

## THE FOOTNOTE

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*He raises the poor from the dust,  
and lifts the needy from the ash heap,  
To seat them with princes,  
the princes of his people.*

—*Psalms* 113:7-8

### I. THE PROBLEM OF THE FOOTNOTE

<sup>4</sup>I would have liked to have written an essay about the relationship of law to literature—to deconstruct the opposition between them and, in the process, to say a few words about deconstructive techniques in general. I would have explained that legal writing and literary writing share a common textuality, a semiotic similarity that one could exploit in legal as well as literary contexts. I would have pointed out that the seemingly meaningless and accidental features of a text possess an economy or logic that both troubles and elucidates other features of the text. I would have shown how the processes of signification that we call the “surface features” of the text and those processes of signification that we call the “meaning” or “argument” or “point” of the text are not separable in the way we ordinarily imagine them to be, but that they feed upon and nourish each other in a most uncanny way. In particular, I would have argued that legal writings’ reliance on figural language—metaphor, metonymy, and so on—was not adventitious or accidental, something that one could do without. I would have contended that this reliance was as essential to legal as to literary expression, and that it could be exploited by the legal critic—exploited in a way that would show the contingency and limitations of our ways of thinking about legal issues. I had planned to write about all these things, and many more, but as I began to write, I was irresistibly drawn to another problem—different and yet not so different: the problem of the footnote.

Perhaps this article should be considered as a footnote to a sentence I have not yet written. Should this make what I have to say less significant? The manner in which this question forced itself upon my attention was almost embarrassing, because the issue was so trivial, so undeserving

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of serious consideration. It is no doubt true that among some law students, lawyers, and legal academics, "footnotes are the real measure of worth in legal writing."<sup>1</sup> Yet although we use footnotes to impress each other with our erudition, I strongly suspect that most legal scholars really do not think much of footnotes. They are a necessary evil, and perhaps not even a necessary one. Nowadays, we see increasing calls for essays with a minimum of footnotes, and a law review article too heavily footnoted may be dismissed as "overwritten" merely to cater to the requirements of a student edited journal.

Symbolically, of course, the footnote is of minor importance. It is relegated to the bottom of the page (or, in the case of endnotes, to the back of the volume). It is excluded from the main body of the text, either because it disturbs the flow of the text, because it is unessential to the argument, or because it is a digression or afterthought. The footnote lives a life of exclusion and marginalization. It is named after the foot, that lowly organ which spends its life near the ground, in the dirt. We remark upon the triviality of the footnote in the very metaphors we use to describe the act of footnoting: one "drops" a footnote, as one might drop a piece of garbage, or anything unpleasant or of little value.

Consider how we treat footnotes when we read a piece of legal writing. We skim over them, or even disregard them, on the assumption that the "essence" of the article is contained in the body of the text. For that reason, when an author prepares an article for publication, it is usually good practice to avoid placing too much in the footnotes. Reading footnotes distracts the eye, which must move up and down from the top of the page to the bottom. There is nothing more tedious than bobbing one's head like a pogo stick only to discover that the footnote contains nothing of substantive worth, except perhaps for a citation, an irrelevant bibliographic excursion, or the ubiquitous "*Id.*" Moreover, when there is something substantive in the footnote, it is more often than not a digression from the argument of the text, and tends to break the train of thought of the reader. If the footnotes are endnotes, the problem is even worse, for no one has the patience to flip back and forth constantly between the place one is reading and the end of the book. As a result, footnotes placed at the end of a volume (or even at the end of a chapter) rarely get read.

Of course, one can deal with this problem by placing the substantive footnotes at the bottom of the page and the bibliographic footnotes at the end of the book. But one still has to bob and weave to read the substantive footnotes, and this is quite disconcerting. Indeed, one suspects that an article that places too much of its substantive argument in the footnotes was probably not well organized or well written in the first place.

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<sup>1</sup> Mikva, *Goodbye to Footnotes*, 56 *COLO. L. REV.* 647, 653 (1985). See also Austin, *Footnotes as Product Differentiation*, 40 *VAND. L. REV.* 1131 (1987).

The author has not been careful enough to place her thoughts in a logical order and avoid digressions. Similarly, an abundance of substantive footnotes may indicate the work of colleagues or law review editors who have made the author modify or refine her statements. Such footnotes are a sign of incompletely justified arguments, or an insufficiently integrated text. On the other hand, footnotes sometimes appear because an editor attempted to excise extraneous material, and the author's recalcitrance resulted in a compromise in which the surplus verbiage has been relegated to a footnote. Such footnotes are the flotsam and jetsam of half-baked ideas and misplaced authorial pride. In any case, whatever the reasons for the presence of footnotes, one always suspects that a law review article whose footnotes continually creep up over half of the page has been poorly written—it could have been rewritten to get rid of at least some of those footnotes if the author cared enough or had enough time.

The footnote is inconsequential, inessential, an intellectual bauble that one could, in theory, do without. That is why it is excluded, marginalized, banished to the bottom of the page or the end of the book. Moreover, it is a dangerous inconsequentiality, infecting the purity and coherence of legal argument. One legal scholar, Judge Abner Mikva, has gone so far as to declare war on footnotes in legal writing. Following in the footsteps of Professor Rodell, who gained fame for decrying the declining state of all legal writing,<sup>2</sup> Mikva focuses on the footnote as symptomatic of the problems of legal writing in general.<sup>3</sup> For Mikva, footnotes are a "fungus" that has increasingly infected legal writing.<sup>4</sup> Like a biologist depicting the invasion of a parasite into its hapless host, he glumly reconstructs the inexorable introduction of this monstrosity into the body of legal writing:

How did footnotes come about? The most likely first use was as a citation to authority. . . . Unfortunately, it was all too easy to move from the pure citation to a description of what the cited authority was about. From there it was only a small step to explaining how the cited authority was distinguishable from the case under consideration, or describing what some other authority had to say about the cited authority, which is distinguishable from what some other authority had said about the cited authority, which is . . . ad very nauseam. This evolutionary process of footnoting did more than add to the length and complexity of footnotes; it led to footnotes becoming substantive. Distinguishing a case can be a subtle way of undercutting it or overruling it. The footnote thus acquired its full capacity for mischief. Meat began to fall from the text and into the footnotes.<sup>5</sup>

A logic of exclusion is at work in this fanciful explanation, a logic

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<sup>2</sup> Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1937); Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279 (1962).

<sup>3</sup> Mikva, *supra* note 1, at 647.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 648.

more important than the creation myth that Mikva offers us. The footnote, itself marginalized and excluded, is at first used to avoid (defer, put off, exclude) dispute by appeal to authority. Later, it is used to distinguish (defer, put off, avoid) the force of other cases. Yet the very process of exclusion is a process of inclusion—a marshalling of substantive reasons justifying the avoidance, deferral, and distinction. The footnote, once excluded from the opinion itself, is now the means for excluding other opinions. It is a nasty turn of affairs, indeed.

Another recurrent image is at work here as well. When Mikva discusses footnotes, he speaks not only of inclusion and exclusion but of purity and impurity: not only does he repeat Rodell's accusation that footnotes are merely "phony excrescences,"<sup>6</sup> but he labels the footnote "an abomination"<sup>7</sup> that often "perverts judicial opinions."<sup>8</sup> The footnote, which is parasitic on the text, is an impurity that must be eliminated (excluded) from the body as much as possible. Mikva announces his decision to purify his legal discourse: "I quit using footnotes in my opinions several years ago. I quit cold-turkey and it was—and sometimes still is—very painful."<sup>9</sup>

Ridding one's self of impurity brings on a shock like being thrown into cold water—it is an immersion in a ritual bath of purification (which Jews call a *mikva*). But can we cleanse ourselves of this impurity in the same way that a convert to Judaism might wash away her uncleanness by going to the *mikva*? Can we go "the way of Mikva" and purify ourselves of our need for footnotes? Could we avoid the vices of legal writing by ridding ourselves of what Mikva sees as their primary symptom—this "phony excrescence?" Or is our sin original, our fall from grace elemental, our impurity already present in and inextricably bound up with the nature of legal writing itself?

