

A Case of Continuing Encroachments

C. P. I V E S

IN A FOOTNOTE (p. 513) of his massive biography of Chief Justice Stone, Alpheus Thomas Mason says "It was not unusual for Stone to allow his law clerks to use footnotes as trial balloons for meritorious ideas...." As is well known, the Justices of the Supreme Court tend to recruit their law clerks from the top men in the graduating classes of the top law schools, of which the Columbia University School is incontestably one. Before going to the Court, Stone had been Dean of the Columbia School from 1910 to 1923; and for the one-year term 1937-1938 of Supreme Court law clerks, he chose for his own clerk one Louis Lusky, a bright star of the Columbia law class of 1937.*

As it happened, Lusky had graduated within a few months of President Franklin Delano Roosevelt's proposal to reorganize the Supreme Court by enlarging its membership with an apparent view to altering its often unenthusiastic reaction to his variously innovative programs. The presidential proposal reflected and, as it were, armed, a long-standing criticism of the Court, dignified and authenticated in 1905 by a statement of Justice Oliver Wendell Holmes, Jr., perhaps most prestigious of latter-day Justices. The majority, said Holmes, dissenting in a case called *Lochner v. N. Y.*, had allowed their laissez-faire economic predilections to override a New York State legislative enactment limiting working hours in bakeries. In some part the President's proposal seemed to aim at parrying, even paralyzing, such still continuing property manifestations.

But Justice Stone, though not unsympathetic with the presidential purpose, was dismayed at the method chosen—some polemicists even described it as a "packing" of the Court. Stone feared that such ex-

ecutive aggression against a coordinate branch might provoke reactive turbulences harmful to the Court's established role as protector of minorities. Sharing the same view, first, no doubt, as student, and now, certainly, as Ivy League-certified LL.B. in a place of unique strategic opportunity, Lusky drafted a prophylactic formula of new procedural devices by which the then current Court might be able to cope unpacked. This proposal Stone obviously found meritorious and so allowed his law clerk to use it in footnote form as a trial balloon, as will appear.

In an "otherwise obscure case" (Mason) known as *United States v. Carolene Products Co.*, the Lusky formula appeared in Footnote 4, perhaps the most portentous footnote in modern Supreme Court history. The question before the Court was whether a Federal statute excluding whole-milk substitutes from interstate commerce breached the open-market mandate of the Constitution. Speaking for the Court, Stone repeated the classic rule that legislative enactments "resting upon some rational basis within the knowledge and experience of the legislators" were presumed to be constitutional. After all, Stone himself had recently reaffirmed Justice Holmes' dictum that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the Courts. This presumption of constitutionality supported most statutory regulation of business and was held to validate the butter law before the Court.

However, without clearly stated reason or readily apparent cause, Stone then found it necessary to explain that it was unnecessary to decide certain hypothetical questions which were not then before the Court anyway, and appended Footnote

Four. The first paragraph of the Footnote warned that "there may be narrower 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 first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."

Paragraph Two of the Footnote stated that "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. "Nor need we inquire," Footnote Paragraph Three continued, "whether similar considerations enter into review of statutes directed at particular religions,...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...."

These texts of Stone's opinion are quoted from Mason's history of *The Supreme Court from Taft to Warren* to indicate by way of the italics, which are Mason's, where this seasoned commentator felt the essential meaning lay. And Mason went on to clarify Stone's motivations by citing their ambiance: "Less than two years after these words were written Hitler unleashed the Nazi forces...." Yet when Holmes had protested pro-property juro-legislation in the *Lochner* case, his indicated remedy was not a juridical scrutiny varying in exactitude with the interests at bar, but a mere return in economic cases to the strict objectivity pledged at large in the judicial oath and still available for life and liberty. That, at least, was a reasonable inference from a constitutional text equalizing property with life and liberty in the famous protected triad, but then adding the addi-

tional and particularized pledge to property of compensation for public use.

Moreover, only three years after his *Lochner* dissent, and doubtless drawing on reflections therein, Holmes had warned that "all rights tend to declare themselves absolute to their logical extreme...." He would hardly have been surprised, then, that the Carolene footnote absolutized precipitously into a neo-doctrine of what came to be called "Preferred Position" for Life and Liberty, with property demeaned and judicial solicitude in its behalf relaxed. Quite naturally, Lusk, a man of scruple, is unhappy about this mere substitution for an old pro-property bias of a new bias against property. Only Paragraph One of Footnote Four suggests a gloss for differentiation among equally pledged rights, he argues; and explains that Paragraph One results from an intervention by Chief Justice Hughes, an intervention, Lusk feels, not at all attuned to the constitutional theme Lusk himself had proposed. That theme speaks, he says, only in Paragraphs Two and Three as presented to Stone, and they merely define an implied power in the Court to prompt as well as to police legislation.

