IS *CAROLENE PRODUCTS* OBSOLETE?

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Footnote four in the Supreme Court's opinion in United States v. Carolene Products Co. *is the most famous footnote in the Court's history. The footnote embraces an attractive theory of judicial review: that the role of the Court is to correct defects in the democratic political process but otherwise to allow important decisions to be made by the elected branches of government. The footnote marked the end of the pre-New Deal era when the Court was hostile to social welfare and regulatory legislation, and it foreshadowed the Warren Court's attack on segregation and expansion of constitutional rights.*

Nonetheless, footnote four has been subject to telling criticisms. It seems to reflect a naïve view of the ability of the text of the Constitution to resolve controversial questions. More important, the footnote requires the courts to assess the political power of different groups in society—something that judges do not seem well equipped to do. The footnote's implicit account of which groups are likely to lack political power may be fundamentally mistaken. And the footnote falls far short of its objective of keeping the courts away from controversial political issues. One can fairly ask whether the Carolene Products *approach, however fruitful it may have been in mid-twentieth-century America, no longer has a role to play in constitutional law.*

But is there a better way to think about what the Court should do in constitutional cases? The theory of the Carolene Products *footnote unifies some of the greatest successes in the Court's history:* Brown v. Board of Education*, the "one person, one vote" decisions, and the expansion of the free speech rights of political dissidents. For all its weaknesses, the* Carolene Products *footnote identifies an objective and a set of standards by which the Court's work can be judged. And, perhaps most important, no one seems to have come up with a better approach.*

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United States v. Carolene Products Co.[1] did not seem to be a terribly important case at the time it was decided. Footnote four in the opinion of the Court in *Carolene Products* was only a footnote, and it did not directly address the issues in the case. Only four of the nine Justices agreed to the footnote.[2] Neither the footnote nor the case has been cited very often by the Court.[3] The arguments in the footnote have been picked apart by commentators for decades.[4]

But it is fair to say that the *Carolene Products* footnote defined the federal courts' agenda for a generation—one of the most momentous generations in the history of the Supreme Court and the federal judiciary. And today, when the influence of the footnote has diminished, to say the least, it presents probably the most impressive challenge to the course that the Court is taking.

I. THE CASE

The issue in *Carolene Products*, the case, was whether the Filled Milk Act of 1923 was constitutional.[5] "Filled milk" was condensed milk in which the fat normally found in milk was replaced with vegetable oil. Filled milk was cheaper than regular condensed milk, and today we would regard it as healthier. Apparently it did not taste any different. The Filled Milk Act, an act of Congress, made it illegal to ship filled milk in interstate commerce.[6] The Act declared that filled milk was "an adulterated article of food, injurious to the public health," and that "its sale constitute[d] a fraud upon the public."[7] It is not difficult to see the Act as a piece of interest group legislation that favored the condensed milk industry by effectively driving a competitor out of business.[8]

The Court nonetheless upheld the Act.[9] Justice Harlan Fiske Stone wrote the majority opinion.[10] It was not the Court's role, Justice Stone

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

2. Justices Cardozo and Reed did not participate in the case. *Id.* at 155. Justice Black concurred in the majority opinion except for the part that included the footnote. *Id.* (Black, J., concurring). Justice McReynolds dissented. *Id.* (McReynolds, J., dissenting). Justice Butler concurred only in the result. *Id.* (Butler, J., concurring).

3. *See* Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 686, 691–97 (1991); *see also* Dan T. Coenen, *The Future of Footnote Four*, 41 GA. L. REV. 797, 825–26 (2007). The title of this lecture reflects my debt to Farber & Frickey, *supra*.

4. *See, e.g.*, Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985); Farber & Frickey, *supra* note 3.

5. 304 U.S. at 145–46.

6. *Id.*

7. *Id.* at 145–46 n.1.

8. *See* Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397, 398–99.

9. *Carolene Prods.,* 304 U.S. at 154.

10. *Id.* at 145.

said, to reexamine judgments made by Congress in cases involving economic regulation.[11]

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[12]

Footnote four, the famous footnote, was appended to that sentence.

The date gives us one clue about why *Carolene Products* was significant. The case was decided in 1938, at the end of a very controversial era in the Court's history. From the late 1890s to the mid-1930s, the Court declared unconstitutional a number of regulatory and social welfare laws enacted by Congress and the state legislatures—laws establishing the minimum wage that an employee could be paid and the maximum number of hours employees could work, laws protecting unions, laws requiring licenses to engage in certain businesses, and the like.[13] This period is now often called the *Lochner* era, after *Lochner v. New York*, which declared unconstitutional a state law establishing maximum working hours for bakers.[14]

In the early 1930s, the Court invalidated some of the central laws of President Franklin Roosevelt's New Deal, and Roosevelt vigorously attacked the Court. After winning reelection by a record margin in 1936, Roosevelt tried to change the composition of the Court by increasing its size so that he could appoint enough new Justices to have a majority that favored his programs.[15] The so-called Court-packing plan failed, but the Court began upholding some regulatory laws—historians disagree about whether it did so in response to Roosevelt[16]—and before long enough Justices left the Court to allow Roosevelt to change its direction.[17] The 1937 decision in *West Coast Hotel Co. v. Parrish*, in which the Court overruled a *Lochner*-era decision and upheld a state law establishing a minimum wage for women, is usually taken to be the turning point.[18] That was also the year in which Roosevelt made his first appointment to the Court—of Hugo Black—an appointment that by itself was enough to

11. *Id.* at 148–51.