Note that Mikva, who follows in the footsteps of Rodell, might be considered as having produced only a footnote to Rodell's attack on legal writing in general: Mikva himself notes that his "aim is much lower and narrower" than Rodell's.<sup>10</sup> Nor was Rodell content to eschew annotation. His afterthoughts were collected into a new article that might serve as a footnote to the first. Should we simply be amused at this exercise in unwitting self-reference, and make some witty remark, such as "purifier, purify thyself?" Or should we remark upon the inevitability of footnoting, and wonder if this phony excrescence, this parasite, is more than it appears to be? Is this coincidence, mere wordplay, or is there a greater logic at work here? Is the problem of the footnote a problem of writing in general, and of legal writing in particular?

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<sup>6</sup> *Id.* at 647 (quoting Rodell, Goodbye to Law Reviews—Revisited *supra* note 2, at 289).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 648.

<sup>9</sup> *Id.* at 651.

<sup>10</sup> *Id.* at 647.

We must defer these questions, and consider once again the question of the footnote: If this article is only a footnote to a sentence I have not yet written, what is the ground of its existence? Could it (the foot-note) stand by itself? If the footnote were something marginal, unessential, this would be impossible. Indeed, as a mere supplement to the text, the footnote could be dispensed with altogether. But suppose the footnote turned out to be essential in some way to the text that it stands beneath? What if its position in the text were taken as symbolic of its role as a foundation of the text—as a source of support without which the text would lose its power in the community of readers? In such a case the footnote might be necessary to supplement the text, given the conventions of legal scholarship. It would now be the text that could not stand by itself, for without footnotes its author might be accused of plagiarism or unjustified assertion.

Here I must make a personal confession. I bet a colleague that I could write this article without footnotes. Then I came to my discussion of Mikva's article, and I felt compelled not only by convention, but by a sense of academic honesty, to cite his previous thoughts on the problem of the footnote, even as he felt compelled to cite Rodell. The footnote is not something that either I, or Mikva, or Rodell, could do without. Mikva, recognizing this, attempted to solve the problem by placing his citations in the body of the text.

*See, e.g.,* Mikva, *supra* note 1, at 647, 649, 653. [Note to the editors of the Law Review: Please retain this citation in the bluebook form appropriate to footnotes in the body of the text, as well as this material in brackets. It will serve to signify my *intervention* in the field of legal convention—my insertion of the excluded into the body of the included—my struggle against marginalization, my fight against a convention that I bow to even as I reject it momentarily. Note that I cannot abandon this convention indefinitely. If I do, I will simply replace it with another one.]

Mikva struggles artfully to eliminate the need for footnotes, yet even he cannot do without them: "because I am still full of footnote toxin, I put my authority citations right in the text. The result is hardly conducive to a flowing style of writing."<sup>11</sup> In later articles, he succumbs to the practice of placing citations on the margin of the page.<sup>12</sup> He makes a bow to the practice of exclusion even as he excludes exclusion itself. (Note the delicious irony of an attempt to marginalize, as much as possible, the process of marginalization itself). Yet his purification has a cost. Mikva eliminates the lack of clarity created by an abundance of footnotes only at the risk of muddying up his text.

Here we must pause and wonder. Is the footnote really so marginal, so unessential as we thought? If Mikva cannot purify his own texts completely, if the spectre of the footnote keeps reasserting itself in every text he writes, are we justified in dismissing the problem of the footnote as a

<sup>11</sup> *Id.* at 652.

<sup>12</sup> *E.g.,* Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. REV. 1123 (1986).

trivial and superficial feature of language? Or does it represent a more powerful feature of writing at work here, disguised in a trivial example?

We cannot answer these questions as yet. Instead, we must return to our original inquiry. If the footnote might be a necessary supplement to the text, could it even be more important than the text that it stands beneath? Could it not state an essential point that the text forgot to mention, but which, the author having thought about it, realized that she needed to say in order to make sense of the text, or in order to meet some trenchant criticism or pungent objection? In such a case, not only might the footnote be more important than the text, but the text could even not stand by itself—its author might be accused of not having thought the matter through without the footnote.

Perhaps the footnote might state the real point of the argument in a highly economical way. It is as if one engaged in a debate with a friend, and as one debated, adding qualifications and clarifications to the position one originally started with, one finally saw the real point one was arguing for all along. Is this at all remarkable? Isn't it one of the purposes of Socratic dialogue? Perhaps, then, the footnote is an afterthought, but the thoughts that come after the first might be more important, more clear, more to the point. Here as well the footnote has become more important than the text.

Perhaps the qualifications and the asides made in the footnote might be more important to future readers, who want to understand the import of the text. The text states the argument in a general way, sufficient for the case at hand, but the footnote touches upon the problems of the all important next case. There is a particular issue that we have in mind—a particular application or exception to the general rule that is unclear from the text and that the footnote clarifies. Is it any wonder then, that the most eagerly studied parts of Supreme Court opinions are the footnotes?

Perhaps the footnote does not solve a difficulty, but merely avoids it, defers it to another day. In *Bowers v. Hardwick*,<sup>13</sup> Justice White casually dropped such a footnote. This is not a case, he said, involving the constitutionality of sodomy laws involving heterosexual couples.<sup>14</sup> Yet the challenged Georgia statute made no distinction between homosexual and heterosexual sodomy. What was the point of this footnote? Could the majority have done without it? Or would the question of differential treatment of heterosexual and homosexual couples have reappeared insistently? Does the footnote defer, or prefigure, the real Hobson's choice (or Hardwick's choice) that the Court would rather not have addressed? Perhaps the Court did not want to admit that heterosexual sodomy was

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<sup>13</sup> 478 U.S. 186 (1986) (upholding Georgia sodomy statute as applied to consensual homosexual sodomy).

<sup>14</sup> *Id.* at 188 n.2.

protected because it could not then justify the exclusion of homosexual sodomy on principled grounds; yet the Court did not want to hold that heterosexual sodomy was not protected because that would have subjected it to a flood of criticism from heterosexuals.

Here the footnote performs the crucial task of holding the logic of the opinion together, by putting off the evil day when these questions will have to be answered. The footnote is the red cape dangled in front of the charging bull, and then removed at the last second, preserving the life of the matador. Does it surprise us that this deferral, this avoidance, is the crucial move in the opinion (like the movement of the cape at the last split second)? Does it surprise us that it is this very movement that holds the opinion together (in the same way that the movement of the cape prevents the matador's intestines from spilling out into the sand)? Does it surprise us, then, that this footnote may be as important as anything else that Justice White said in his opinion?

One could not think of a less important, less essential thing to write about than the placement of footnotes in legal texts. But if the problem of the footnote is like a boomerang, like the bad penny that keeps turning up, perhaps it is not so odd for us to ask if it is not symptomatic or symbolic of some other feature, of writing in general. And if this feature, this problem, is symptomatic of writing in general, might we not be entitled to ask if it is also symptomatic of legal writing? And thus emboldened, might we not ask a still more "serious" question—whether this mysterious feature, this disease, this flaw, this problem, is not also symptomatic of a system of law that is and can only be expressed in legal writing? Dare we hope that from such trivial beginnings an issue of momentous importance might emerge? Could we not think that our dismissal of those beginnings would itself be a marginalization worth studying for its own sake?

Yet we must put these speculations aside. It is time to move from the subject of this article—the footnote—to the *subject* of this article—the Footnote. When constitutional scholars talk about the "problem of the footnote," they are referring to a specific footnote, *the* Footnote, footnote four of *United States v. Carolene Products*, an opinion written by Justice Harlan Fiske Stone.<sup>15</sup> Here indeed is a footnote that has become more important than the text; that is often read separated from its text; that can stand alone. Nor is this footnote a trifle, or an insignificant bauble. It has inspired countless books and law review articles.<sup>16</sup>

<sup>15</sup> 304 U.S. 144, 152 n.4 (1938).

