

# NOTABLE NOTES



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**T**he Supreme Court has long had an uneasy relationship with footnotes. Chief Justice Charles Evan Hughes reportedly refused to be bound by them. Justice Arthur Goldberg decried them, saying that they “cause more problems than they solve.”<sup>1</sup> Justice Stephen Breyer refuses to use them. “Either a point is sufficiently significant to make, in which case it should be in the text,” he has said, “or it is not, in which case, don’t make it.”<sup>2</sup>

These justices are not alone. Many respected jurists and commentators opine that footnotes are poor style, a source of mischief, or worse. Abner Mikva, former chief judge of the D.C. Circuit, called the footnote “an abomination” that “perverts judicial opinions.”<sup>3</sup>

Judge Richard Posner of the Seventh Circuit boasts that he has never used a footnote in an opinion. Professor Fred Rodell derided footnotes as “phony excrescences” that “breed nothing but sloppy thinking, clumsy writing, and bad eyes.”<sup>4</sup> The footnote, it seems, has very few enthusiasts.

Yet Supreme Court footnotes have persisted and, not uncommonly, contain crucial points of law. Substantive footnotes of this variety, forever scrutinized by scholars and lower courts, sometimes overshadow the text to which they attach. Other footnotes hold interest for their display of interdisciplinary observation, humor, or judicial in-fighting. This column profiles a few examples worthy of the Footnote Hall of Fame.

### *United States v. Carolene Products*, Footnote 4: Paving the Way for Tiered Constitutional Review

Undeniably, the most famous footnote in Supreme Court history is footnote 4 in *United States v. Carolene Products* (1938). Situated in an otherwise unremarkable opinion upholding the federal Filled Milk Act, this footnote’s discussion of “discrete and insular minorities” laid the foundation for the tiered levels of scrutiny that the Court developed for much of its constitutional review. Footnote 4 has given rise to voluminous commentary and has become a mainstay of constitutional law courses. Indeed, footnote 4—not the *Carolene Products* case itself—forms the basis of influential constitutional theories, including John Hart Ely’s *Democracy and Distrust*.

The broad impact of footnote 4 is a product of the dynamic historical and jurisprudential context in which it originated. When *Carolene Products* reached the Supreme Court in 1938, the Court’s due process jurisprudence was in a well-documented state of flux. For more than thirty years, the Court had vigorously protected the “liberty of contract” set forth in *Lochner v. New York* (1905), relying on a broad interpretation of the due process clauses of the Fifth and Fourteenth Amendments. In 1937, with the decision in *West Coast Hotel v. Parrish*, the Court changed course. The new majority bloc, formed when Justice Owen Roberts switched sides, was poised to accord a presumption of constitutionality to economic regulation. The Court’s role, it explained, was not to sit as a superlegislature or to second-guess legislative judgments in the fields of business and labor.

But would the narrower construction of the due process clause also apply where civil liberties were at stake? This question vexed the new majority wing, which tended to favor robust protection of the liberties enshrined in the Bill of Rights.

The facts of *Carolene Products* did not directly implicate this conundrum. The issue was the constitutional-

ity of a federal statute that prohibited the appetizingly named “filled milk”—skim milk mixed with fats or oils other than milkfat—from being shipped in interstate commerce. *Carolene Products* had been indicted for selling a filled-milk product called Milnut, a combination of condensed skim milk and coconut oil that looked like cream but cost less. Because the Filled Milk Act was a straightforward business regulation, the new majority wing was able to conclude rather easily that the law received a presumption of constitutionality.

In footnote 4, however, the opinion took up the looming question and reached out to address whether the same deference to the legislature would apply in cases involving civil liberties. Justice Harlan F. Stone, writing for himself and three others, did not definitively answer the question. But, in three short paragraphs, he raised the possibility that certain types of legislation might warrant less deference. In the footnote’s most famous sentence, he wrote:

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

As Justice Stone explained in a memorandum to Chief Justice Hughes, he “wish[ed] to avoid the possibility” that pronouncements in the opinion about the presumption of constitutionality “in the ordinary run of due process cases” would be “applied as a matter of course to these other more exceptional cases.” He wished, instead, to “file a caveat” in the footnote, albeit “without committing the Court to any proposition contained in it.”<sup>5</sup>

The key suggestion from footnote 4—that legislation disadvantaging “discrete and insular minorities” might call for “more searching judicial inquiry”—paved the

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way for the tiered system of scrutiny that is now the defining architecture of constitutional review. In the decades that followed *Carolene Products*, the Court supplied details for the framework, applying rational basis review to most legislation and applying “strict”

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### ***Brown v. Board of Education*, Footnote 11: The Social Science Debate**

*Brown v. Board of Education* (1954), likely the most famous Supreme Court decision of the twentieth century, has a famous footnote of its own. Footnote 11, discussed in dozens of books and articles, was integral to the controversial rooting of the Court’s holding in the field of social science.

