See *United States v. Virginia*, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting) (“It is hard to consider women a ‘discrete and insular’ minorit[y] unable to employ the ‘political processes ordinarily to be relied upon,’ when they constitute a majority of the electorate.”); *Gregory v. Ashcroft*, 501 U.S. 452, 468–70 (1991) (noting, and relying on, Court’s refusal to apply *Carolene Products*-based strict scrutiny to discrimination against aliens in regulatory areas that fall “firmly within a State’s constitutional prerogatives”); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (concluding “mental retardation” is not “classification calling for more exacting standard of judicial review”); *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 800–01 n.8 (1980) (Blackmun, J., concurring in judgment) (raising

importance, the Court has rejected Footnote Four-based reasoning—built directly on the ruminations of Professor Ely¹¹⁹—to the effect that race-based affirmative action programs ordinarily should survive constitutional attack.¹²⁰

The foregoing points are hardly inconsequential. Suppose, for example, that you are a Supreme Court Justice who wishes to argue that a special attentiveness to “discrete and insular minorities” has no proper role to play outside of cases that involve discrimination based on race or ethnicity. This history would at least give you something to say. So would Justice Rehnquist’s expressions of concern about the inevitable subjectivity of what he called a “‘ward of the Court’ approach to equal protection.”¹²¹ As he put the point in *Sugarman v. Dougall*:

Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find “insular and discrete” minorities at every turn in the road. Yet, unless the Court can precisely define and constitutionally justify both the terms and analysis it uses, these decisions today stand for the proposition that

questions about whether nursing home patients meet the standard of Footnote Four); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976) (determining that “old age does not define a ‘discrete and insular group’ ”); *see also* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (observing that “one aspect of the judiciary’s role under the Equal Protection Clause is to protect ‘discrete and insular minorities’ ” but upholding challenge to contractor set-aside program designed to help historically excluded groups).

¹¹⁹ *See* ELY, *supra* note 2, at 61–62 (discussing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

¹²⁰ *Compare* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (stating, in an affirmative-action context, that “[f]ederal racial classifications . . . must serve a compelling governmental interest, and must be narrowly tailored to further that interest”), *with* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, J., concurring in judgment in part and dissenting in part) (stating that “racial classifications designed to further remedial purposes ‘must serve important governmental objectives and must be substantially related to achievement of those objectives’ ”). *See also* *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsberg, J., dissenting) (stating that “government decisionmakers may properly distinguish between policies of exclusion and inclusion. . . . [W]here race is considered ‘for the purpose of achieving equality,’ no automatic proscription is in order.”) (quoting *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 920, 932 (2d Cir. 1968)).

¹²¹ *Sugarman*, 413 U.S. at 657 (Rehnquist, J., dissenting).

the Court can choose a "minority" it "feels" deserves "solicitude" and thereafter prohibit the States from classifying that "minority" differently from the "majority."¹²²

There is, of course, even more to say against the unempoweredness principle if one embraces a strict show-me-the-specifics originalist methodology.¹²³

Notwithstanding these potential critiques, there is much to say in support of the traditional unempoweredness-principle approach. For example, while it is true that the Court did not cite Footnote Four from 1938 to 1973,¹²⁴ Professor Ely's book shows that its philosophy in fact underpinned a great portion of the Warren Court's work.¹²⁵ Constitutional text also lends support to an expansive conception of the unempoweredness principle for the simple reason that the text of the Equal Protection Clause (unlike, for example, the Fifteenth Amendment) does not limit its reach to race-based and other enumerated forms of discrimination.¹²⁶ Justice Rehnquist's argument based on judicial subjectivity is subject to counterattack on it-comes-with-the-territory reasoning, bolstered by materials generated by Justice Rehnquist himself.¹²⁷ And, for

¹²² *Id.*

¹²³ See SUNSTEIN, *supra* note 54, at 63–65 (describing Constitution's reach under originalist methodology and suggesting, for example, that under this approach "[d]iscrimination by states on the basis of sex would be entirely acceptable").