<sup>16</sup> *E.g.*, J. ELY, *DEMOCRACY AND DISTRUST* (1980); L. LUSKY, *BY WHAT RIGHT?* (1975); Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059 (1974); Brillmayer, *Carolene, Conflicts and the Fate of the "Insider-Outsider"*, 134 U. PA. L. REV. 1291 (1986); Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE. L.J. 1287 (1982); Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. (1982); Powell, *Carolene Products Revisited*, 82 COLUM. L. REV.

The fourth footnote of *Carolene Products* has not, like its siblings, lived a life of exclusion and marginalization. It has enjoyed fame and fortune. Indeed, the footnote has for so long escaped marginalization that the opposite has tended to happen—the footnote has become much more important than the body of the opinion it appears in, an opinion whose actual holding is often forgotten. This is clear in recent commentaries. Professor Ackerman states casually that footnote four appeared in an “otherwise unimportant” case.<sup>17</sup> Justice Powell notes that “*Carolene Products* was an otherwise unremarkable decision in the same line [as *West Coast Hotel v. Parrish*].”<sup>18</sup> Stone’s former clerk, Professor Louis Lusky, remarks that “the opinion occasioned [Justice Stone] no difficulty as far as the validity of the statute—the only issue on the merits—was concerned.”<sup>19</sup> Professor Brilmayer finds the footnote dropped in an “otherwise unremarkable discourse on the beauties of deference to legislative choice.”<sup>20</sup>

Is this a happy ending? Is the victory of the footnote over the text an unproblematic reassertion of equality, or does it betray its own logic of marginalization, its own deliberate disregard? If the marginalization of a footnote is always incomplete, if the problem of the footnote constantly reemerges, try as we might to banish it, will the marginalization of the body of the opinion be any more successful? Will not the “insignificant” and “unremarkable” opinion in *Carolene Products* (now relegated by history to the status of a footnote) haunt our discussions of the footnote (now understood as the real “holding” of the case)?

## II. THE OPINION AS FOOTNOTE

*Carolene Products* concerned the constitutionality of the Filled Milk Act of 1923, “which prohibit[ed] the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream.”<sup>21</sup> Section 62 of the Act declared that “filled milk . . . is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public.”<sup>22</sup> The appellee, Carolene Products Co., was indicted for shipping in interstate commerce

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1087 (1982). The responses to Ely’s masterful reinterpretation of footnote four constitute a significant body of literature by themselves: See, e.g., Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); *Symposium: Judicial Review v. Democracy*, 42 OHIO ST. L.J. 1 (1981); Estreicher, *Platonic Guardians of Democracy: John Hart Ely’s Role for the Supreme Court in the Constitution’s Open Texture* (Book Review), 56 N.Y.U. L. REV. 547 (1981); Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review* (Book Review), 59 TEX. L. REV. 343 (1981).

<sup>17</sup> Ackerman, *supra* note 16, at 713.

<sup>18</sup> Powell, *supra* note 16, at 1089.

<sup>19</sup> *Redux*, *supra* note 16, at 1095.

<sup>20</sup> Brilmayer, *supra* note 16, at 1294.

<sup>21</sup> 304 U.S. at 145-46.

<sup>22</sup> *Id.* at 146 n.1.

packages of "Milnut," a product which combined skim milk with coconut oil to produce a substance resembling whole milk or cream. Such artificial substitutes were also marketed under the trade name "Carolene," from which the company derived its name.<sup>23</sup> Carolene Products Co. argued that the statute was beyond the power of the federal government both under the commerce clause and the due process clause of the fifth amendment.<sup>24</sup> (It is often forgotten that *Carolene Products* is not only a due process case but also a commerce clause case, a fact which is usually excluded from edited versions appearing in contemporary Constitutional Law casebooks).

The themes that we found pervasive in our discussion of "the problem of the footnote"—inclusion and exclusion, marginalization and emphasis, purity and impurity—are here in force in this opinion. The federal government has acted to prevent Milnut from crossing state lines into various states. Milnut, an impure, adulterated substance which substitutes a false ingredient to create the illusion of pure, whole milk, must be excluded from state borders because of the danger to the public health.

These "surface features" of the text, these contingent facts about the opinion (contingent because Stone could have chosen any opinion in which to introduce his ideas) replicate the reasoning and the logic of the opinion itself. *Carolene Products* is also about another type of purity and impurity, another type of inclusion and exclusion—that which affects the democratic process. *Carolene Products*, especially in its famous footnote, is concerned with impurities in the democratic process caused by adulteration of the means of political deliberation (the subject of the footnote's second paragraph) or by the exclusion of discrete and insular minorities from full political participation (the footnote's third paragraph). According to the logic of the footnote, certain groups are shut out of the democratic process, relegated to the periphery. They are, to use Professor Brilmayer's expression, "insider-outsiders"—persons subject to the power of the political community yet excluded from participation within it.<sup>25</sup> The goal of *Carolene Products* is to restore them to their rightful place within the polity through judicial supervision of the results of the democratic process. The role of the judiciary is to exclude legislation which is the result of impurities in the process, and by this exclusion, include those persons previously excluded, or prevent their future exclusion.

Stone's very choice of words in the third paragraph—"discreteness and insularity"<sup>26</sup>—connote the sense of being closed off from the political process, and (from a less sympathetic standpoint) excluded as impurities

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<sup>23</sup> See *United States v. Carolene Prods.*, 7 F. Supp. 500, 501 (S.D. Ill. 1934).

<sup>24</sup> 304 U.S. at 146-47.

<sup>25</sup> Brilmayer, *supra* note 16, at 1293.

<sup>26</sup> 304 U.S. at 153 n.4.

that are falsely believed to threaten a homogeneous body politic. Because the majority seeks to keep itself pure, it excludes the pariah from the political bargaining table, banishes the scapegoat to the periphery. This vision of politics presented itself with particular urgency in 1938, on the eve of a World War fought against a regime that considered racial purity an article of faith.<sup>27</sup>

Thus, the language of *Carolene Products* is crafted to break open the hermetic seal and allow the minority to spread into the inside, to make the outsider an insider, to put the excluded group in the place it would have enjoyed had it been counted an insider all along. In so doing, *Carolene Products* contests the claim that the minority group is impure. It labels the purity of the majority a false purity, adulterated in its own, more insidious way by unreasoning prejudice. *Carolene Products* holds that true purity can be achieved only through participation, only by ridding ourselves of the dangerous impurity of thought whose ugliest manifestation is racial and religious discrimination.

Yet there is irony in the capacity of this text to refer to itself. The famous assertions of *Carolene Products*, made on behalf of the outsiders, the excluded, are themselves made in the course of an opinion extolling the rule of the majority. They are made through the use of a literary device—the footnote—which, as we have already seen, lives a life of marginalization and exclusion, which itself is considered an impurity and a hindrance. Indeed, not only do the most famous claims of *Carolene Products* appear in a lowly footnote, but the footnote does not even assert them directly. It merely raises them tentatively, deferentially (in the manner that the body of the opinion tells us the judiciary ought to behave). This diffidence marks all three paragraphs of the footnote:

There may be narrower scope for the operation of the presumption of constitutionality . . . [paragraph one]

It is unnecessary to consider now whether legislation which restricts those political processes . . . is to be subjected to more exacting judicial scrutiny . . . [paragraph two]

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities. [paragraph three]<sup>28</sup>

Here the opinion mocks itself, reserving the discussion of the marginal to the margin, and the impurities of the democratic process to the impure (footnote). The footnote exhibits what it denies, for it is on the

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<sup>27</sup> And in the process of fighting this war against a racist regime, our country would make its own invidious distinctions based upon race, distinctions that would be upheld by the very same Court that decided *Carolene Products*. See *Korematsu v. United States*, 323 U.S. 214 (1944) (executive order restricting American citizens of Japanese descent held constitutional); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (curfew imposed on Japanese-Americans held constitutional).

<sup>28</sup> 304 U.S. at 152 n.4 (citations omitted).

outside looking in. The self-reference continues as the question of judicial deference is itself deferred to another day. Yet if the opinion mocks itself, history mocks the opinion by reversing its prioritization, for succeeding events would soon make the footnote more important than the body of the opinion.