12. *Id.* at 152.

13. For a summary, see, for example, BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 148–79 (1942).

14. 198 U.S. 45, 64–65 (1905).

15. WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 132–34 (1995).

16. *Compare id.* at 215 ("The Supreme Court . . . frequently went out of its way to frustrate the Roosevelt administration."), *with* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 21 (1998) ("[T]he decisions were not a direct response to the Court-packing threat.").

17. For an account of these events, see LEUCHTENBURG, *supra* note 15, at 213–36.

18. 300 U.S. 379, 386–87, 400 (1937).

tip the balance in many cases.[19] The next year, Roosevelt made another appointment, changing the balance on the Court even further.[20]

By the time of the decision in *Carolene Products* in 1938, the *Lochner* era was decisively over. The Court was out of the business of closely reviewing regulatory and social welfare legislation—"regulatory legislation affecting ordinary commercial transactions" in the words of the *Carolene Products* opinion.[21] Questions about the propriety of such legislation were for Congress and the state legislatures, not for the courts. The Court's decision to abandon that line of work can be explained in different ways. Perhaps it was the result of the Court's sensible recognition that the courts do not have the expertise to decide questions about whether laws regulating economic matters are really needed; or perhaps it was simply a matter of the Court's capitulating to the inexorable demands of the interest group state.[22]

In any event, the settlement of 1937,[23] as it is sometimes called, raised the question: if the courts were out of the business of closely assessing the constitutionality of regulatory and social welfare legislation, what business were they in? The *Carolene Products* footnote was the Court's first—and maybe only—attempt to say, systematically, when the courts should declare laws unconstitutional.

II. THE FOOTNOTE

The theory underlying the *Carolene Products* footnote grew directly out of the reaction to the *Lochner* era. The central premise of this theory is that the political branches of government—Congress, the President, and the state legislatures—should run the show. Those political institutions—not the courts—have the primary responsibility for deciding disputed issues that arise in society. The courts should step in only when there is some problem that prevents the political process from functioning in the way that it should.[24] Bad outcomes do not justify the courts in intervening; only some identifiable defect in the process can.[25] One of the attacks on the *Lochner*-era federal courts was that they were fundamentally anti-democratic because, by striking down popular social welfare and regulatory laws, the courts thwarted the will of the people's representatives.[26] The *Carolene Products* footnote accepts the idea that the courts should not be anti-democratic; in fact, it accepts that idea with a

19. LEUCHTENBURG, *supra* note 15, at 184, 211–12.

20. *See id.* at 154, 220.

21. 304 U.S. 144, 152 (1938).

22. *See, e.g.*, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 200–01 (1993).

23. Rebecca L. Brown, *The Art of Reading* Lochner, 1. N.Y.U. J.L. & LIBERTY 570, 589 (2005).

24. Felix Gilman, *The Famous Footnote Four*: *A History of the* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163, 176–79 (2004).

25. *See* Ackerman, *supra* note 4, at 718–19.

26. *See* GILLMAN, *supra* note 22, at 1–6.

vengeance. In the *Carolene Products* vision, the courts are justified in setting laws aside only when doing so facilitates the operation of democracy by making the political process work in the way that it should.[27]

The *Carolene Products* footnote had three paragraphs.[28] The first paragraph is, in some ways, the least helpful. "There may be narrower scope for operation of the presumption of constitutionality," the Court said, "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."[29] At first glance, this seems to be neither innovative nor controversial: of course there is a serious issue for the Court when a law seems inconsistent with the language of the Bill of Rights. The important question, not addressed by the footnote, is whether a particular law actually *is* inconsistent with a provision of the Bill of Rights. To that extent, this part of the footnote seems to beg the important question.

As it happens, though, even this first paragraph of the footnote was significant in the historical context of 1938. One of the principal criticisms of the *Lochner*-era Court was that it enforced a right to freedom from economic regulation—"liberty of contract"—that was not found in the text of the Constitution.[30] The first paragraph of the *Carolene Products* footnote may have reflected the Court's acceptance of a version of that criticism. A competing criticism of the *Lochner*-era Court was more

27. For the most important systematic statement of the *Carolene Products* approach, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

28. The footnote, in full, said:

> 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. See *Stromberg* v. *California*, 283 U. S. 359, 369–370; *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, 713–714, 718–720, 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, 373–378; *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. 484, 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* v. *Barnwell Bros.*, 303 U.S. 177, 184 n. 2, and cases cited.

304 U.S. 144, 152–53 n.4 (1938).

29. *Id.* at 152 n.4.

30. *See* W. Coast Hotel v. Parrish, 300 U.S. 379, 391 (1937) ("What is this freedom? The Constitution does not speak of freedom of contract.").

general: it held that the courts should avoid controversial or socially divisive issues more generally. Justice Felix Frankfurter in particular—a Roosevelt appointee who had not yet joined the Court at the time of *Carolene Products*—adhered to that view. He argued that the Court should be deferential even in cases that seemed to raise serious issues under the Bill of Rights or other constitutional provisions.[31] The Frankfurter view did not prevail, and the *Carolene Products* footnote can be seen as having set the Court on a different course. Rather than receding generally, as Justice Frankfurter urged, the Court would undo the *Lochner* error by confining itself to enforcing specific constitutional provisions.

