the government any power to abridge speech. But the beginnings of such a philosophy may be gleaned in much earlier cases in which a rule of decision based on a preference for First Amendment liberties was prescribed. Thus, Chief Justice Stone in his famous *Carolene Products* "footnote 4" suggested that the ordinary presumption of constitutionality that prevailed when economic regulation was in issue might be reversed when legislation is challenged that restricts "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or that reflects "prejudice against discreet and insular minorities . . . tend[ing] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[531] Then, in *Murdock v. Pennsylvania*,[532] in striking down a license tax on religious colporteurs, the Court remarked that "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position." Two years later the Court indicated that its decision with regard to the constitutionality of legislation regulating individuals is "delicate . . . [especially] where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions."[533] The "preferred-position" language was sharply attacked by Justice Frankfurter in *Kovacs v. Cooper*,[534] and it dropped from the opinions, although its philosophy did not.

Justice Black expressed his position in many cases but his *Konigsberg* dissent contains one of the lengthiest and clearest expositions of it.[535] That a particular governmental regulation abridged speech or deterred it was to him "sufficient to render the action of the State unconstitutional" because he did not subscribe "to the doc-

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[531] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). In other words, whereas economic regulation need have merely a rational basis to be constitutional, legislation of the sort to which Chief Justice Stone referred might be subject to "more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . ." Id. Justice Powell later wrote that footnote 4 "is recognized as a primary source of 'strict scrutiny' judicial review." Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 Columbia L. Rev. 1087, 1088 (1982).

[532] 319 U.S. 105, 115 (1943). *See also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

[533] Thomas v. Collins, 323 U.S. 516, 529–30 (1945).

[534] 336 U.S. 77, 89 (1949) (collecting cases with critical analysis).

[535] Konigsberg v. State Bar of California, 366 U.S. 36, 56 (1961) (dissenting opinion). *See also* Braden v. United States, 365 U.S. 431, 441 (1961) (dissenting); Wilkinson v. United States, 365 U.S. 399, 422 (1961) (dissenting); Uphaus v. Wyman, 364 U.S. 388, 392 (1960) (dissenting); Barenblatt v. United States, 360 U.S. 109, 140 (1959) (dissenting); American Communications Ass'n v. Douds, 339 U.S. 382, 445 (1950); Communist Party v. SACB, 367 U.S. 1, 137 (1961) (dissenting); Beauharnais v. Illinois, 343 U.S. 250, 267 (1952) (dissenting); New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (concurring); New York Times Co. v. United States, 403 U.S.