In tracing the metaphors of purity and impurity, exclusion and inclusion, we have noted an uncanny self-reference between what *Carolene Products* is about (introduction of adulterated milk into state borders) and what *Carolene Products* is about (judicial perfection of the democratic process through the protection of minority rights). In different senses, these are both the "subjects" of the opinion. They simply represent different aspects of its processes of signification, to which we might also add a third—the opinion's choice of words, its placement of a particular discussion in the (impure, excluded) footnote, its sentence length and structure, and so forth. These syntactical features have also joined into the conversation, obliquely commenting on and contradicting other aspects of the text. Thus, when I say that *Carolene Products* is about the process of marginalization and the reversal of marginalization, about insiderness and outsiderness, about purity and impurity, I am speaking of more than the reasoning of the opinion, more than the facts of the opinion, and more than the metaphors and syntactic structures used in the opinion. I am speaking about all of these at once, just as all of these speak about each other.

This uncanny conversation of the text with itself is not something that we shall shy away from in this Article, although as good lawyers we are taught to disregard such coincidences, leaving them to the students of poetry and literary texts. Instead, we shall luxuriate in the self-reference and internal disputation of the text of *Carolene Products*, riding the play of signifiers as far as it will take us. For our goal is to understand *Carolene Products* not as a legal text, not as a literary text, but as a text, neither pure nor simple. Only in so doing will we reverse the marginalization of the "irrelevant" features of *Carolene Products*, which mark the boundary of exclusion that separates law from literature.

Let us look more closely at this easiest of easy cases, this unremarkable holding of constitutionality that is *Carolene Products*. How does Justice Stone go about his exercise in constitutional redundancy, his beating of a doctrinal dead horse? In the section of the opinion marked "First," he begins by dismissing the claim that the Filled Milk Act is beyond the Congress' powers under the commerce clause:

Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare . . . or which contravene the

policy of the state of their destination.<sup>29</sup>

Here Stone nonchalantly intimates that the federal government has the power to safeguard the traditional objects (health, morals, and welfare) of the police power of the states. This would no doubt have come as a shock to the old (*Lochner* era) Court, for as Justice Sutherland had stated proudly only two years previously, "the . . . notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, ha[s] never been accepted but always definitely rejected by this court."<sup>30</sup> This is not to say that the old Court might not have upheld the statute under another line of reasoning, for the Court had permitted Congress to banish from interstate commerce products (like liquor, lottery tickets, and prostitution) that were harmful in and of themselves.<sup>31</sup> Indeed, the old Court had specifically upheld the Pure Food and Drug Act which prohibited the introduction of adulterated foods into interstate commerce.<sup>32</sup> Stone might have relied on these decisions without arguing for a general right of the federal government to promote the health, morals, and welfare of the public through the regulation of interstate commerce. Yet he is not content to rest on so narrow a ground:

Such regulation is not a forbidden invasion of state power either because its motive or its consequence is to restrict the use of articles of commerce within the states of destination, and is not prohibited unless by the due process clause of the Fifth Amendment. And it is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.<sup>33</sup>

It is important here to note Stone's agnosticism on the issue of legislative purpose, an agnosticism that will become even more important only a few pages later in the opinion. Even if Congress' goal was to usurp for itself the police power of the states through the regulation of interstate commerce, Stone will not look for an unconstitutional motivation or investigate the possibility of pretext.<sup>34</sup>

Stone concludes, then, that "[t]he prohibition of the shipment of filled milk in interstate commerce is a permissible regulation of commerce, subject only to the restrictions of the Fifth Amendment."<sup>35</sup> This brings us to the portion of the opinion marked "Second." Having obliterated

<sup>29</sup> 304 U.S. at 147 (citations omitted).

<sup>30</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936).

<sup>31</sup> See *Hammer v. Dagenhart*, 247 U.S. 251, 270-71 (1918).

<sup>32</sup> *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911).

<sup>33</sup> 304 U.S. at 147. This is not, however, as great a break with existing precedents as might first appear. See *Carolene Prods. Co. v. Evaporated Milk Ass'n*, 93 F.2d 202, 204 (7th Cir. 1937).

<sup>34</sup> Cf. *Bailey v. Drexel Furniture*, 259 U.S. 20, 39 (1922); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (congressional attempts to exercise power not granted to Congress under the pretext of enforcing constitutionally granted powers will be struck down as unconstitutional).

<sup>35</sup> 304 U.S. at 148.

the distinction between federal and state regulation in this area, Stone notes that, even during the infamous *Lochner* era, the evil heyday of substantive due process, the Court had upheld similar state statutes:

Twenty years ago this Court, in *Hebe Co. v. Shaw*, 248 U.S. 297, held that a state law which forbids the manufacture and sale of a product assumed to be wholesome and nutritive, made of condensed skim milk, compounded with coconut oil, is not forbidden by the Fourteenth Amendment. The power of the legislature to secure a minimum of particular nutritive elements in a widely used article of food and to protect the public from fraudulent substitutions, was not doubted; and the Court thought that there was ample scope for the legislative judgment that prohibition of the offending article was an appropriate means of preventing injury to the public.<sup>36</sup>

The *Lochner* era Court would have viewed this law (assuming it were passed by a state legislature) as an attempt to preserve the health, safety, and welfare of the citizenry, akin to the eradication of a public nuisance—it would have seen this law as advancing the public interest in unadulterated foodstuffs. Given its common-law-inspired understandings of the police power, the Court would easily have upheld the statute as a reasonable and nonarbitrary exercise of legislative judgment, in accordance with the rule of *Hebe Co. v. Shaw*.<sup>37</sup>

Yet Stone finds no satisfaction in upholding this act on the limited basis acknowledged by the old Court. He must devise a new methodology of judicial scrutiny. “[W]e might rest decision wholly on the presumption of constitutionality,” says Stone, “[b]ut affirmative evidence also sustains the statute.”<sup>38</sup> He tells us that Congress held detailed hearings on the subject of filled milk, gathering evidence from twenty years of scientific inquiry, and compiling them in reports of the House and Senate Committees on Agriculture.<sup>39</sup> These committees concluded that the use of filled milk as a substitute for pure milk was injurious to health and constituted a fraud on the public; retail merchants often represented filled milk to uneducated consumers as equally good or better than pure condensed milk sold at a higher price.<sup>40</sup> Stone summarizes Congress’ findings in footnote two, a footnote whose comparative significance to footnote four has been considerably less than their numerical ratio. Referring to the evidence contained in this second footnote, he states “[t]here is nothing in the Constitution which compels a legislature, either national or state [note again the casual equation], to ignore such evidence, nor need it disregard . . . other evidence which amply supports the conclusions of the Congressional committees.”<sup>41</sup> Here Stone artfully

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<sup>36</sup> *Id.*

<sup>37</sup> See 248 U.S. at 303 (legislature permitted to enact regulations to protect public health and prevent fraud).

<sup>38</sup> 304 U.S. at 148.

<sup>39</sup> *Id.* at 148-49.

<sup>40</sup> *Id.* at 149 n.2.

<sup>41</sup> *Id.* at 149.

constructs and then demolishes a straw man—as if someone had actually argued to the Court that legislatures must legislate without reference to facts. He wraps around himself the mantle of social science, praising the careful considerations of a majoritarian body, and impliedly criticizing the majority of the old Court who thought they knew better than legislatures how to run the nation's economy.

Here, for a brief moment (a second perhaps), it appears as if Stone has provided us with a new approach to judicial scrutiny, of which footnote *two* is the centerpiece. Here, in "Second," he suggests that the test of legislative reasonableness is whether Congress has held hearings, gathered evidence, made detailed findings of fact—in short, whether there are indicia of a sound and considered judgment by the elected representatives of the people based upon reliable scientific information. If the Congress has made an effort to learn the facts, if it has sought dispassionately and conscientiously to ascertain the public interest through a process of deliberation and self-education, it is not for the courts to second-guess its judgment. The theory of "Second," had it been allowed to flourish, might have developed into something reminiscent of what later writers would call "Due Process of Lawmaking"—a concern for the procedural purity of the process by which Congress makes decisions in the public interest, posed as an alternative to the Lochnerian concern with the end results of the political process.<sup>42</sup> Or, the theory of "Second" might have developed into a republican conception of politics, with a judicial role that sought to promote sincere deliberation over cynical logrolling, and public interest over private advantage.<sup>43</sup>

Yet as soon as these alternatives are suggested, they are hurriedly whisked off the stage, and another, superficially similar, line of reasoning takes their place. This seemingly harmless and uninteresting rationale appears in the section labelled "Third," which at first glance appears to be no more than the warm up act for the real celebrity, its neighbor, the famous footnote four. Yet before we accept this conventional wisdom, let us look at both of them more carefully. Let us lay out the body of the text and the footnote side by side, moving our eyes from one to the other, and listening to the conversation between them:

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<sup>42</sup> See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1673-87 (2d ed. 1988).