¹²⁴ See *supra* notes 90–115 and accompanying text.

¹²⁵ ELY, *supra* note 2, at 75.

¹²⁶ Compare U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."), with U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

¹²⁷ In *United States v. Lopez*, Chief Justice Rehnquist wrote for the Court in invalidating a federal statute on the ground it exceeded the commerce power because it regulated "noncommercial" activity. 514 U.S. 549, 566 (1995). Responding to a challenge based on the obliqueness of this principle, Chief Justice Rehnquist wrote:

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under

reasons already offered, originalist thought lends aid to the unempoweredness principle, at least if one stands ready to link up the broad text of the Fourteenth Amendment with themes of minority protection at the heart of *The Federalist*.¹²⁸

Not surprisingly, the current Court's so-called "liberals" remain adherents of traditional notions of the unempoweredness principle.¹²⁹ In addition, both Justice Scalia and Justice Thomas have drawn upon the principle in high-profile opinions. Pointing to the numerical majority of female voters in evaluating the single-sex military school at issue in *United States v. Virginia*,¹³⁰ Justice Scalia wrote that "normal, rational-basis review of sex-based classifications would be much more in accord with the genesis of heightened standards of judicial review, the famous footnote in *United States v. Carolene Products*."¹³¹ From this passage, however, one cannot glean much information about Justice Scalia's overarching view of the unempoweredness principle; in particular, he did not have to endorse that principle to argue that—even if it applied—women should not be viewed as an underempowered group.

A similar analysis applies to Justice Thomas's dissenting opinion in *Kelo v. City of New London*.¹³² There the issue was whether a

the Commerce Clause always will engender 'legal uncertainty.'

Id. Chief Justice Rehnquist's comments on the Commerce Clause goose would seem to apply as well to the Equal Protection gander.

¹²⁸ See *supra* notes 12–32 and accompanying text.

¹²⁹ See *Miller v. Johnson*, 515 U.S. 900, 947–48 (1995) (Ginsburg, J., dissenting) (arguing that "history of exclusion from state politics" calls for "vigilant judicial inspection to protect minority voters"); *Hudson v. Palmer*, 468 U.S. 517, 555–57 (1984) (Stevens, J., concurring in part, dissenting in part) (arguing that courts have "special obligation to protect the rights of prisoners" who constitute a "discrete and insular minority").

¹³⁰ *United States v. Virginia*, 518 U.S. 515 (1996).

¹³¹ *Id.* at 575 (citation omitted). In Justice Scalia's opinion, "[i]t is hard to consider women a 'discrete and insular minorit[y]' unable to employ the 'political processes ordinarily to be relied upon,' when they constitute a majority of the electorate." *Id.* For other ruminations by Justice Scalia on the unempoweredness principle, see *Lawrence v. Texas*, 539 U.S. 558, 602–03 (2003) (Scalia, J., dissenting) (asserting that homosexuals' political power is illustrated by fact that "Texas is one of the few remaining States that criminalize private, consensual homosexual acts"), and *Romer v. Evans*, 517 U.S. 620, 645–46 (1996) (Scalia, J., dissenting) ("[B]ecause those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, . . . have high disposable income, . . . and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide.").

¹³² *Kelo v. City of New London*, 545 U.S. 469 (2005).

city's condemnation of private land, for later incorporation into a private firm's tax-base-enhancing economic development project, comported with the "public use" language of the Fifth Amendment.¹³³ Along with much else, Justice Thomas observed that:

Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," . . . surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages "those citizens with disproportionate influence and power in the political process, including large corporations and development firms," to victimize the weak.¹³⁴

Read for all it is worth, Justice Thomas's reasoning invites an expansion of the unempoweredness principle beyond its present-day protection of nonmarital children,¹³⁵ lawful aliens,¹³⁶ and children of

¹³³ *Id.* at 472. The so-called Takings Clause provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

¹³⁴ *Id.* at 521–22 (Thomas, J., dissenting) (citation omitted); *see also id.* at 522 (noting that "[u]rban renewal projects have long been associated with the displacement of blacks; '[i]n cities across the country, urban renewal came to be known as 'Negro removal' ' ' (citation omitted)).