Perhaps even more important, to illustrate its assertion that courts should be prepared to enforce specific constitutional provisions, the Court cited two free speech cases as examples.[32] It did not cite, for example, the Just Compensation Clause of the Fifth Amendment, which had been applied to the states for a longer time.[33] Why free speech cases? The next paragraph of the footnote—which is at the core of the *Carolene Products* approach to judicial review—tells us why.

> 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.[34]

Courts should step in when "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" are curtailed in some way.[35] The governing principle is that decisions are made by the democratic process. The Court should intervene only if that process is blocked in some way. Even then, the Court's role is not to remake the decisions made by the political branches of government; it is only to eliminate the blockage. That is how judicial review is reconciled with popular government: the principal function of judicial review is to make sure popular government operates as it should.

In this paragraph of the footnote, the Court mentioned three kinds of laws that might undermine the democratic process (and cited cases to illustrate them): "restrictions upon the right to vote," "restraints upon the dissemination of information," and "interferences with political organizations."[36] The Court's assumption was that the political process is

31. See, for example, his dissenting opinion in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 646–71 (1943) (Frankfurter, J., dissenting) and his concurring opinion in *Dennis v. United States*, 341 U.S. 494, 541–42 (1951) (Frankfurter, J., concurring).

32. *Carolene Prods.*, 304 U.S. at 152 n.4 (citing Lovell v. Griffin, 303 U.S. 444, 452 (1938); Stromberg v. California, 283 U.S. 359, 369–70 (1931)).

33. *See, e.g.*, Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 236 (1897).

34. *Carolene Prods.*, 304 U.S. at 152 n.4.

35. *Id.*

36. *Id.* at 152–53 n.4.

ordinarily self-correcting because bad laws will precipitate a negative reaction from members of the public. But if people are not allowed to vote, or to hear information or arguments about government policies, or to organize in opposition to those policies, then that self-correcting process will not operate as it should. Then the Court should act, to make sure that all voices are heard in the political and electoral process.

If the second paragraph of the footnote identified the core premise of the *Carolene Products* approach, the third paragraph developed that premise in the most important way because it anticipated the most momentous thing the Court would do over the next generation: the attack on the Jim Crow system of racial segregation.

> 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.[37]

The point is not simply the relatively familiar one that courts should protect minorities against overbearing majorities. In fact, one of the main lessons of the *Lochner* era was precisely that there are winners and losers in the democratic process, and the losers should not be able to reverse their losses by appealing to the courts. If the manufacturers of filled milk do not have enough political strength to protect themselves against hostile legislation, then that is how democracy works. The same is true of landlords opposed to a rent control law, or businesses that object to a licensing requirement, or managers who want to keep labor unions from organizing.

The *Carolene Products* footnote said that a minority is entitled to judicial protection only when it is a "discrete and insular" minority that is the victim of "prejudice."[38] It is not entirely clear what "discrete" and "insular" mean. But a reasonable definition, consistent with the general theory of the footnote, is that these are groups that are not able to play their proper role in democratic politics. They are "discrete" in the sense that they are separate in some way, identifiable as distinct from the rest of society. They are "insular" in the sense that other groups will not form coalitions with them—and, critically, not because of a lack of common interests but because of "prejudice."

This part of the *Carolene Products* footnote fills out the theory of democracy that is implicit in the footnote. The democratic process is a competition among groups. There will be winners and losers. As long as a group is in the competition and allowed to be a player, it cannot complain. But if a group has been silenced (in the way the second paragraph

37. *Id.* at 153 n.4 (citations omitted).
38. *Id.*

suggests) or not allowed to play the game (because it is a discrete and insular group subject to prejudice), then the process is not working as it should. Then the courts have a role to play, because the self-correcting properties of democratic politics will be nullified, and only the courts can make the democratic process work as it should.

At the time of the *Carolene Products* decision there was, of course, a clear example of prejudice directed at a discrete and insular minority: the treatment of African Americans, especially in parts of the country that practiced Jim Crow segregation. African Americans were easily identified and set off from the rest of society; everyone knew who was an African American. Although the Fifteenth Amendment formally prohibited states from denying the vote on account of race, African Americans were, in fact, denied the right to vote throughout much of the South[39] by means of subterfuges (like literacy tests) or simply by private violence and intimidation. Partly as a result, other groups refused to form coalitions with African Americans.[40] It was the kiss of death for a politician in a Jim Crow state to be seen as aligned with African Americans; indeed, politicians competed with each other to declare their hostility to civil rights for African Americans.[41] In 1938, there was not much doubt about what at least one "discrete and insular minority," subject to prejudice, looked like.