That they do; yet as suggested by the italics in Mason's quotation of the three paragraphs, surely Paragraphs Two and Three speak as much as does Paragraph One of a judicial solicitude varying in vim with the variance before the Court of interests pledged unvarying equality in the Constitution. As Mason, a friendly analyst, puts it, "...[T]he now famous footnote suggest[ed] special judicial responsibility in the orbit of civil rights...." Yet the remedy for a tilt toward property can hardly be merely to swerve the tilt against it. Surely the true cure is equal protection for life, liberty and property, each supporting the other two, as it was proof of the Founder's wisdom to see, long before the socialism of the world offered laboratory demonstrations. After all, no more than other intellectual artifacts can Footnote Four escape judgment according to its fruits—a rule, surely, not un-Columbian. The pragmatic fruit of Footnote Four in historical

perspective is irrefutably the doctrine of Preferred Position, or Preferred Freedoms. The new discrimination was soon translated by polemicists lay and legal into a standing standoff between "human rights" and "property rights"; a somewhat curmudgeonly partisan of the originally equal billing explained the new differential as follows: "If he's got it, it's a property right; but if I want it, it's a human right: and human rights have preferred position."

As it happens, the genesis of the Carolene Footnote coincided roughly with the flowering of a new legal philosophy, "fostered in its inception at Columbia and Yale," according to a paper by two of its preceptors in the *Columbia Law Review*. It was hailed as "scientific," "experimentalist," above all "Realistic," but a German refugee professor at Columbia added a touch of chill in likening the new creed to the legal positivism summarized in Berlin by the Governor-General of occupied Poland for German jurists in the fateful year 1939: "Pale phantoms of objective justice do not exist for us any more...." When William O. Douglas (LL.B. Columbia, 1925, Columbia law faculty, 1925-28, Yale law faculty, 1928-34) was nominated by President Roosevelt to the Supreme Court, "Realist" law Professor Karl N. Llewellyn of the Columbia faculty wrote an exultant letter to the *New York Times* celebrating Douglas as the first "...high judge trained from the beginning in the modern Realistic approach to legal techniques...."

Whether or not Douglas and/or the "modern Realistic approach to legal techniques" was the causal factor-in-chief, a seasoned observer was to report marked change in the ensuing "quinquennium of the 1941-1945 terms of the Court," as follows:

"1. Never before in the history of the Court were so many of its members influenced in decisions by considerations extraneous to the legal issues that supposedly controlled decisions.

"2. Never before have members of the Court so often acted contrary to their con-

victions on the governing legal issues in decisions.

"3. Never has so large a proportion of opinions fallen short of requisite professional standards.

"It would relieve me of much unhappiness if I did not feel compelled to have these convictions. But they are based on a study of the history of the Court which began from the day I left the [Harvard] law school just forty years ago and on firsthand detailed knowledge of what has been going on inside the Court during the last thirty-five years." The quotation is from a note to Justice Frank Murphy from...Justice Felix Frankfurter. It appears in Joseph Lash's edition of Frankfurter's Diaries. Frankfurter had also criticized Footnote Four.

It was against this tapestry of dejection that the absolutizing of "human rights" powered in at least some part by the new legal "Realism" reached its logical extreme in Justice Douglas' astonishing—not so much search for, as invention of—"precedents" for the conclusion which he announced for the Court majority in the famous birth control case of *Griswold v. Connecticut*. The appellants were officers of a birth control clinic in New Haven opened in amicable test of a Connecticut statute prohibiting not the mere manufacture, not the distribution, not even the retail sale, but the *use* of contraceptives. Justice Stewart, who was to dissent, acknowledged this to be a "silly law." But twenty successive State legislatures had refused to repeal it and Justice Brandeis had construed basic constitutionalism in a warning of some 30 years before: "It was never the thought that by means of a friendly suit a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of a legislative act...."

Notwithstanding, Douglas swept Brandeis and 40 years of Connecticut history aside to re-inspect the "human rights" provisions of the Bill of Rights and to descry—or intuit—there "emanations" from the First, Third, Fourth and Fifth Amendments, which, coagulating into

"penumbras," and with a weight-making nod to the Ninth Amendment, were held to de-constitutionalize the Connecticut anti-contraception law, as breaching marital privacy.