¹³⁵ *Clark v. Jeter*, 486 U.S. 456 (1988) (holding that state statute's six-year statute of limitations for paternity actions did not withstand heightened security under Equal Protection Clause).

¹³⁶ *Graham v. Richardson*, 403 U.S. 365 (1971) (holding state welfare laws conditioning

unlawful aliens who confront the denial of free public education.¹³⁷ Indeed, tracking themes put forward by Milner Ball more than three decades ago, this passage offers hope for a principle aimed more generally at protecting the "poor," the "weak," and "the least politically powerful."

Will Justice Thomas or others take Footnote Four in this direction? The *Kelo* dissent by itself provides little cause to think so, in part because Justice Thomas consistently centered his discussion on the Takings Clause and the specialized implications of its "public use" text.¹³⁸ No less important, Justice Thomas neither had to nor did embrace a highly generalized conception of the unempoweredness principle. Rather, he observed that the facts of *Kelo* presented special problems "[i]f ever there were justification for intrusive judicial review"¹³⁹ under the principle of *Carolene Products*. Justice Thomas's analysis thus contains one big "if." In *Kelo*, as in *United States v. Virginia*, the dissenters did not have to endorse the Stone/Warren/Ely/Ball principle that courts have a special role to play in protecting discrete and insular minorities. In fact they went no further than assuming for purposes of argument that such a principle exists.

If push comes to shove, what will Justices Scalia and Thomas do with the unempoweredness principle? In particular, will they follow the trajectory of the Court's past rulings by recognizing the principle's application to groups identified by characteristics apart from race and ethnicity? Perhaps not, given an oft-voiced preference for bringing a show-me-with-specificity originalist perspective to constitutional decisionmaking.¹⁴⁰ From such a perspective, there is probably not much to be said for affording special protection to aliens, nonmarital children, or women under the Equal Protection

benefits on citizenship violated Equal Protection Clause).

¹³⁷ *Plyler v. Doe*, 457 U.S. 202 (1982) (invalidating state tuition requirement imposed on children of undocumented aliens).

¹³⁸ *Kelo*, 545 U.S. at 506–07 (arguing, for example, that the majority replaced the "Public Use Clause" with a "public purpose" Clause").

¹³⁹ *Id.* at 521 (emphasis added).

¹⁴⁰ See *United States v. Virginia*, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting) (arguing, in the equal protection context, that majority's reasoning "ignores the history of our people").

Clause.¹⁴¹ Yet it is precisely those groups that the Court in fact has protected under the banner of the unempoweredness principle.¹⁴²

Another cautionary note comes from what might seem like an unlikely source—a concurring opinion in a dormant Commerce Clause case. In *West Lynn Creamery, Inc. v. Healy*,¹⁴³ the issue was whether a state could simultaneously (1) impose a tax on all milk sales made by wholesalers in Massachusetts and (2) return the proceeds of that taxing program to in-state milk producers.¹⁴⁴ Embracing an analysis that highlighted the political powerlessness of out-of-state producers,¹⁴⁵ Justice Stevens concluded for a five-Justice majority that the payments made to in-state operators amounted to a de facto “rebate” in violation of the Constitution’s strong ban on taxing measures that discriminate against interstate commerce.¹⁴⁶ In a concurring opinion, Justice Scalia (joined by Justice Thomas) went out of his way to disassociate himself from Justice Stevens’s opinion, reasoning that its political-process reasoning would logically (and wrongly) invalidate an affirmative state subsidy that favored in-state interests.¹⁴⁷ In a passage potentially rich with meaning, he added that “[a]nalysis of interest group participation in the political process may serve many useful purposes, but serving as a basis for interpreting the dormant Commerce Clause is not one of them.”¹⁴⁸

Why does this passage about the dormant Commerce Clause shed light on how Justices Scalia and Thomas might in the future look at discrete and insular minorities? The answer is simple: Because concerns about exclusion from operative political processes are just

¹⁴¹ SUNSTEIN, *supra* note 54, at 63–65 (noting, for example, that under originalist approach, discrimination by states and national government against women would be constitutional).