III. THE SUCCESS STORY

The theory of the *Carolene Products* footnote has a powerful appeal. The single biggest issue about judicial review, at least as it was formulated at the end of the *Lochner* era, was this: what business do courts have overruling the decisions of elected representatives? Judges (federal judges, anyway), do not have to answer to the people; they serve for life. They are chosen from an unrepresentative stratum of society. It seems inconsistent with every principle of democratic government for people like that to be deciding controversial and important issues for the nation.

The *Carolene Products* footnote does not take issue with any of that—that is its great appeal. Footnote four recognizes that majorities should rule and that politics, not courts, should govern the country. But the footnote tries to identify a way in which judicial review is a part of a well-functioning democracy. Judicial review, when it is justified and limited in the ways described by the *Carolene Products* footnote, is not antidemocratic, not an overriding of the will of the people, but rather a matter of making sure that the true will of the people is expressed.

39. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 28–39 (2004).

40. For an account of this period, see, for example, *id.* at 10–17.

41. *Id.*

Ideally, the *Carolene Products* approach does not require courts to make the kinds of decisions that a democratic government is supposed to make: decisions about values, moral principles, or distributive justice. All of that is for the political process. If the courts' only objection is to the outcome, not to the process, they have no business intervening. As long as the political process is inclusive and open, the courts should keep out, whatever decisions the political process reaches.

A good case can be made—and has been made—that *Carolene Products* was the theory of the Supreme Court of the United States under Earl Warren, from the mid-1950s until the late 1960s.[42] The most famous Warren Court decision, of course, was *Brown v. Board of Education*, which struck down laws that segregated public schools on the basis of race.[43] The Warren Court attacked Jim Crow segregation in a number of other decisions as well.[44] The legal regime that implemented Jim Crow segregation was, as I said, the clearest case of legislation "directed at particular . . . racial minorities" that reflected "prejudice against [a] discrete and insular minorit[y]."[45]

The Warren Court was a *Carolene Products* Court in other important ways, as well. It greatly expanded the rights of critics of the government, political dissenters, and even those who advocated violation of the law. To give the two most important examples, *Brandenburg v. Ohio*, at least if taken at face value, provided greater protection to advocates of law violation than any previous decision.[46] And *New York Times Co. v. Sullivan* departed from a long tradition of allowing state law to regulate defamation in order to provide extensive constitutional protection for people who wanted to criticize public officials.[47] *Sullivan* identified "the central meaning of the First Amendment" as the right to criticize the government: an endorsement of the *Carolene Products* idea that the role of the courts is to facilitate the functioning of democracy by making sure that debate is wide open.[48]

Perhaps the most dramatic example of a *Carolene Products* success story, though, is a series of cases less celebrated than *Brown v. Board of Education* or even *Sullivan*. These are the cases that established the principle of one person, one vote—the so-called reapportionment decisions. Before these cases, the Court had held that a state's decisions about how to apportion its legislature were none of the courts' business

42. *See* ELY, *supra* note 27, at 73–77.

43. 347 U.S. 483, 495–96 (1954).

44. *E.g.*, Green v. County Sch. Bd., 391 U.S. 430 (1968); Loving v. Virginia, 388 U.S. 1 (1967); Griffin v. County Sch. Bd., 377 U.S. 218 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Cooper v. Aaron, 358 U.S. 1 (1958); Lucy v. Adams, 350 U.S. 1 (1955); Bolling v. Sharpe, 347 U.S. 497 (1954).

45. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

46. 395 U.S. 444, 448–49 (1969).

47. 376 U.S. 254, 283 (1964).

48. *Id.* at 273.

at all; those decisions, the Court said, were for the political process.[49] In 1962, the Court held, in *Baker v. Carr*, that legislative apportionment was subject to judicial review.[50] Two years later, in *Reynolds v. Sims*, the Court established the principle of one person, one vote.[51] (Of course, at the time, it was "one man, one vote.") State legislators had to represent districts of at least roughly equal population.[52] A state could not arrange things so that, for example, a populous urban district and a sparsely-populated rural district each had a single representative in the legislature. That arrangement unconstitutionally devalued the votes of the people in the urban district.[53]

Today, "one person, one vote" might seem like a natural, even inevitable requirement of the Constitution. But in fact the reapportionment decisions were remarkable in several respects. *Forty-nine* states had legislatures that violated this principle.[54] What's worse, in many of them the violation was simply that the states had done, for themselves, exactly what the Constitution had done for the federal government. These states had a lower house of the legislature that was roughly apportioned according to population, but an upper house that represented geographical units, such as counties, that greatly differed in population—just as the U.S. Senate represents geographical units that greatly differ in population.[55] Mimicking the Senate was not good enough, the Court said; the principle was one person, one vote.[56]

What's more, the reapportionment decisions had little or no support in many of the usual sources of law. The decisions were based on the Equal Protection Clause of the Fourteenth Amendment. But there is no plausible argument that, when the Fourteenth Amendment was adopted, it was understood—by the drafters, ratifiers, or the general population—to outlaw malapportioned legislatures, much less to embrace the principle of one person, one vote.[57] On the contrary, malapportioned legislatures were common at the time and were not thought to present a significant constitutional problem. In fact, a powerful argument can be made, on the basis of the text of the Fourteenth and Fifteenth Amendments, that the Equal Protection Clause does not forbid discrimination in voting

49. *See* Colegrove v. Green, 328 U.S. 549, 556 (1946) ("The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.").