It was apparently about this time in the history of constitutional exegesis that Lusky, artificer and projector of the Carolene footnote—two-thirds of it, that is—but now full professor of law in Columbia University began to retrace the trajectory of his trial balloon to its Holmesian extreme in the area of its extremest application. This he may be said to have accomplished for the later years in two and a half singularly succinct paragraphs:

"...The (Griswold) case (1965) held that it is none of the State's business whether married couples use contraceptives or not; but the Court *said* it was protecting privacy, and thereby gave privacy a new and indefinitely extensible dimension....

"Another case in the same vein is *Stanley v. Georgia* (1969) where the Court held that one has a constitutional immunity—based on a so-called right of privacy—against criminal punishment for possessing and viewing pornographic movies in his own home. *Eisenstadt v. Baird* (1972) though ostensibly decided on equal protection grounds, is more properly classified as a neo-privacy case. It extended the Griswold decision's protection of "marital privacy" in the use of contraceptives to cover unmarried persons as well.

"...Although we now see *Griswold v. Connecticut* as the first neo-privacy case, neo-privacy became identifiable as a major constitutional doctrine only in *Roe v. Wade*, the principal 1973 abortion case. The Griswold decision was most plausibly interpreted as establishing no more than a unique right of "marital privacy" with little potential for extension in other fields.... Not until *Roe v. Wade* did the Court (with only two dissents) propound a rationale so broad and conclusory as to provide convenient precedent for extension of non-economic laissez-faire as far as the Court chooses to enlarge it. That was when it became obvious that the Court has taken a course which, if pursued as far as its

[Holmesian?] logic seems to permit, will result in a conflict of cataclysmic proportions between judicial review and self-government...." Hence Lusky's title, *By What Right?* has the Court acted.

Not that at any point Lusky repudiates Footnote Four tout court; as we see above, he faults certain interventions by Chief Justice Hughes for the "Preferred Position" aberration. And he argues, with force, that Paragraphs Two and Three of the Footnote merely delineate a still rarely exploited power of tentative review which may now be the last, best hope for averting the "conflict of cataclysmic proportions...." Lusky even urges that this new formula, retroactively applied, would authenticate much of the ambiguously justifiable performance for which the Court is criticized.

There are, he counsels, not just one, but two kinds of action open to the Justices in weighing legislation. (1) Where the legislature—State or Federal—has acted, and the Constitution as clearly worded or reasonably and authoritatively interpreted says No, and (2) where the legislature is silent, but the constitutional verbiage as authoritatively construed, might well imply Yes. The Court in future as in the past may—*must*—invalidate in Situation 1, by definitive review. In future, as occasionally in the past, the Court may nudge the legislature, so to speak, by rulings which Lusky calls *tentative* review to "interpret the silence of Congress": "if and when Congress does act [to the contrary] the Court yields."

Yes, but Lusky is also vividly aware of continually stout opposition in responsible quarters to *any* proposition that authorizes the Court, even *pro tempore* to legislate. He is, of course, familiar with the armory of objection to comparable arrangements amassed by Justice Black in Note 6 of Black's dissent in *Griswold*. Urging as a major theme of his book, greater candor on the Justices as to techniques and tactics in their work, he is candid about his own proposal: To promote legislation does "ineluctably involve...the risk of judicial usurpation...." But even critics would

agree that the risk is somewhat lessened if judges will—and some will—respect the single respectable exception to the rule of rigidly separate powers, stated most formidably—and, of course, most felicitously—by Justice Holmes some 60 years ago: “Judges do and must legislate but they can do so only interstitially; they are confined from molar to molecular motions. A common law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court....” Justice Cardozo made the same point some years later in his *The Nature of the Judicial Process* (1921).

But it is precisely the common law judge’s refusal to reject what he may feel to be historical nonsense that the modern juro-legislators abhor. The cases which most, and most rightly, worry Lusky are those in which the juridical motion is flamboyantly molar—the interstice is brutally forced by predilectional fervor—*Griswold*, *Eisenstadt*, *Roe v. Wade*—to mention only several neo-privacy cases in which the religio-cultural shibboleths of millenia governing human gender are found, in the awful naivete of judicial hubris to be—unconstitutional! Does not the context make the fateful adjective seem almost ludicrous?

After all, the boldest proponents of the juro-legislation for residuals for which Lusky still appears to pine—even at risk, are quite direct in their assault upon Holmes’ abstinent common law judge. Professor Mitchell Franklin, for instance, is as pleased with Douglas in the *Griswold* case as Lusky is disturbed. Not to be sure with “emanations” and “penumbras” which Franklin dismisses as pseudo-Neo-Platonist words [without] analytical or historical merit. What Franklin welcomes in the Douglas opinion in *Griswold* is the almost oblique but still manifest nod toward the Ninth Amendment as supportive of legislating judges.