<sup>43</sup> See, Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1988); Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985).

<sup>4</sup>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, 713-14, 718-20, 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.

*Third.* We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

But such we think is not the purpose or construction of the statutory characterization of filled milk as injurious to health and as a fraud on the public. There is no need to consider it here as more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as do the reports of legislative committees, by revealing the rationale of the legislation. Even in the absence of such aids the 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.<sup>4</sup> See *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 584 and cases cited. The present statutory findings affect appellee no more than the reports of the Congressional Committees; and since in the absence of the statutory findings they would be presumed, their incorporation in the statute is no more prejudicial than surplusage.

As we read these words, laid side by side, we suddenly realize that we are confronted not with a text and a footnote, not with a major thesis and a throwaway remark, but with an organic theory of democratic life, a comprehensive conception of politics. These words separate the world into two parts; and in each part, a different judicial role, a different judicial rule applies. Yet as we read each column, we experience the troubling feeling that the real issues implicated within it are always outside of it, lurking in the other column we have momentarily disregarded, and yet escaping us the moment that we shift our attention. We sense that the vision of politics, the image of life, created by the footnote and the text, which boast of their comprehensiveness, is already incomplete, partial, abstracted, and impure. We sense that in the neat division of the world into text and footnote cases, another conception of politics has been excluded, marginalized, silently avoided. Let us focus then, on what everyone believes to be the most uninteresting portion of this duet, the body of the opinion, the portion marked "Third," and consider the importance of its unimportance.

In "Third," as in "Second," Stone preaches deference to legislative judgments of ends and means. In both of these sections Stone assumes that legislatures are better able than courts to serve the public interest. Yet in "Third" Stone now makes it clear that even if the Congress had held no hearings, had called no witnesses, had engaged in no factfinding or deliberations whatsoever, the constitutionality of the statute would remain unaffected. The Court will simply make up facts and reasons to justify the distinctions made by the legislation it is presented with, and it will not strike down the legislation unless the Court cannot invent a scenario in which a rational legislature might have produced the bill before it.

Here we are brought to the difficulty and the interest in this easy and uninteresting case. Stone reveals himself supremely unconcerned with the actual method by which Congress reached its conclusion, or with the actual purpose that motivated the legislators in banning filled milk. Indeed, in his fidelity to judicial deference, Stone commits the Court to an enterprise of disguise and misrepresentation. The goal of a Court faced with a due process or equal protection challenge henceforth is to paint the rosiest possible picture of the process of deliberation and of the legislature's purpose. We now see why the results of the Congressional hearings were relegated to footnote two—they were mere window dressing, a surplusage ultimately unnecessary to the decision of the case. Indeed, the whole section of the opinion marked "Second" has itself been a sham, a diversionary tactic.

Only in this light do we understand the full import of other remarks made almost casually, statements that now take on a more sinister aspect. For instance, in "Second," Stone argues that

[T]he prohibition of the statute is inoperative unless the product is "in imi-

tation or semblance of milk, cream, or skimmed milk, whether or not condensed." Whether in such circumstances the public would be adequately protected by the prohibition of false labels and false branding imposed by the Pure Food and Drugs Act, or whether it was necessary to go farther and prohibit a substitute food product thought to be injurious to health if used as a substitute when the two are not distinguishable, was a matter for the legislative judgment and not that of the courts. . . . Appellee raises no valid objection to the present statute by arguing that its prohibition has not been extended to oleomargarine or other butter substitutes in which vegetable fats or oils are substituted for butter fat. The Fifth Amendment has no equal protection clause, and even that of the Fourteenth, applicable only to the states, does not compel their legislatures to prohibit all like evils, or none. A legislature may hit at an abuse which it has found, even though it has failed to strike at another.<sup>44</sup>

And again, in "Third," he notes:

[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the Court that those facts have ceased to exist . . . . [And] a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition . . . . But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.<sup>45</sup>

By refusing to inquire into less restrictive alternatives, and by rejecting attacks based upon over and underinclusiveness, Stone wholeheartedly embraces agnosticism as to purpose. The rationale of every governmental action almost always has a nice version and a naughty version; inquiry using such proxies as means-ends fit is important, for the real legislative purpose is not always easily determined otherwise. A poor fitting of means to ends is the surest sign that the legislature's stated goals are not its real goals, and that the bill disguises some unseemly machination or invidious prejudice.

The "nice" version of the Filled Milk Act, for example, is that the bill was designed as a paternalistic measure to prevent uneducated and even illiterate consumers from purchasing a less expensive but less nutritious substitute for milk and cream. The legislature was concerned that consumers would purchase Milnut under the influence of unscrupulous merchants motivated more by private profit than by public concern. Conceivably, lack of consumer education might have undermined the efficacy of labelling Milnut as a milk substitute as required by the Food and Drug Act.

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<sup>44</sup> 304 U.S. at 151.

<sup>45</sup> *Id.* at 153-54.

On the other hand, the rationale of the Filled Milk Act also has a naughty version, as Professor Komesar tells us:

It does not take much scrutiny to see the dairy lobby at work behind the passage and enforcement of the "filled milk" act. Indeed, the dairy industry's efforts to employ legislation to keep "adulterated" products from grocery shelves and vending booths have a long history, extending from before *Lochner v. New York* to the present. It is not too uncharitable, perhaps, to suggest that concern for the dairies' pocketbooks rather than for the consumer's health best explains the dairy lobby's efforts. In fact, though the filled milk legislation seemed to be aimed at helping consumers, it may have harmed them. They were "saved" from "adulterated" products, but only at the cost of higher prices, while the dairy industry benefited from reduced competition.<sup>46</sup>

Komesar's explanation leaves us wondering who was really sacrificing public interest for personal profit. And the doctrine of "Third" gives us only this reply: Who Cares? This is a very *uninteresting* opinion, indeed. But, the deficiency of interest is not ours, but the opinion's, in its lack of concern with the integrity of the legislative process.

Moreover, if we dig deeper, forgetting for the moment that we are lawyers attempting to divine *the legal meaning* of this text—a text which, as we have just seen, suffers from an acute case of ennui—we will again witness how the opinion comments upon and even mocks itself. The portion we have nicknamed "Third" is a remarkable exercise in judicial deference to the legislature. Yet this judicial deference is a deferral both *to* and *of* the legislature. By fabricating a rational basis for this legislation, the Court not only marginalizes its own role (scrutiny of legislative action), but, ironically, also defers and puts off the legislature itself. The rational basis test requires the Court to disregard the actual legislative process, and substitute in place of the real legislature (with its adulterated motivations and flaws of reasoning) an ideal legislature, armed with precisely those facts and considerations that would make a statute reasonable and thus worthy of judicial deference. The Court adopts the stance of the infatuated lover in the first stages of a crush, who substitutes an ideal picture of the beloved for a less flattering reality.

This legislative deference is legislative *deferral*, substitution—a substitution uncannily mocked by the subject of the opinion. Even as the Court recites Congress' concerns about adulterated products that substitute nondairy fat for milk fat, it engages in its own substitution. It delivers its own adulterated product (a theory of judicial scrutiny) by substituting the constitutional theory of "Third" for that of "Second"—a bait and switch game whose contours have already been noted. The

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<sup>46</sup> Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 416 (1984)(footnotes omitted). For a more detailed treatment of the political effects of lobbying by the dairy industry, of which the Filled Milk Act was only one example, see Miller, *The True Story of Carolene Products*, 1988 S. CT. REV. 397.