¹⁴² See, e.g., *Plyer*, 457 U.S. at 230 (invalidating state tuition requirement imposed on children of undocumented aliens).

¹⁴³ *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

¹⁴⁴ *Id.* at 188.

¹⁴⁵ *Id.* at 196 n.11 (noting that effect of pricing order is to place out-of-state product at “substantial commercial disadvantage because of discriminatory tax treatment”).

¹⁴⁶ *Id.* at 197.

¹⁴⁷ See *id.* at 208–09 (Scalia, J., concurring in judgment) (noting that “[i]t seems to me that a state subsidy would *clearly* be invalid under any formulation of the Court’s guiding principle,” given that subsidies favor in-state over out-of-state producers).

¹⁴⁸ *Id.* at 212 (quoting *id.* at 215 (Rehnquist, C.J., dissenting)).

as surely at the heart of dormant Commerce Clause doctrine as they are at the heart of the unempoweredness principle. Indeed, in justifying the discrete-and-insular-minority principle in Footnote Four itself, Chief Justice Stone specifically relied on the Court's dormant Commerce Clause decision, handed down just nine weeks earlier, in *South Carolina State Highway Department v. Barnwell Bros.*¹⁴⁹ And there is strong reason to say he should have. As Professor Ely observed:

The Commerce Clause of Article I, Section 8 provides simply that Congress shall have the power to regulate commerce among the states. But early on the Supreme Court gave this provision a self-operating dimension as well, one growing out of the same need to protect the politically powerless Thus, for example, early in the nineteenth century the Court indicated that a state could not subject goods produced out of state to taxes it did not impose on goods produced locally. By thus constitutionally binding the interests of out-of-state manufacturers to those of local manufactures represented in the legislature, it provided political insurance that the taxes imposed on the former would not rise to a prohibitive or even an unreasonable level.¹⁵⁰

The post-*Barnwell* cases are entirely clear on this point,¹⁵¹ which is why (for example) the Court in *Minnesota v. Clover Leaf Creamery Co.*¹⁵² could reject a dormant Commerce Clause challenge in part because "[t]he existence of major in-state interests adversely

¹⁴⁹ S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 187 (1938).

¹⁵⁰ ELY, *supra* note 2, at 83-84.

¹⁵¹ See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 408-13 (3d ed. 2000) (collecting many cases); Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 1005 nn.207 & 208 (1997) (same); Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 67 (1988) (noting that "many opinions since *Barnwell* have mentioned local political restraint as a factor in dormant commerce power analysis"); Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 251-52 (1995) ("The political process leading to the enactment of laws that discriminate against outside commerce is an important theme of the Court's decisions . . .").

¹⁵² *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

affected by the Act is a powerful safeguard against legislative abuse.”¹⁵³

The bottom line is not hard to behold: If Justices Scalia and Thomas are troubled by the long-recognized political-process moorings of dormant Commerce Clause jurisprudence, there is reason to suspect they will be troubled as well by the long-recognized political-process moorings of protecting unempowered minorities under Footnote Four. To be sure, they might ultimately deem the Equal Protection Clause and dormant Commerce Clause to be very different in this regard. There is, however, no denying that courts long have viewed the dormancy doctrine and the unempoweredness principle as kindred concepts jointly tethered to the justness of protecting deserving political outsiders.