50. 369 U.S. 186, 209–11 (1962).

51. 377 U.S. 533, 568 (1964).

52. The Court also extended this principle to congressional districts. *See* Wesberry v. Sanders, 376 U.S. 1, 7–9 (1964).

53. *See Reynolds*, 377 U.S. at 562–63.

54. *See* KERMIT L. HALL & JOHN J. PATRICK, THE PURSUIT OF JUSTICE: SUPREME COURT DECISIONS THAT SHAPED AMERICA 139 (2006).

55. *Reynolds*, 377 U.S. at 575 ("The relationship of the States to the Federal Government could hardly be less analogous.").

56. *See* Robert B. McKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223, 226–27 (1968).

57. *Reynolds*, 377 U.S. at 590–91 (Harlan, J., dissenting).

in any way.[58] And, as I mentioned, the Court had held—as late as 1946—that the apportionment of state legislatures was a matter for the political process, not the courts.[59]

How could the reapportionment decisions possibly be justified? They were contrary to the clear implications of the text of the Constitution, to the unquestioned original understandings, and to recent precedent. They amounted to a massive interference by federal courts not just with state law but with the heart of the states' governments. Their justification was *Carolene Products*. The democratic process was blocked. In many states, there were enormous disparities in the size of districts, so that some legislators represented hundreds of times as many people as others. And—the key step, for *Carolene Products* purposes—these state legislatures were not about to fix themselves. State legislators were not going to vote themselves out of office by voluntarily redrawing district lines. The democratic process was not working as it should—citizens' votes did not have equal weight—and only one institution, the courts, could fix it. This is the clearest case for judicial review on the *Carolene Products* model.

58. These arguments were advanced by Justice Harlan in his dissenting opinions in *Reynolds*, 377 U.S. at 590–91 (Harlan, J., dissenting), and *Oregon v. Mitchell*, 400 U.S. 112, 167–68 (1970) (Harlan, J., dissenting). For a contrary view, see William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 85.

The Fourteenth Amendment was, of course, adopted in the wake of the Civil War. The Equal Protection Clause, which is in Section One of the Fourteenth Amendment, was unquestionably designed to forbid some forms of discrimination against African Americans. But there is abundant evidence that it was not intended to forbid discrimination in voting even against African Americans; and therefore, a fortiori, it was not intended to forbid treating other groups unequally in the allocation of voting rights.

There are two powerful pieces of textual evidence. First, Section Two of the Fourteenth Amendment contemplated that states might discriminate against African Americans in voting and provided a specific remedy: a state's representation in the House of Representatives is to be reduced in proportion to its exclusion of African Americans from the voting rolls. This provision—which has never been enforced—is inconsistent with a claim that the Equal Protection Clause forbids discrimination in voting entirely. If discrimination were forbidden by Section One, then Section Two would not give states the option of accepting a reduction in representation as the price of discrimination.

Even more impressive, the Fifteenth Amendment, which explicitly forbids discrimination in voting on the basis of race, would have been superfluous if the Fourteenth Amendment already banned such discrimination. In fact, voting rights for African Americans was an intensely controversial issue after the Civil War; many people who were in favor of protecting some basic civil rights of African Americans did not favor granting African Americans the right to vote. The controversy over voting rights played out for several years after the adoption of the Fourteenth Amendment before finally being "settled" in the Fifteenth Amendment. It was only formally settled, of course, because by the end of the nineteenth century, African Americans were unconstitutionally but massively excluded from voting in the states where most of them lived.

By the time of the reapportionment decisions, the Court had held, in the face of these arguments, that the Fourteenth Amendment did forbid racial discrimination in voting. Nixon v. Condon, 286 U.S. 73, 89 (1932); Nixon v. Herndon, 273 U.S. 536, 541 (1927). But the reapportionment decisions were an enormous additional step, also inconsistent in these ways with the text and original understandings, and lacking even the connection to racial discrimination, the acknowledged central concern of the Fourteenth Amendment.

59. Colegrove v. Green, 328 U.S. 549, 556 (1946).

It is also the most dramatic vindication of the *Carolene Products* footnote. The reapportionment decisions were very controversial at first. There was even an effort, reaction to those decisions, to establish a "super Supreme Court," composed of the chief justices of the fifty state supreme courts, with the power to overturn decisions of the Supreme Court.[60] That effort, of course, went nowhere. The controversy over the one person, one vote decisions died out quickly—much more quickly than the controversy over *Brown v. Board of Education*, or about the Court's decisions forbidding prayer in public schools, or about some of the Warren Court's criminal procedure decisions.[61] Within a relatively short time, the principle of one person, one vote became essentially uncontroversial, and it remains uncontroversial to this day—notwithstanding its lack of conventional legal foundations and the intrusiveness of the Court's actions. It is hard to think of a more powerful demonstration of how the *Carolene Products* footnote captured something central to our legal and constitutional culture.

Chief Justice Warren said, later in his career, that *Brown v. Board of Education* would have been unnecessary if the reapportionment cases had been decided sooner.[62] His idea was that if state legislatures had been properly apportioned—with urban areas, in particular, not being vastly underrepresented compared to rural areas—segregation would have been abolished by legislation.[63] It is far from clear that this is true, of course.[64] But Chief Justice Warren's remark reflects something important about the orientation of the Warren Court: an orientation very much in line with the *Carolene Products* footnote.