Court replaces one conception of the judicial role—the inquiry into the actual deliberative process in democratic institutions—with another: the creation of excuses for pluralist hardball. In like fashion, the cream of actual legislative deliberation is skimmed away, and replaced with the artificial substitute of an imagined and ideal purpose. The Court then passes off its product to the ultimate consumer, claiming that this new judicial role is better (and less costly to society) than a more active judicial role (read here substantive due process). Finally, not only is the Court's new product adulterated, but it is even *mislabeled* as judicial scrutiny.

Here too, the issue of purity reappears in a highly problematical fashion. It is hard to know what is pure and what is impure in the portions of the opinion marked "Second" and "Third." Consider: the Court, suspecting that the legislative motivation behind the Filled Milk Act is not pure—that the Act is rather an attempt by the dairy lobby to subdue its economic competitors—hides this impurity by constructing a "purer" purpose for public consumption. Yet the purity of this purpose is artificial (and hence also impure). Consider: usurpation of the legislature's role introduces an impurity into our democratic system; requiring actual purity of motive on the legislature would encroach upon the purity of democracy. Yet abdication of the judicial role leaves no protection of the process from self-adulteration; it may reduce the courts to apologists for a process that is really impure.

The issues of substitution, purity, and deferral do not escape us. They return with each investigation into this seemingly unremarkable opinion. The Carolene product of *Carolene Products* is already, also, and always adulterated, a substitution of an unhealthy and artificial filler (institutional considerations, appeal to a nonexistent legislative consideration) for a more searching inquiry. Might we not inquire, as Congress did, whether this substitution will not ultimately injure the public's health? When, as here, the Court offers us a less costly product, will we not be tempted to choose it instead of a healthier, albeit more difficult inquiry into the processes of democratic deliberation? Will this purchase of shoddy goods not leave us worse off in the long run?

### III. THE NEW CIVIL RELIGION AND ITS PROPHETS

In developing the problematics of this uninteresting opinion—an opinion which professes no interest in the interests of special interests—we seem to have garnered for ourselves a tidy sum (of interest). How could our interpretations of so marginal a product have borne so much fruit? Perhaps *Carolene Products* is not so unimportant an opinion after all. Perhaps Stone was right to place his famous footnote in the margin of the opinion, for the problems that give rise to this footnote are already implicated in the text.

*Carolene Products* is the post-1937 Court's first extended discussion

and elaboration of a theory of judicial review proclaimed in a very famous opinion: *West Coast Hotel Co. v. Parrish*.<sup>47</sup> *West Coast Hotel*, and its companion in the Commerce Clause area, *NLRB v. Jones & Laughlin Steel Corporation*,<sup>48</sup> announce the end of the *Lochner* period in Supreme Court jurisprudence; together they constitute the boundary that separates modern from premodern constitutional law. Yet if *West Coast Hotel* forms the boundary, *Carolene Products* is the first way station in this hitherto uncharted territory.

*West Coast Hotel* is never mentioned in *Carolene Products*; the former dealt with a line of cases involving labor regulations while the latter concerned itself mainly with cases involving regulation of adulterated foodstuffs. Yet the revolution of *West Coast Hotel* was very much on the minds of the justices as they decided *Carolene Products*. The former decision had left many important and unanswered questions. What was the promise of *West Coast Hotel v. Parrish*? What contours would the new revolution in constitutional jurisprudence take? For Justice Stone, the answer was easy enough. As Stone's former clerk, Professor Lusky, reports, even before 1937, Stone "had trumpeted a call for ungrudging acceptance of the legislative judgment, for a vigorous presumption of constitutionality, and for leaving governmental decisions to legislators, who had ready access to knowledge of the needs and demands of the sovereign people."<sup>49</sup> For Stone, the doctrinal strategies of "Third" were the obvious continuation of the glorious revolution of 1937.

Yet however obvious this interpretation of *West Coast Hotel* was to the Justices in 1938, we can see in hindsight that it was not a necessary development. To be sure, there is plenty of language in Chief Justice Hughes' opinion celebrating deference to the legislature. But *West Coast Hotel* announces many other revolutionary themes besides that one in the course of upholding Washington's minimum wage law for women:

The legislature was entitled to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. . . . There is additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. . . . The community is not bound to provide what is in effect a

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<sup>47</sup> 300 U.S. 379 (1937) (upholding minimum wage law for women, and overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923)).

<sup>48</sup> 301 U.S. 1 (1937) (holding that National Labor Relations Act was not beyond Congress' powers under the Commerce Clause).

<sup>49</sup> Lusky, *supra* note 16, at 1095.

subsidy for unconscionable employers.<sup>50</sup>

As Professor Tribe has argued, these words could have been understood as a substantive decision about the liberty protected by the due process clause—a decision that “in twentieth century America, minimum wage laws, as a substantive matter, are *not* intrusions upon human freedom in any constitutionally meaningful sense, but are instead entirely reasonable and just ways of attempting to combat economic subjugation and human domination.”<sup>51</sup> *West Coast Hotel* could have been seen as the clarion call for a new doctrine of substantive economic justice, where economic rights were based not upon parameters derived from the common law but from evolving notions of economic fairness in a nascent post-industrial America. To be sure, this would have substituted one form of economic substantive due process for another. Yet one could have replied that the difference between them lay in the fact that the latter was the *right* understanding of economic substantive due process in modern times.

Similarly, *West Coast Hotel* could have been understood as questioning the political neutrality of the status quo through its deconstructive claim that “[t]he community is not bound to provide what is in effect a subsidy for unconscionable employers.”<sup>52</sup> This delightfully perverse statement responds to an unstated premise in *Lochner* era jurisprudence. Alterations of common law rules of contract—for example, those designed to ameliorate the inequality of bargaining power between the parties—were viewed by the *Lochner* Court as subsidizing one of the parties (or the public at large) at the expense of the other. Such alterations were impermissible redistributions of wealth unless they fell within the Court’s limited conception of the police power or were otherwise in aid of common law rights.

Yet, as Professor Sunstein points out, “[t]he notion of subsidy is . . . incoherent without a baseline from which to make a measurement.”<sup>53</sup> If the employer suffered from the public’s decision to enact a minimum wage law, the employee suffered from the public’s decision not to enact a minimum wage law. One might object that in the latter case the state did nothing by failing to enact such a law, but the logic of *West Coast Hotel* implies that having a common law of contracts that protects some expectations but not others is a type of action for which the state is ultimately responsible.<sup>54</sup> Hence, *West Coast Hotel* might have led to a rejection of the common law or the status quo as the benchmark for determining whether economic, political, or civil rights had been violated.<sup>55</sup> This too,

<sup>50</sup> 300 U.S. at 398-99.

<sup>51</sup> L. TRIBE, *supra* note 42, at 585 (emphasis in original).

<sup>52</sup> 300 U.S. at 399.

<sup>53</sup> Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 876 (1987).

<sup>54</sup> *Id.*

<sup>55</sup> *See id.* at 882.

would have substituted a new kind of substantive protection for the older, common law inspired jurisprudence of the *Lochner* Court.

Thus, *West Coast Hotel* represented a revolution, but a revolution of imprecise contours. It could have been a revolution, as Tribe suggests, in which economic liberty was still protected, but through a different system of values. Or, as Sunstein suggests, it could have been a decision to reject the belief in a neutral market ordering created by a common law for which the state was not responsible. In either case the Court would not have foresworn the legitimacy of substantive review of legislative enactments, or the requirement that legislation demonstrate a "fair and substantial relation" to its stated objectives.<sup>56</sup> In either case, the Court could have claimed that it was a true servant of the revolution. Yet *Carolene Products* took a third approach. It saw the vice of *Lochner*, and the virtue of *West Coast Hotel*, in purely institutional terms. Under this interpretation, the revolution of 1937 was fought not over the content of values but over who was to choose those values—after the revolution, such choices were excluded from the purview of courts and placed solely in the hands of legislatures. Thus, the portion of *Carolene Products* marked "Third" is by no means insignificant or unimportant. It represents the reinterpretation of the revolution in terms of a seemingly value neutral deference to legislative will.