Amendment Nine, Franklin recalls, was projected by James Madison, who, like his mentor, Mr. Jefferson, was in touch with intellectuals of the French Enlightenment. With these “Encyclopedists” in the

background, Franklin construes Douglas in the *Griswold* case as “...receiving what in effect is a Romanist conception of the Ninth Amendment” into the United States Constitution. “It is the mission of the Ninth Amendment,” he continues, “not only to prevent the weakening of the Second Constitution (Franklin’s name for the Bill of Rights) but to provide for the development of such texts to control historically new situations....[I]t is a text of *juridical* method. It is a text concerning the *judiciary* (italics CPI’s) power....[A]s the Ninth Amendment is formulated under Encyclopediste domination, it reflects the hostility of the Enlightenment toward the legal method of historically reprobated English feudal common law, which is antagonistic to formulated law, which upholds *stare decisis* in its various manifestations, which examines codified law narrowly and suspiciously, and which turns aside from and ignores the written text when the latter spends its immediate force....The great role of the Ninth Amendment thus becomes clearer. It requires the consistent *judicial development* of the first eight amendments to *control novel situations* which are not *immediately* subject to the Second Constitution....” (italics CPI’s)

It is notable that in such a passage on “feudal English Common law” Franklin says nothing of a greening sprig under an earlier French name that flourished inexorably in that time. The name was “parlement,” meaning a “talkerie,” to which His Majesty summoned his good lieges for advice, counsel, and on occasion, consent. The notable point is that with time and its passage, even judges came to regard this upstartling non-Court with considerable respect. Not that Franklin, deeply learned in the law, is unaware that his thesis will invite responses:

“If Justice Douglas and the majority of the Justices of the Supreme Court have strengthened [sic] American democracy by receiving what is in effect a Romanist conception of the Ninth Amendment, an anti-democratic [sic] counter-attack may be expected in the name of traditional Anglo-

American legal method. Here the constitutional thought of Judge Learned Hand may be mentioned," citing Hand's Bill of Rights lectures on the Oliver Wendell Holmes Foundation at Harvard in 1958.

Well, yes, Hand may be at least mentioned. But curiously enough, Franklin does not cite to the core passages of the Holmes lectures, those in which Hand summarizes his and Holmes' and the Anglo-American view on legislating judges. Having explained with due humility that despite his close observation of the current [Warren] Court, "I cannot frame any definition that will explain when the Court will assume the role of a Third legislative chamber and when it will limit its authority to keeping Congress and the States within their accredited authority. Nevertheless, I am quite clear that it has not abdicated its former function, as to which I hope that it may be regarded as permissible for me to say that I have never been able to understand on what basis it does or can rest except as a *coup de main*...."

However, "Each one of us must in the end choose for himself how far he would like to leave our collective fate to the wayward vagaries of popular assemblies.... For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless, when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture...."

None of this, of course, is in any slightest degree to deprecate the scholarship, the courage or the candor of Lusky's study—which might be likened to the apologia of the sorcerer who has reassessed the performance of his apprentices with something less than glee. But it does seem fair to suggest that just as Hand is the plangent voice of the "historically

reprobated" Anglo-American aversion to Platonic Guardians—with some fairly apparent historical reprobations of his own—so also he suggests the true but often unarticulated premise of most propositions for juro-legislation: a distrust of representative government, hence of the vagaries of popular assemblies—wayward precisely because representative—and so a yearning for Platonic guidance by a lawyerly elite inaccessible to community caprice.

And one more point: As it happens, Holmes' opinion cited above on the abuse of juro-legislation contained, as well, his equally famous if perhaps more characteristic admonition that "the law is not a brooding omnipresence in the sky." No doubt the Yale, Columbia, and Harvard law communities could go along with him and with each other on that. But if there is no brooding omnipresence in the Ciceronian, Pauline, Augustinian or Aquinian sense or senses, then alternative reactions may seem available to judges. If there is no higher direction the judicial oath may mean merely, I will decide what I will decide. Or if there is no higher direction, then the oath-taker may nonetheless sense an abrupt intuitive thrust against any temptation to fill the vacuum by divinizing self in juro-legislation. If a layman were to catalog recent Justices this one would place Holmes, Frankfurter and Hand in the second category: three Harvard men still going to school to Langdell, Beale, and of course, Thayer. However, to avoid simplism, that pit for book reviewers, he would note that Mitchell Franklin is A.B. Harvard, 1922, J.D. Harvard 1925, and S.J.D. Harvard 1928. But also, that if the Harvard accent is somewhat muted in Mitchell Franklin, it may be tentatively crescent at some points on Morningside Heights.

*See *By What Right!* by Louis Lusky, Charlottesville, Va., The Michie Company, 1978 (Second Printing) 446 pp. \$15.50.