IV. A SUCCESS STORY?

That is the case for the *Carolene Products* footnote as a success story in American constitutional law. But there are many criticisms to be made as well. Begin with the first paragraph, on the importance of implementing the provisions of the Bill of Rights. As I said, this part of the footnote reflected one common criticism of the *Lochner*-era Court—that that Court invented constitutional rights not found in the text—and it implicitly rejected the idea that the proper reaction to the *Lochner* era was for the Court to retreat from all difficult constitutional issues, even those that arose because the government had arguably violated a specific constitutional provision.[65]

60. Robert B. McKay, *Court, Congress, and Reapportionment*, 63 MICH. L. REV. 255, 256 (1964).
61. *See* McKay, *supra* note 56, at 224–25, 228.
62. JOHN HART ELY, ON CONSTITUTIONAL GROUND 4 (1996).
63. *See id.*
64. *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 788–89 (1991).
65. *See supra* notes 24–31 and accompanying text.

In some respects, this part of the footnote did anticipate an important development in constitutional law over the next seventy years. The Court has, of course, not retreated from the enforcement of constitutional rights in difficult cases, as Justice Frankfurter prescribed. Perhaps most notably, the Court's approach to the First Amendment—recall that the *Carolene Products* Court cited, in the first paragraph, only examples from the First Amendment as illustrations—has become a remarkable repudiation of the Frankfurter position. Notwithstanding all the various ideological and methodological disagreements among the Justices of the Court, no one has accepted the Frankfurter approach to the First Amendment for decades. All the Justices have agreed, for some time now, that the Court has an important role to play in enforcing the First Amendment.[66]

In other ways, though, the first paragraph of the *Carolene Products* footnote has been inadequate and even misleading in its conception of the course that constitutional law should take. One problem is manifest: to say the Court should enforce the text of the Bill of Rights does not provide much guidance. The issue, invariably, is a disagreement about what the text requires. The fact that all the Justices agree on the need for judicial enforcement of the First Amendment has not prevented bitter disagreement in First Amendment cases.

The more subtle and perhaps more important problem is that this part of the *Carolene Products* footnote may reflect a misreading of the lessons of the repudiation of the *Lochner* era. Perhaps the problem with the *Lochner* era was not that the Court invented new rights that were not found in the Constitution; perhaps the rights to economic freedom that the *Lochner* Court enforced do have a sufficient basis in the Constitution. Instead, the problem may have been, for example, that the *Lochner* Court failed to understand the many possible justifications for restricting these rights in order to permit sensible regulations of economic transactions and the redistribution of wealth.[67]

That kind of disagreement, about precisely where a widely-repudiated decision went wrong, would not matter except for the effect it had on controversies later in the twentieth century—and has continued to have, to this day. In 1965, in *Griswold v. Connecticut*, the Court held that a Connecticut statute forbidding the use of contraceptives by a married couple violated the Constitution.[68] The Court did not assert a violation of any specific provision of the Bill of Rights, and Justice Black—the first Roosevelt appointee, who had joined the Court just before *Carolene Products*—dissented sharply, accusing the Court of reviving *Lochner*.[69]

66. *See* David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 376–77 (2003).
67. For an argument to this effect, see *id.* at 374.
68. 381 U.S. 479, 485–86 (1965).
69. *See id.* at 514–16 (Black, J., dissenting).

Griswold, of course, was a precursor to *Roe v. Wade*.[70] The debate over that decision has usually been cast in the same terms: did the Court invent a right to reproductive freedom that is not in the text of the Constitution? But it is not clear that that debate—ordained, in a sense, by the first paragraph of the *Carolene Products* footnote (and, more generally, by the criticism of *Lochner* reflected in that footnote)—is the most useful way to approach the issues raised by *Roe v. Wade*.[71]

The first paragraph of the *Carolene Products* footnote, though, is the least important. The second and third paragraphs, on blockages in the democratic process and "discrete and insular minorities," respectively, reflect the justification of judicial review that is distinct to *Carolene Products* and that proved so important in the Warren Court years. Those parts of the footnote, too, are subject to important objections.

Consider first the idea that the courts should intervene when "statutes [are] directed at particular religious or national or racial minorities," because "prejudice against discrete and insular minorities may . . . tend[ ] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . ."[72] There is not much room for dispute about African Americans in the Jim Crow South, whose situation seems to be described perfectly by this passage. The real question is whether the approach of the *Carolene Products* footnote can be generalized: whether it applies to any other group or is confined to a historically unique situation.

One objection to the *Carolene Products* formulation is that it misunderstands how the political process operates. This objection is that members of discrete and insular groups will in fact exercise greater power than their numbers warrant.[73] The argument is that groups that are discrete and insular—set aside from the rest of society in some way, with members who are relatively easy to identify—will be able to organize themselves more effectively. The members are more likely to feel solidarity with the group. They are more likely to have important interests in common, which will give them an incentive to organize. And the ease of identifying members will make it easier for group members to monitor each other and induce any potential free-riders to participate. This kind of argument is a standard explanation for why, for example, many advanced democracies provide agricultural subsidies: farmers of a certain crop have similar organizational advantages.[74] Meanwhile, the consum-

70. 410 U.S. 113 (1973).