And here the significance of *Carolene Products*' seeming insignificance is revealed. *Carolene Products* is the humble servant of the messianic *West Coast Hotel*, playing St. Paul to the latter's Jesus. If Jesus came to offer a message of salvation for the world, St. Paul told us what that message was. And in interpreting that message for the Gentiles, St. Paul did more than act as a messenger. He invented an entirely new religion—Christianity.

One must pardon the temptation to see the religious analogy here, in this New Testament of our Civil Religion (the Constitution), in this most ecclesiastical of cases, which even bears the name *Parrish*. Here is the long hoped for Messiah, come to sweep away the old law and replace it with the new (yet at the same time insisting that He came not to abolish the law but to fulfill it).<sup>57</sup> Here is the faithful servant, St. Paul, who in an effort to attract the heathen, downplays the role of good works (read here substantive review) in his Master's sayings, and informs us that faith alone (in the democratic process) is both necessary and sufficient for salvation. The anti-establishment and revolutionary elements of the Master's message, the identification with the disadvantaged and the poor, are all marginalized, deemphasized. Good works will not save us, for no one is without sin, and hence no one can gain salvation merely by pursuing the right values; all will ultimately fall short of the mark. The way to

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<sup>56</sup> F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

<sup>57</sup> *Matthew* 5:17.

heaven is not by good works, the enforcement of the proper choice of values, but through faith in the new civil religion—democracy.

And who writes the epistles that champion this interpretation? Who creates this new civil religion of salvation through faith alone? It is Justice Stone, the apostle whose faith in democracy disguises his agnosticism towards legislative purpose. Stone's opinion is both St. Paul and St. Peter—Stone's opinion is the *petros* (or rock) upon which this new church is founded.

What was the advantage of the interpretation Stone created in *Carolene Products*, the promise of this new civil religion? Quite simply, *Carolene Products* seemed to offer an alternative to, and a retreat from, value-laden decisionmaking by the judiciary. To Stone and his brethren, the erratically high level of judicial scrutiny adopted by the old Court had only resulted in a superimposition of its economic and political views onto those of legislatures. In the new constitutional regime, a strong presumption of constitutionality of majoritarian acts and a low level of judicial scrutiny would prevent the judiciary's intervention into controversial value choices that were properly the concern of the democratic process. Stone's interpretation of the 1937 revolution counseled that preemptive impositions of value by the judiciary should be eliminated, or at the very least, seriously curtailed.

Ideally, the judiciary would have avoided imposing substantive value choices entirely. Yet this ideal was impossible to achieve in practice, for taken seriously, one would have to overrule *Marbury v. Madison* and the doctrine of judicial review itself. Moreover, it presented a potential embarrassment. Stone and his allies on the Court were quite concerned that majorities might seek to abridge civil liberties of speech, press, and peaceable assembly, and had joined in several opinions dispensing with the presumption of constitutionality and applying a relatively high level of judicial scrutiny where freedom of speech as opposed to contract was involved.<sup>58</sup> Under the judicial nonscrutiny envisioned in "Third," an unscrupulous majority could soon make short work of political opponents, and America might easily degenerate into the very sort of fascism that Stone and his brethren saw percolating on the other side of the Atlantic. The problem for Stone and his like-minded colleagues was how to reconcile their instinct for the preservation of civil liberties with their commitment to legislative deference and judicial self-restraint. The revolution they had fought for was in serious danger of unravelling intellectually at the very moment of its success.

According to the institutional interpretation of the 1937 revolution, preemptive value choices had to be excluded from the judicial role. They represented the evil of the old religion, an impurity and a danger to the

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<sup>58</sup> See, e.g., *Near v. Minnesota*, 283 U.S. 697 (1931); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *De Jonge v. Oregon*, 299 U.S. 353 (1937). See also Lusk, *supra* note 16, at 1094-95.

democratic faith. Yet the need for such preemptive choices reasserted itself as soon as they were excluded. A high level of judicial scrutiny—a serious commitment to judicial review—was both necessary and dangerous to the new civil religion; necessary because of the desire to preserve civil liberties, dangerous because it threatened the intellectual coherence of the new Court's teachings.

If a serious commitment to judicial scrutiny could not be eliminated in all cases, perhaps it could be confined to its appropriate sphere. The dirty and disgusting job of judicial review might be banished to areas demarcated in advance, much as one places lepers, criminals, or the insane in a colony, prison, or asylum. The messy and questionable task of judicial scrutiny might be *confined* to particular types of legislation, to a particular group of factual situations, without infecting the purity of the general commitment to democracy. This confinement, this quarantine, might allow the disease or abnormality to be treated on its own terms without risking an infection of the general populace. Here is the solution of *Carolene Products*—a partial exclusion, which divides the constitutional world into a rule (deference, the kingdom of "Third") and an exception (scrutiny, the *hospital* of the footnote, where diseases are treated, or otherwise prevented from injuring the outside world).

And with this exclusion comes a new myth to justify the exile, the marginalization, the neat division of the world into rule and exception, normal case and abnormal, healthy and sick. It is well stated by Justice Powell:

The fundamental character of our government is democratic. Our constitution assumes that majorities should rule and that the government should be able to govern. Therefore, for the most part, Congress and the state legislatures should be allowed to do as they choose. But there are certain groups that cannot participate effectively in the political process. And the political process therefore cannot be trusted to protect these groups in the way it protects most of us.<sup>59</sup>

The key words in this passage—the words that establish and justify the logic of exclusion and marginalization—are "for the most part." Note their implications: The political process works effectively most of the time; representative democracy can generally be trusted to act in the public interest. Nevertheless, in a small, selected group of cases, which can be readily identified, the process malfunctions. In that marginal set of cases the judiciary properly may subject legislation to a higher level of scrutiny, not because it is authorized to impose its value choices upon the majority, but because the process itself is defective, undemocratic, impure. And in the very act of excluding these marginal situations from the norm, the judiciary demonstrates a double fidelity to democracy: First, because it avoids interfering in the normal processes of democratic institutions, and second, because it intervenes in those and only those abnor-

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<sup>59</sup> Powell, *supra* note 16, at 1088-89.

mal cases in which the democratic ideals that justify judicial deference have been disserved.

Here the Court takes for itself a new role—the physician who tends to the diseased, or the pastor who brings succor and comfort to the criminal or to the leper. And it is well that the Court should confine its work to this very small class of cases—the derelicts of the democratic process. For as Jesus tells us, “[t]hose who are well have no need of a physician, [only] those who are sick.”<sup>60</sup> The Court’s proper role is as master of the marginal, like the doctor who preserves health by treating the sick, the prison warden who preserves safety by sequestering the dangerous, the minister who preserves morality by preaching to the sinful.

The metaphors of purity and impurity, sickness and health, inclusion and exclusion, are busily at work in the language of the third paragraph of the footnote. Stone speaks of prejudice against discrete and insular minorities as a “special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>61</sup> Thus, prejudice is a special condition, an impurity or illness that is limited in scope, unusual, a defect that one is not likely to find everywhere. It is precisely because of its limited nature that it can be excluded, cut off, placed outside the political process through judicial supervision. The task of the judiciary, then, is to exclude or set aside those legislative enactments that are the result of this special condition. The rhetoric of inclusion and exclusion closes in upon itself, for exclusion will be remedied by a form of exclusion. The judiciary outlaws those decisions and actions that result from an imperfect political process, leaving the purer, democratic products of the process untouched and uncontaminated.

Yet at the very moment in which Stone makes this division, impurities have already infiltrated into the political system. For we have no reason to believe that prejudice, lack of deliberation, stereotypical thinking, and invidious motivation appear magically only during consideration of legislation that tramples upon civil liberties.<sup>62</sup> If the political process is impure where noneconomic rights are at stake, it is equally impure when economic rights are concerned. Yet this is the governing myth of the new Civil Religion—the process will never fail us when the legislature considers particular subject matters (economic rights) while it often fails us when considering others (political rights).