Before announcing its holding, the *Brown* Court discussed the effects of segregation on schoolchildren. Separating black children from others “solely because of their race,” Chief Justice Earl Warren wrote, “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” The Court agreed with the state court that “[a] sense of inferiority affects the motivation of a child to learn,” and that segregation deprived black children of benefits they would receive in an integrated school system. This finding

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Footnote 11 generated controversy on multiple fronts. First, the studies it cites have been criticized as flawed. The first study cited, the “doll test” done by Dr. Kenneth Clark, has received the most scrutiny. In the experiment, black schoolchildren were instructed to choose from a collection of black and white dolls. The children identified the white dolls as “nicer,” from which Clark inferred that racial segregation triggered feelings of inferiority based on race. The structure and execution of the study—the small sample size, lack of a control group, and oversimplified methodology—spurred widespread criticism. Dr. Clark’s work, these critics claimed, did not prove the Court’s “finding.”

Footnote 11 also fueled a more general debate on the use of social science in judicial reasoning. For some critics, the footnote exhibited insufficient judicial restraint; under their view, judges should rely not on empirics but on “neutral principles” of law. For others, resting such an important constitutional ruling on the shifting sands of social science experiments was worrisome, for it exposed the decision to revision based on contrary study results. Still other critics doubted the competence of judges to interpret social science studies. On the other hand, many scholars and jurists

celebrated the ruling’s recognition of the value of empirics in judicial reasoning and of the Court’s willingness to respond to developments in social science in particular. On top of all this, commentators continue to debate whether the Court really relied on the footnote 11 studies at all, or whether it was deploying science merely to mitigate or deflect backlash to the legal aspects of its decision. All of these debates continue, and have become part of *Brown’s* legacy.

### ***Ernst & Ernst v. Hochfelder*, Footnote 12; and *Dirks v. SEC*, Footnote 14: Shaping Securities Actions**

In *Ernst & Ernst v. Hochfelder* (1976), the Supreme Court held that merely negligent conduct cannot give rise to liability under Section 10(b) and Rule 10b-5 in a securities action; a plaintiff must establish scienter on the part of a defendant. In much-cited footnote 12, the Court suggested—but did not decide—that recklessness may be sufficient to meet the scienter requirement. Interpreting footnote 12 immediately became a widely discussed aspect of securities law: is recklessness enough, or isn’t it, and what acts are sufficient to constitute recklessness?

Just three years ago, in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* (2007), the Supreme Court acknowledged that it had never resolved the question of recklessness that it had raised in footnote 12. The Court noted that “[e]very Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness required.” The Court then declined once again to resolve the question.

*Ernst & Ernst’s* footnote 12 is not the only influential footnote in the securities world. In footnote 14 of *Dirks v. SEC* (1983), the Court expressed support for the concept of “constructive” or “temporary” insiders: that certain outsiders of corporations (such as lawyers, consultants, and accountants) may qualify

as insiders for purposes of insider trading because of their “special confidential relationship” with the corporation. The Court limited this footnote rule to situations where the corporation expects the outsider to keep information confidential. In the wake of *Dirks*, courts and commentators have debated who qualifies as a temporary insider (and thus acquires fiduciary duties) under the criteria set forth in footnote 14.

### ***Terry v. Ohio*, Footnote 16: Declining to Approve a “Terry Stop”**

Footnote 16 of *Terry v. Ohio* (1968), the case in which the Court allowed law enforcement officers to frisk individuals based on less than probable cause, is noteworthy for what it did *not* decide. Reflecting deep disagreement among the justices, the footnote expressly left open the constitutionality of what we now know as a “Terry stop.”

In *Terry*, a patrolling police officer was suspicious that three men pacing in front of a store were “casing a job.” The officer approached the men, identified himself as a police officer, asked their names, and—when Terry “mumbled something in response”—grabbed Terry and frisked him. The frisk turned up a revolver in Terry’s pocket; a subsequent pat-down of one of the other men yielded another revolver. There was little question that the officer had not had “probable cause” for the stop and frisk. Did admission of the revolvers into evidence violate the men’s Fourth Amendment rights?

Although the decision in *Terry* was 8–1 in the government’s favor, the case sparked deep disagreement among the justices over the proper Fourth Amendment analysis. In particular, the justices could not agree on whether and how to recognize a power of investigative detention on less than probable cause. According to a law review article by Professor Earl Dudley Jr., one of Chief Justice Warren’s law clerks at the time, Justices John Marshall Harlan II and Byron White wanted to resolve the question of the investigative stop.<sup>6</sup> As they

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saw it, the power to stop was a logical prerequisite to the power to frisk, and thus the constitutionality of the two had to be addressed together. Chief Justice Warren, in contrast, favored separating the “stop” from the “frisk,” and approving explicitly only the latter. He feared that a broader power to detain a person for investigative purposes based on less than probable cause was both difficult to define and susceptible to abuse.