What about Chief Justice Roberts? During his confirmation hearings, Senator Richard Durbin asked the nominee to reflect on his views “when it comes to expanding our personal freedom.”¹⁵⁴ In his response, then-Judge Roberts stated:

I had someone ask me in this process – I don’t remember who it was, but somebody asked me, you know, “Are you going to be on the side of the little guy?”

And you obviously want to give an immediate answer, but, as you reflect on it, if the Constitution says that the little guy should win, the little guy’s going to win in court before me. But if the Constitution says that the big guy should win, well, then the big guy’s going to win, because my obligation is to the Constitution. That’s the oath.¹⁵⁵

These words may not carry the ring of a Footnote Four enthusiast. In fairness to Chief Justice Roberts, however, what he said is entirely correct. The Court must apply the rules of the Constitution in evenhanded fashion to little guys and big guys alike.

¹⁵³ *Id.* at 473 n.17 (citation omitted).

¹⁵⁴ Transcript of Record from Judge John Roberts Confirmation Hearings (Sept. 15, 2005), <http://www.asksam.com/ebooks/releases.asp?file=JGRHearing.ask&dn=Day%204%20%2d%20Durbin%204%2d%20Core%20Values>.

¹⁵⁵ *Id.*

But the vital question remains: What rules *does* the Constitution establish to be thus applied? If one rule is that courts must direct a “more searching judicial inquiry” at laws that disadvantage unempowered groups,¹⁵⁶ then that is a rule to which the Court in *all* cases must adhere. For more than a half century, this rule in fact has been a guiding star in the constitutional firmament. And if the work of Milner Ball teaches us anything, it is that that rule should continue to operate in that way.

V. THE UNEMPOWEREDNESS PRINCIPLE AND MILNER BALL

It is fitting that Milner’s own story in the law centers, in a very real way, around Footnote Four. Ron Ellington, who taught Milner thirty-seven years ago, tells of the “epiphany” that occurred when Milner first encountered Justice Stone’s treatment of discrete and insular minorities: “I can still picture the excitement in Milner’s face,” Professor Ellington writes, “as he saw instantly the potential in this opening for crafting a principled way for courts to protect the rights of minorities. . . .”¹⁵⁷

Given this reaction, it is not surprising that Milner turned his attention to Footnote Four as a young academic, arguing in the first full-fledged law review article he wrote (as we have seen) that judges should fully honor its promise. In the classroom, too, Milner breathed life into the value of including the excluded. Of particular significance was his work with Native American law. In a time when the subject was almost unnoticed in the profession, Milner insisted on its rightful place in the curriculum. Later, he similarly insisted on offering a course on Race in the Law. And most important, he personally undertook the heavy lifting required to make these courses a reality.

True to his views of inclusion and openness, Milner—as David Shipley has written—“was doing interdisciplinary work long before most schools started touting their interdisciplinary initiatives.”¹⁵⁸

¹⁵⁶ United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

¹⁵⁷ C. Ronald Ellington, *Milner Ball: My Student, My Teacher*, 41 GA. L. REV. 749, 750 (2007).

¹⁵⁸ David E. Shipley, *Milner S. Ball: Proof That One Professor Can Make a Difference*, 41 GA. L. REV. 753, 753 (2007).

Much of this work has concerned scripture, but that fact only begins to capture Milner's extraordinary range. To provide only one small illustration of the point, Milner's 1974 article on the unempoweredness principle drew upon principles of "cybernetics."¹⁵⁹

At every opportunity, Milner has worked to bring women, minorities, and diverse voices into our community, counseling always against the natural tendency to value life experiences and outlooks that fit comfortably within one's own frame of reference.¹⁶⁰ In the same spirit, in his time away from work, Milner has thrown himself into protecting the interests of marginalized persons. Sometimes this work had a national significance, as when he dealt with land claims asserted by aboriginal Hawaiians.¹⁶¹ More often, Milner has rolled up his sleeves and worked within our own community. He has labored, and continues to labor, on behalf of the homeless community, helpless children, victims of sexual violence, persons struggling with addictions, those who have disabilities, and, always unstintingly, the poor.