71. For further discussion of this point, see David A. Strauss, *Abortion, Toleration, and Moral Uncertainty*, 1992 SUP. CT. REV. 1, 18–20.

72. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (citations omitted).

73. *See* Ackerman, *supra* note 4, at 717. The underlying theory about how groups affect the democratic political process is derived from MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965). For criticism of Ackerman's account, see Farber & Frickey, *supra* note 3, at 701–16.

74. *See* Ackerman, *supra* note 4, at 728.

ers or taxpayers who effectively pay for the subsidies are too diffuse, and the interest of each individual is too small, to permit them to organize effectively.

> Except for special cases, the concerns that underlie *Carolene* should lead judges to protect groups that possess the opposite characteristics from the ones *Carolene* emphasizes—groups that are "anonymous and diffuse" rather than "discrete and insular." It is these groups that both political science and American history indicate are systematically disadvantaged in a pluralist democracy.[75]

This argument would not apply to groups that are systematically excluded from the political process, either by being disenfranchised, or by being ostracized by other groups that refuse to form coalitions with them—or by both means, as was true of African Americans in many parts of the United States until the mid-twentieth century. Groups like that might have organizational advantages, in principle, but they would still not be able to wield their power in politics. Still, though, the argument complicates the *Carolene Products* approach. It reveals, if it was not already clear, that *Carolene Products* requires the Justices to be, in a sense, amateur political scientists. They have to decide just which groups in American politics are able to form coalitions, and how easily.

The problems with *Carolene Products* go even deeper. There are some groups that are certainly ostracized but that seem to be very unlikely candidates for special judicial solicitude—arsonists, for example, and armed robbers.[76] Convicted felons are certainly an insular minority—no politician is going to be their champion, and no respectable interest group will try to bring them under its umbrella. In some places convicted felons cannot vote.[77] But it seems to be a reductio ad absurdum of the *Carolene Products* theory to suggest that the courts should adopt a more strict standard of review for laws that disadvantage people convicted of serious crimes.[78]

The *Carolene Products* footnote anticipates this objection when it specifies that the concern is with "prejudice" against discrete and insular minorities.[79] The question is whether a group is excluded from the political process because of prejudice—that is, for illegitimate reasons—or because it should be excluded, for good reasons. But once the question is

75. *Id.* at 724.

76. *See* Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 135 (1981)

77. *See* Romer v. Evans, 517 U.S. 620, 634 (1996) ("To the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is . . . unexceptionable.").

78. It may not be completely implausible to argue that the harshness of criminal sentences in the United States reflects the kind of problem that the *Carolene Products* footnote addresses because there is no political benefit in opposing any proposal to increase the severity of a sentence. *See generally* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993). But there is certainly no hint in current law that the courts are willing to use *Carolene Products* logic in that way.

79. *See* Farber & Frickey, *supra* note 3, at 701.

put in that form, the inquiry demanded by the *Carolene Products* footnote seems to become even more difficult, and the theory underpinning the footnote—that the role of the courts is to leave controversial decisions about value-laden matters to the political branches, while just making sure that the democratic process is fair and inclusive—becomes even more difficult to implement. The reference to prejudice smuggles in the kind of moral evaluation that the footnote is supposed to prevent. The issue becomes not just whether a minority is discrete and insular—a question that itself seems to require the courts to be amateur political scientists—but whether the minority is worthy or unworthy. And that looks like exactly the kind of decision that the courts are supposed to leave to politics.

Do gays and lesbians, for example, constitute a discrete and insular minority within the meaning of the *Carolene Products* footnote, so that courts should develop special rules to protect them against laws that disadvantage them? Or are they just ordinary groups, competitors in the political process who can look after their own interests and therefore should get no more judicial protection than manufacturers of filled milk? Under current law, gays and lesbians do not receive any special judicial solicitude—not officially, in any event, although there is arguably some movement in the cases toward treating gays and lesbians as a group that merits special protection from hostile legislation.[80]

Undoubtedly, in some places gays and lesbians, like African Americans in the Jim Crow South, are cut off from the political process and isolated by prejudice. In other places, they seem not to be; and in some places they are actively courted by politicians.[81] So a court trying to apply the *Carolene Products* framework to gays and lesbians would first have to make a judgment about the strength of their political power. But then, after that exercise in amateur political science, the courts must do something that, under the *Carolene Products* approach, is even more questionable: they must decide whether any disadvantages suffered by gays and lesbians are the product of prejudice or of legitimate moral judgment. Many of us would have no problem making this judgment, but the entire point of the *Carolene Products* approach is to enable courts to avoid controversial moral issues of this kind. And because the *Carolene Products* footnote makes it critical to decide whether a group's disadvantage is the result of prejudice, it is hard to see how courts can avoid it.

Even questions that seem to fit easily under the *Carolene Products* framework turn out to be more difficult than they appear. Consider, for example, undocumented aliens, a group that seems like an excellent candidate to be treated as a discrete and insular minority. Undocumented aliens cannot vote, and there is certainly a significant amount of preju-

80. *See, e.g.*, *Romer*, 517 U.S. at 635–36.