Chief Justice Warren won the battle. In footnote 16, the Court stated that it “decide[s] nothing today con-

### Best of the Rest

The plethora of other influential footnotes makes it difficult to select among them. Other footnotes that have received sustained attention include footnote 14 in *Sedima v. Imrex Co.* (1985), which addresses the ways to establish a “pattern of racketeering activity” under the Racketeer Influenced and Corrupt Organizations (RICO) Act; footnote 59 in *United States v. Socony Vacuum Oil Co.* (1940), which indicates that a conspiracy to fix prices is established even if the alleged conspirators lack the power to affect prices; and

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cerning the constitutional propriety of an investigative ‘seizure’ upon less than probable cause for purposes of ‘detention’ and/or interrogation.” Because the Court could not tell “with any certainty upon this record whether any such ‘seizure’ took place here prior to” the pat-downs, the Court “assume[d] that up to that point no intrusion upon constitutionally protected rights had occurred.”

Thus, because of footnote 16, *Terry* itself does not stand for the proposition that has become its lasting legacy: that an investigative stop based on less than probable cause—a “*Terry* stop”—is consistent with the Fourth Amendment. Indeed, in Professor Dudley’s words, the majority opinion “circumambulated Robin Hood’s barn to avoid approving” what are now “known universally as ‘*Terry* stops.’”<sup>7</sup>

Chief Justice Warren did not, of course, win the war. Soon after the *Terry* decision, the Court’s opinions began assuming that *Terry* had, in fact, authorized investigative stops. The Court so held explicitly in *United States v. Hensley* in 1985.

footnote 37 in *Crane v. Commissioner* (1947), perhaps the most famous footnote in tax history, which addressed the effect of disposing of a real estate investment financed by a nonrecourse loan when the fair market value of the property is below the outstanding balance on the loan.

Developing doctrine, of course, is not the only calling for Supreme Court footnotes. The justices routinely employ footnotes to add context, humor, or commentary to an opinion—or to fight among themselves. For example, Justice Harry Blackmun used footnote 4 of *Flood v. Kuhn* (1972), a case upholding the exemption of professional baseball from federal antitrust laws, to pay homage to the sport of baseball by quoting Grantland Rice’s 1926 poem, “He Never Heard of Casey!” Justice Blackmun noted that “[m]illions have known and enjoyed baseball” and that “one writer knowledgeable in the field of sports almost assumed that everyone did until, one day, he discovered otherwise.”

This excerpt from Rice’s poem followed:

*I knew a cove who’d never heard of Washington and Lee,  
Of Caesar and Napoleon from the ancient jamboree,  
But, blime, there are queerer things than anything like that,  
For here’s a cove who never heard of “Casey at the Bat”!*

*Ten million never heard of Keats, or Shelley, Burns or Poe;  
But they know “the air was shattered by the force of  
Casey’s blow”;  
They never heard of Shakespeare, nor of Dickens, like as not,  
But they know the somber drama from old Mudville’s  
haunted lot.  
He never heard of Casey! Am I dreaming?  
Is it true?  
Is fame but windblown ashes when the summer day  
is through?  
Does greatness fade so quickly and is grandeur doomed to die  
That bloomed in early morning, ere the dusk rides down  
the sky?*

Footnotes have also been territory for colorful back-and-forth between the current Court’s two opera fans, Justices Ruth Bader Ginsburg and Antonin Scalia. In footnote 3 of his concurring opinion in *Minnesota v. Carter* (1998), Justice Scalia took an opportunity to phrase his disagreement with Justice Ginsburg’s dissent in operatic vocabulary:

That the Fourth Amendment does not protect places is simply unresponsive to the question whether the Fourth Amendment protects people in other people’s homes. In saying this, I do not, as the dissent claims, clash with “the *leitmotif* of Justice Harlan’s concurring opinion” in *Katz* . . . ; *au contraire* (or, to be more Wagnerian, *im Gegenteil*), in this regard I am entirely in harmony with that opinion, and it is the dissent that sings from another opera.

## CONCLUSION

In *United States v. Dixon* (1993), Justice Scalia chided Justice David Souter for relying on a case that “contains no support for his position except a footnote” that Justice Scalia described as “the purest dictum” and contradictory to the opinion’s text. “Quoting that suspect dictum multiple times,” Justice Scalia wrote, “cannot convert it into case law.”

That may be so, but history shows that footnotes can be a driving force in shaping Supreme Court jurisprudence.

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1. Arthur J. Goldberg, “The Rise and Fall (We Hope) of Footnotes,” 69 *ABA Journal* 255 (1983).
2. “In Justice Breyer’s Opinion, A Footnote Has No Place,” *The New York Times*, July 28, 1995.
3. Abner J. Mikva, “Goodbye to Footnotes,” 56 *U. Colo. L. Rev.* 647, 648 (1985).
4. Fred Rodell, “Goodbye to Law Reviews—Revisited,” 48 *Va. L. Rev.* 279, 282, 289 (1962).
5. Justice Stone’s memorandum is attached as an appendix to an article written by one of his former law clerks, the late Professor Louis Lusky. See Louis Lusky, “Footnote Redux: A Carolene Products Reminiscence,” 82 *Colum. L. Rev.* 1093 (1982).
6. See Earl C. Dudley, Jr., “*Terry v. Ohio*, the Warren Court, and the Fourth Amendment: A Law Clerk’s Perspective,” 72 *St. John’s L. Rev.* 891 (1998).
7. Dudley, 72 *St. John’s L. Rev.* at 896.