A Requiem for Footnote 4

By Robin B. Wagner

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Let us bow our heads and recall that famous footnote you studied in your Con-Law class—somehow the most important footnote in history that appeared in a case about milk regulations. You know, the footnote that provided a caveat to the holding of *United States v. Carolene Products Co.*,[1] that Congress may regulate ordinary commercial transactions, as long as there was some "rational basis" for the legislation. That caveat rose to become the foundation for judicial scrutiny—particularly the need to protect the vulnerable among us from the oppression of majority rule.

Carolene Products' Footnote 4 addresses three distinct types of legislation and the forms of judicial scrutiny each may require. First, it suggests that legislation "within a specific prohibition," such as one in the Bill of Rights, is presumptively constitutional. Second, it addresses legislation that might regulate or restrict voting and other political processes and strongly suggests, but does not hold, that such laws might "be subjected to more exacting judicial scrutiny." Third, Footnote 4 articulates its most famous formulation: that statutes directed at religious, national, or racial minorities—indeed,

> 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.[2]

This third part of the footnote enthralled me as a law student. I was inspired to read this language, articulated by Justice Harlan Fiske Stone decades before the civil rights movement but at a time when the vile implications of the 1935 Nuremburg race laws were increasingly understood across the world. Here was vastly inclusive language—"discrete and insular minorities" could mean persons with disabilities, LGBTQ+ people, and indigenous people—that called for a "more searching judicial inquiry" for laws that might oppress any minority, not just the specific named categories of religion, national origin, and race. If one squints a bit, Footnote 4 also applied to women—who are not perhaps numerically a "minority" but certainly could not rely on "those political processes" for economic or political freedom in 1938.

Here in this footnote was the promise of the federal courts. It identified the potential of the majority to oppress minorities of all kinds and claimed that the judiciary had the power to guard against such abuses. I aspired to practice civil rights law, and this footnote confirmed for me what had led me to law school in middle age: that the courts are where our civil rights are defined and vindicated, and that the courts will step in to speak for the "discrete and insular minorities" when prejudice against them leads to cruel and oppressive laws—laws that might ban speaking of homosexuality or criminalizing parents and healthcare providers who provide gender-affirming care for transgender kids.

But now I am writing this column after the leak of a draft majority opinion in *Dobbs v. Jackson Women's Health Organization*[3] overturning *Roe v. Wade* and revising it days after the final decision has been handed down.[4] Now armed with the knowledge that the final decision is hardly different from the leaked draft, we know much more about the Court's current view of the role of the judiciary.

Justice Alito's opinion for the majority in *Dobbs* mentions voting several times.[5] Most disturbing to me, though, is the majority's insistence that the political process in each state should be the arbiter of whether a woman in that state may determine for herself the outcome of her pregnancy. Voters in one state may see this issue one way, while voters in another state may see it the other, Justice Alito conveys.[6]

Let's not forget that when one speaks of "states' rights" one is harkening to the original "right" to enslave humans—some states saw the issue one way, and other states saw it another way. The federal system is supposed to provide the minimum guarantees for our civil rights in the face of majorities that might see the issue one way or another—and the federal judiciary is to scrutinize laws to protect these rights. Or at least that's what Footnote 4 promised.

With no hint of irony or acknowledgment that the majority of Americans do not want *Roe* overturned,[7] the conservative Court's decision

> returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power.[8]

Long story short, we have learned that the Court's majority is unconcerned that political processes might not protect discrete and insular minorities from the prejudice of the majority. Short story long, the conservatives on the Court, in a parade of voting-rights decisions, have turned a willfully blind eye to the obvious fact that voting rights are the spoils of a state's victorious party.[9] These justices do not care how a purported "majority" is constructed in today's political processes, and they maintain that any laws created by these processes need no scrutiny. We "discrete and insular minorities" should just trust the system.

Even as we shake our heads in disbelief, there is a reason for hope. With Justice Ketanji Brown Jackson about to take her place on the Supreme Court, we will for the first time in our history see in our highest bench a representation of gender and race roughly proportional to the demographics of our population—four women and three persons of color, compared to 50.8% female[10] and 38.4% non-white.[11] Those of us who are not white men are beginning to see ourselves and our lived experiences reflected in the judiciary. Maybe the pendulum will swing us back to a place where the federal courts once again protect our rights from the prejudice and caprice of our political processes. In the meantime, we will litigate with uncertainty as precedents are shattered, and we will gain and lose essential rights as we cross state lines.

So today, I pour one out for Footnote 4 as well as for that law student so enthralled and inspired by its promise. Justice Stone's perspicacity in 1938 was grounded in empathy for minorities who are vulnerable to political processes that might be abused by a majority. It has been replaced by cynicism grounded in circular logic—that we should simply work within our highly partisan and disproportional political processes and not expect the Court to bother if the result seems to oppress the vulnerable among us. ⊙

Endnotes

[1]304 U.S. 144 (1938).

[2]*Id.* at 153 n.4.

[3]*Read Justice Alito's initial draft abortion opinion which would overturn Roe v. Wade*, POLITICO (May 2, 2022, 09:20 PM EDT), https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504.

[4]No. 19-1392, 597 U.S. ___ (2022).

[5]"It is time to heed the Constitution and return the issue of abortion to the people's elected representatives." *Dobbs*, 597 U.S. __, __ (slip op. at 6). He asks rhetorically regarding his inaccurate history of abortion legislation: "Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?" *Id.* at 29. Well, yes, perhaps the courts ought to at least question their motives, given widespread animus toward women's independence and to Catholics for much of U.S. history.

[6]*Id.* at 31.

[7]*See, e.g.*, Jean Yi and Ameila Thomson-DeVeaux, *Where Americans Stand on Abortion, In 5 Charts*, FIVETHIRTYEIGHT (May 6, 2022, at 06:00 AM), https://fivethirtyeight.com/features/where-americans-stand-on-abortion-in-5-charts/.

[8]*Dobbs*, 597 U.S. __, __ (slip op. at 65).

[9]For just two of the most recent, *see, e.g., Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (holding that Arizona's law restricting ballot collection and barring the counting of out-of-precinct ballots did not violate the Voting Rights Act); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding that claims of partisan gerrymandering present political questions that are not justiciable).

[10]U.S. CENSUS BUREAU, QUICKFACTS UNITED STATES, https://www.census.gov/quickfacts/fact/table/US/PST045221 (last visited June 6, 2022).

[11]Nicholas Jones, et al., *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU, https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html (last visited June 6, 2022).