81. *E.g.*, Ernie Suggs, *Reed, Norwood Spend Week Courting Gay Vote*, ATLANTA J.-CONST., Nov. 21, 2009, http://www.ajc.com/news/atlanta/reed-norwood-spend-week-207482.html.

dice against them. If we were looking for a group in today's society that resemble African Americans in the pre-civil rights era South, undocumented aliens seem like a plausible candidate. On the other hand, though, a nation is entitled to exclude some people from citizenship—or at least the Constitution contemplates that our nation will.[82] So the disadvantages suffered by undocumented aliens cannot be attributed entirely to prejudice. And is it so clear that they are insular? People who are of the same nationality as prominent groups of undocumented aliens can be a powerful lobbying presence on their behalf. So even in this case—which seems like a natural one for applying the *Carolene Products* framework—the courts would quickly find themselves enmeshed in both difficult questions of political science (to what extent will citizens, acting perhaps out of national solidarity, vote in ways that advance the interests of undocumented aliens) and the kinds of moral issues about the proper treatment of aliens that seem, in the *Carolene Products* vision, to be just the kinds of questions that should be resolved by the political process.

V. IS *CAROLENE PRODUCTS* OBSOLETE?

Maybe, then, the approach of the *Carolene Products* footnote, for all its appeal, is obsolete today. The *Carolene Products* approach was highly successful for a time, when the Court was attacking racial segregation, malapportionment, and excessive restrictions on political speech and activity. But perhaps once those core problems are more or less solved, the *Carolene Products* approach requires too many of the difficult judgments that, according to the theory of the footnote itself, are supposed to be made by elected officials—or that, in any event, judges do not seem especially competent to make. Today, African Americans—once the paradigm example of a discrete and insular minority—might even be characterized, by opponents of the *Carolene Products* approach, as the kind of group that enjoys an organizational advantage that gives it political power disproportionate to its numbers.[83] Even the possibility that that is true seems like a dramatic illustration that the era of the *Carolene Products* footnote has passed.

Carolene Products does not seem very helpful in analyzing some of the most controversial issues of the last few decades, like reproductive rights. It is not even clear how much the *Carolene Products* approach helps in analyzing issues that seem like successors to the Warren Court issues that were so closely connected to *Carolene Products*—current issues like the treatment of gays and lesbians. And, in general, the current Court certainly does not seem committed to, or even mildly sympathetic with, the *Carolene Products* approach.

82. U.S. CONST. amend. XIV, § 1, cl.1.

83. *Compare* Farber & Frickey, *supra* note 3, at 687, *with* Ackerman, *supra* note 4, at 718–19.

And yet, even if the *Carolene Products* approach is obsolete, "obsolete" is different from "discredited." If one were to list the Court's greatest successes of the last hundred years—areas where the Court took it upon itself to effect change, sometimes in the face of substantial opposition, and the Court's actions eventually became widely, even universally accepted—the list would reflect the *Carolene Products* approach. It would include the racial segregation cases, the reapportionment cases, and many free speech cases. It would also include the Court's retreat from *Lochner*-era invalidations of regulatory and redistributive legislation—a successful retreat that was also a part of the *Carolene Products* approach. Perhaps the *Carolene Products* footnote has become obsolete only because its most important implications have become thoroughly incorporated into the legal culture. *Of course* the Court acts in its proper role when it protects racial minorities and makes sure that all sides of the political debate are heard. If that seems like common ground today, it is a sign that the *Carolene Products* footnote is triumphant.

And besides that, if you want to say that the *Carolene Products* footnote is obsolete, what else do you have to offer? What other justification is there for judicial review—a justification that will both explain how judicial review can coexist with democratic government and guide the courts' decisions? *Carolene Products* did both of those things. What successor approach can make the same claim?

It is not enough to say that the courts should just enforce the law. That recapitulates the weakness of the weakest part of the *Carolene Products* footnote, its first paragraph. The question is precisely what the law demands; the provisions of the Constitution, even the specific ones, do not interpret themselves. Does the First Amendment protect commercial speech as fully as it protects political speech? If the nation is at war, and criticism of the government undermines the war effort, can the government punish it? The language of the First Amendment does not answer those questions. The *Carolene Products* footnote at least gives us a direction: the political process must stay open, and it is the courts' job to keep it open. Other things the courts might do, beyond those described in the footnote, are harder to justify, because they are presumptively decisions that should be left to the political process.

That may be why, in the end, *Carolene Products* is not obsolete. Despite all its weaknesses, and there are many, it still gives us a way of thinking about what the courts should do. They should protect political dissenters; they should make sure the democratic process is not blocked; they should protect minorities whose condition resembles that of the clearest example of a discrete and insular minority, African Americans in the Jim Crow South. We might disagree about what those groups are; people undoubtedly do disagree about whether gays and lesbians are such a group. But *Carolene Products* tells us what questions to ask. *Carolene Products* is certainly in eclipse now, but its essential vision is still

powerful: the role of the courts is to make sure that the democratic process remains open and inclusive, and that unfairly excluded minority groups are protected. If you have a better idea about what courts should be doing in difficult constitutional cases, let me know.