Milner has done this work selflessly, but with an insistent and demanding voice. A year ago, at Milner's seventieth birthday party, my wife Sally offered a toast that focused on this character trait. Sally's toast told a story that began when our area's United Way agency unexpectedly cut off funding to an organization named Community Connection, which helps meet the needs of the poor and others by providing information-and-referral services. According to Sally's account:

[Milner] set up a called meeting with the United Way board. Community Connection's director, Tim Johnson,

¹⁵⁹ Ball, *supra* note 6, at 1071.

¹⁶⁰ See generally Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990) (discussing importance of work of minority scholars).

¹⁶¹ See generally Kekuni Blaisdell, *Ka Ho'Okolokolonui Kanaka Maoli: The Peoples' International Tribunal, Hawai'i 1993*, FOURTH WORLD BULLETIN: ISSUES IN INDIGENOUS LAW AND POLITICS, Dec. 1993, available at <http://carbon.cudenver.edu/public/fwc/Issue6/hawaii-1.html> (discussing 1993 International Peoples' Tribunal in Hawaii on which Ball served as judge on issues including claims that U.S. government wrongfully annexed territory and committed other offenses against native Hawaiians). See also MILNER S. BALL, CALLED BY STORIES: BIBLICAL SAGAS AND THEIR CHALLENGE FOR LAW 97 (2000) (discussing 1993 International Peoples' Tribunal in Hawaii).

and I came along, and it was a scene I will always remember. Milner entered the room with a scowl on his face, knitted eyebrows, and glaring eyes. After Tim and I made brief and polite presentations, Milner leaned forward, glowering at the board members across the table. The room suddenly became deathly quiet. With an intensity I had never witnessed before in Milner, or *anyone*, he proceeded to assail, attack, berate, castigate, criticize, denounce, excoriate, flay, flog, lambaste, pummel, rebuke, reprimand, scathe, scold, shellac, slam, slash, smear, thrash, upbraid, wallop, and whip those poor, now trembling, cowering board members . . .

The next day we learned that Community Connection's funding from United Way was not only completely restored but increased for the upcoming year.¹⁶²

What Sally calls the "Wrath of Milner" is indeed a powerful thing, primarily because it gathers force from its purely altruistic use in pursuing the interests of other people.¹⁶³ Ron Ellington writes: "Always a friend, Milner was not always easy on me as a dean."¹⁶⁴ Ron knew something of the "Wrath of Milner."

Throughout his professional life, Milner has worked tirelessly to give opportunity and impetus to students drawn to public interest law. He singlehandedly erected—with no model to follow—our law school's Public Interest Practicum, a pioneering effort designed to

¹⁶² See *infra* APPENDIX A.

¹⁶³ I pause here to mention a related point that is, perhaps, both the most obvious and the most important one to be made. Milner's "charity for all" does not come from nowhere. It is in large measure the product of a deeply fulfilling family life that reaches back to Milner's earliest years. Milner's concern for others finds particular nourishment in the treasured relationships he shares with his three children, their spouses, and his five beautiful grandchildren. At the center of it all, of course, stands the indescribably close relationship he shares with his life partner, June. Ned Spurgeon quotes Milner as once saying that the two of them are "joined at the hip" and speaks accurately of their "long and wonderful marriage." Edward D. Spurgeon, *A Tribute to Milner S. Ball*, 41 GA. L. REV. 757, 758 (2007). For me, theirs is a "marriage" in the richest and most paradoxical sense of the word—a sort of communion of everything between two vibrantly independent individuals. I think first of my own parents when I contemplate what a healthy life partnership can be; among the small handful of those I think of next are Milner and June.

¹⁶⁴ Ellington, *supra* note 157, at 751.

offer students client-centered work and study opportunities outside the criminal-law setting. Milner then fought to build on this program, and he succeeded richly in that effort. Today, the University of Georgia also offers students opportunities to participate in a family violence clinic, a land use clinic, a mediation clinic, an environmental law practicum, a special education practicum, and a spectrum of "externships" that range from the representation of immigrants through the Catholic Charities of Atlanta, to death-penalty-related research for the Southern Center for Human Rights, to poverty-law work with Georgia Legal Services and Atlanta Legal Aid. All of these programs exist in no small measure due to Milner's efforts, but his greatest contribution has come from the example and counsel he has provided to individual students. As Dean Rebecca White rightly observes: "I have witnessed through my years on the faculty Milner's influence on his students and have seen them transformed by his passion and vision."¹⁶⁵

On the academic side, Milner's work took a new direction in the latter years of his career, as he focused on the powerful role of narratives in culture, in ethics, and in law. Such books as *Called by Stories: Biblical Sagas and Their Challenge for Law*¹⁶⁶ and *Lying Down Together: Law, Metaphor, and Theology*¹⁶⁷ illustrate the point, as do articles like *Just Stories*,¹⁶⁸ and *Lawyers in Context: Moses, Brandeis and the A.B.A.*¹⁶⁹

As if all this were not enough, seven years ago, Milner undertook a new adventure in his professional life. He immersed himself in the day-to-day work of our Public Defender Clinic, representing indigent criminal defendants. In doing so, Milner again lived out his commitment to the principles of Footnote Four by offering his time and talent to those who may be the most powerless among us. Milner, however, also sought something more in this work. He

¹⁶⁵ Rebecca H. White, *Milner Ball: Mentor, Teacher, and Friend*, 41 GA. L. REV. 743, 745 (2007).

¹⁶⁶ BALL, *supra* note 161.

¹⁶⁷ MILNER S. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* (1985).

¹⁶⁸ Milner S. Ball, *Just Stories*, 12 CARDOZO STUD. L. & LIT. 37 (2000).

¹⁶⁹ Milner S. Ball, *Lawyers in Context: Moses, Brandeis and the A.B.A.*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321 (2000).

sought to learn, and learn from, the stories of others—the true stories of those involved in the everyday operation of our system of justice—and to bring those stories back to his work as teacher, scholar, and citizen.

What is there to learn from Milner's own story? There is inspiration here, even if most of us lack the talent and energy needed to put together a life-narrative that matches this one in richness. There is a lesson about what is possible, including for the legal academic. Milner, after all, has shown us that a law professor can be not only a teacher and researcher, but a hands-on participant in the practical world of lawyers, institutions, and ordinary people, as well as a conduit that connects one's students to that world. In Milner's story, there is much food for thought about the linkages among law, life, and spirituality, for at the root of Milner's being is an abiding (though thoroughly non-judgmental and non-exclusionary) religious faith. Perhaps most of all, there is a powerful challenge posed: For those of us who espouse the ideals of Footnote Four, what moral responsibilities does that commitment carry as we go about our day-to-day lives? As I grapple with that question in my own life, I consider often the story of Milner Ball.

VI. CONCLUSION

Footnote Four has a story, too. It is a story that reaches back much earlier than 1938; indeed, as we have seen, it draws nourishment from the founding period itself, and particularly from lessons taught by *The Federalist Papers*. In the years more immediately leading up to 1938, the forces that gave birth to the footnote gained strength from the real-world suffering of African-Americans and other racial minorities,¹⁷⁰ Seventh Day Adventists and other religious minorities,¹⁷¹ and political dissidents of all

¹⁷⁰ See, e.g., *Nixon v. Herndon*, 273 U.S. 536, 1941 (1927) (holding statute prohibiting African-Americans from voting in primary election violated Fourteenth Amendment).

¹⁷¹ See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that law prohibiting religious proselytizing without permit violated Fourteenth Amendment); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 532 (1925) (holding that law requiring compulsory public education without option of private religious education was unconstitutional); *In re King*, 46 F. 905, 918 (W.D. Tenn. 1891) (holding that Seventh Day Adventist was properly convicted for violating Sabbath law).

stripes.¹⁷² The burdens borne by these and other excluded groups revealed that the ringing promise of “equal protection” remained unfulfilled in the America of that day, as it remains in this day as well.

The post-1938 story of Footnote Four is the story of a vital American institution—the federal Judiciary—giving marginalized persons a greater measure of protection and voice. Again, the roots of this story lay in the original Constitution, particularly its insistence on the Judiciary’s independence from popular pressures and political meddling. The story also has involved real-world courage displayed by real-world judges, lawyers, and ordinary citizens, including Milner himself.

Through all of the story of Footnote Four runs a spirit of basic fairness and broad inclusion—much the same spirit that has set the theme of Milner Ball’s remarkable life. As Milner reflected on how to close his own article on Footnote Four, he turned to the words of Hugo Black. Those words, written just two years after Footnote Four was laid down, declared that: “Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.”¹⁷³ As I recount these words, I am moved by how powerfully they embody the distilled philosophy, the determined hope, and the lived commitments of Milner Ball.

¹⁷² See, e.g., *Abrams v. United States*, 250 U.S. 616, 624 (1919) (upholding conviction of Russian immigrants, referred to in dissent by Holmes as “puny anonymities,” for advocating labor strikes at ammunition factories); *Debs v. United States*, 249 U.S. 211, 216–17 (1919) (upholding indictment under Espionage Act for approving Socialist Anti-War Proclamation).

¹⁷³ *Chambers v. Florida*, 309 U.S. 227, 241 (1940) (Black, J., for a unanimous Court).

APPENDIX A

The Wrath of Milner

by Sally Wyche Coenen

delivered on the occasion of Milner's seventieth birthday

I met Milner nineteen years ago. I liked him immediately, of course. There's a lot to like about Milner—his great intellect and thoughtfulness, his kind ways and calm manner. But during my early encounters with Milner, I did not pick up on one essential ingredient of Milner's make-up that is extremely important but sometimes overlooked. It is about that trait that I want to speak tonight.

During my early years in Athens, I served on the Community Connection board with Milner. For all you non-Athenians here, Community Connection is an information and referral organization that links people in need with the social services available in the area. Back in those days, Community Connection was a shoestring operation and depended largely on funding from the United Way. This arrangement made sense because Community Connection provided one of the basic services that typically United Way agencies would provide on their own—that is, basic information and referral services.

One day Community Connection received the news, completely out of the blue, that United Way would no longer provide any funding for Community Connection. This news had dire consequences for the continued existence of the agency, and Milner was irate. He knew that if Community Connection should fold, people in poverty would suffer all the more, a situation he found outrageous and unacceptable.

So he set up a called meeting with the United Way board. Community Connection's director, Tim Johnson, and I came along, and it was a scene I will always remember. Milner entered the room with a scowl on his face, knitted eyebrows, and glaring eyes. After Tim and I made brief and polite presentations, Milner leaned forward, glowering at the board members across the table. The room suddenly became deathly quiet. With an intensity I had never witnessed before in Milner, or *anyone*, he proceeded to assail,

attack, berate, castigate, censure, criticize, denounce, excoriate, flay, flog, lambaste, pummel, rebuke, reprimand, scathe, scold, shellac, slam, slash, smear, thrash, upbraid, wallop, and whip those poor, now trembling, cowering board members. That day I witnessed, in full, the WRATH OF MILNER.

The next day we learned that Community Connection's funding from United Way was not only completely restored but increased for the upcoming year.

In the United Way board room that day I discovered that within this typically calm and measured man lies a genuine ferocity. Milner despises injustice. With passion he marshals his drive, his intellect, and his many talents as a minister, as a lawyer, as a professor, as a scholar, and as a man, to fight injustice wherever he sees it.

So my toast tonight is to the WRATH OF MILNER—may it continue to blaze in all its fury for many years to come.