Merely to state this myth is to reveal its fictional character. Yet the task Stone set for the judiciary in “Third” was to perpetuate that myth, and where economic rights were involved, to disguise every prejudice as a principle, every adulterated action as the servant of the public interest.

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<sup>60</sup> *Matthew* 9:12.

<sup>61</sup> 304 U.S. at 153 n.4.

<sup>62</sup> Nor do we have reason to believe that such behavior is not manifested by those persons who actively support and defend civil liberties. See Ackerman, *supra* note 16, at 739-40.

Once again we see that the substitution of "Third" for "Second" was more than accidental, that it was essential to the logic of Stone's work. Stone could not have taken what he said in "Second" seriously: to do so would have admitted the possibility that the impurity in the political process could not be cabined in, that it might infect even purely economic legislation. He would have had to admit that legislation that does not directly address civil liberties or the rights of suspect categories, even legislation neutral on its face, might be contaminated by the same disease and deformity that abides in the exile of the footnote.<sup>63</sup> Yet how could he concede that the epidemic had spread beyond the confines of the hospital, that the criminal population had escaped their prison, without destroying the essential *myth*, the faith of the new Civil Religion? Such an alternative was too horrible to be contemplated. And so, *Carolene Products* perpetuates a deception through the artful substitution of "Third" for "Second," clinging all the while to its pluralist faith in a discernible public interest—a public interest that is more than just the vector sum of political forces and yet is achieved only through their summation.

#### IV. THE FOOTNOTE AS OPINION

The governing myth of *Carolene Products*—the division of legislative acts into normal and abnormal, democratic and depraved, is replicated in the syntactic structure of the written opinion. The body of the opinion discusses the (deferential) role of the Court in the usual case, while the discussion of the abnormal, exceptional case of a defective process is placed in a footnote. Once again, however, the opinion's self-imitation involves self-commentary and self-contradiction. From the placement of the footnote *as a footnote*—as a marginal addition to an otherwise complete judicial opinion—one might have gathered that the discussion in footnote four was unessential to the logic of the opinion it appeared in. And indeed, as Professor Lusky reports, Justice Stone did not *intend* for footnote four to be anything more than exploratory—it was designed merely to stimulate discussion on the issue of when higher levels of scrutiny would be appropriate.<sup>64</sup> However, whether the text of this footnote actually appeared in this or any other opinion, its logic was hardly adventitious. The theory of footnote four was necessary to give intellectual coherence to Stone's particular interpretation of *West Coast Hotel v. Parrish*, an interpretation based upon a pluralist conception of politics in which the Court had only a limited role, just as we have already seen that the substitution of "Third" for "Second" was equally necessary to this conception. And if the logic of this footnote was only tentative and not fully developed, this simply made all the more problematic the opinion it supported.

<sup>63</sup> See Brillmayer, *supra* note 16, at 1305-13.

<sup>64</sup> See Lusky, *supra* note 16, at 1098-99.

Stone's institutional interpretation of *West Coast Hotel* (the third section of *Carolene Products*) raised the embarrassing question why judicial deference was not appropriate in every case. The reasoning of "Third" seemed to offer no way of picking and choosing among subjects for more searching judicial review. Yet the Court did, in actual practice, strike down some statutes but not others. If so, the Court's decision to defer in a particular case might be seen as just as much a value choice as the decision to scrutinize strictly in another case, and one was back to the vices of *Lochner*.

Thus, whenever the Court decided an economic regulation case, the logic of the footnote hovered at the periphery, supporting the Court's decision by answering the unspoken objection: "Why did you defer here and not elsewhere?" Only by characterizing the Court's role as properly concerned with marginal failures of process (the subject of the footnote) that called for more searching judicial scrutiny could the Court justify its new role (or nonrole) in the general area of social and economic regulation (the subject of the text). Only by explaining that higher levels of scrutiny were justified by the ideals of democracy themselves and not by a particular substantive conception of values could the new Roosevelt Court distinguish its work from the substantive due process review of the hated *Lochner* Court. And only by linking the Court's abandonment of the presumption of constitutionality to the ideals that justified the presumption could the Court explain why it deferred to the legislature in some cases but not others.

Thus in every economic due process case the logic of the footnote is deferred yet present, silent yet secretly evoked. In the doctrinal picture painted by the Court, it is kept outside the canvas, yet through this very act of exclusion it becomes the frame that keeps the canvas taut. Here, then, is yet another sense in which the footnote dominates the text. For not only has footnote four become more famous than the opinion in *Carolene Products*, it also supports and justifies the pluralist conception of politics in post-1937 constitutional jurisprudence. It is aptly called a footnote—for just as the body cannot stand or move without feet, the edifice of modernist constitutional law cannot support itself without complementary theories of judicial review and nonreview.

Yet, at the same time, if the logic of the footnote supported the logic of the opinion (and hence by extension the logic of post-1937 economic regulation cases in general), the converse was also true: The logic of the famous footnote four was predicated upon the very interpretation of *West Coast Hotel* that necessitated the footnote's existence. Footnote four owes as much to "Third" as "Third" owes to it. This footnote is the remedy to a disease, yet like a vaccine it bears the characteristics of the sickness it seeks to cure. The articulation of a justification of judicial review based upon failures of process is the natural result of the institutional interpretation of the 1937 revolution which saw the rough and

tumble of legislative bargaining as the appropriate method for ascertaining and enforcing values. Because the text of *Carolene Products* defends judicial deference in pluralist terms, the footnote also defends judicial nondeference in pluralist terms—that (putting enforcement of the Bill of Rights to one side) judicial review is only justified to the extent that it can be tied to the correction of the limited flaws of democratic pluralism.<sup>65</sup>

The faith of *Carolene Products* was that one could exclude values from the judicial role, and by casting them out substitute the task of purifying the democratic process. Yet, as so many commentators have noted, the purported exclusion of value that justified *Carolene Products* is a false exclusion, for controversial value choices arise anew the moment that others are avoided. The Supreme Court still had to identify those minorities and those fundamental liberties that were to be protected by more searching judicial scrutiny. Thus, the problem of the footnote reappeared insistently, for the more value choices were marginalized and ex-

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<sup>65</sup> But can we put the Bill of Rights to one side? Or doesn't this relegation to the periphery simply recreate the same set of problems discussed throughout this article? If the first paragraph of footnote four—which sees enforcement of the Bill of Rights as an essential judicial function—can be so casually disregarded, if it is itself a footnote within a footnote, will this act of marginalization not result in its own set of difficulties that will trouble us later on?

The first paragraph was inserted into the body of footnote four at the request of Chief Justice Charles Evans Hughes (the author of *West Coast Hotel*), who wrote Stone that he was "somewhat disturbed" by the theory of the footnote. Lusky, *supra* note 16, at 1106. The different treatment of cases involving the Bill of Rights, argued Hughes, should "lie not in the nature of the *test* but in the nature of the right invoked." *Id.* (emphasis in original). Hughes meant by this cryptic remark that it was unnecessary to create new levels of scrutiny for cases involving rights like speech. Rather, the judicial function should be the same in all cases under the Due Process Clause or the Bill of Rights. The contours of what would constitute a reasonable restriction of speech should be determined by the nature of the right of free speech, and not by reference to an artificial test of higher or lower scrutiny. See Friedman, *Charles Evans Hughes as Chief Justice 1930-1941: The Complexities of Moderation* (1978) (Unpublished D. Phil. Thesis). In this respect Hughes was prescient, for the creation of the two tier system of scrutiny did indeed result in future difficulties, as discussed *infra* text accompanying notes 71-85.

Justice Stone, however, did not directly address this criticism. Rather he simply included cases involving the Bill of Rights in his laundry list of situations in which a higher level of scrutiny might apply. Stone's grafting of Hughes' objection into the body of the footnote altered the nature of the objection, and at the same time introduced a dangerous supplement into the theory of the footnote itself. While the second and third paragraphs justify judicial review as a means of counteracting pathologies in the representative structure of democracy, the first paragraph appears to justify judicial power on the basis of textual commitments in the Constitution itself. It thus undercuts the non-textual or meta-textual justification of judicial review in the succeeding paragraphs. Moreover, while the second and third paragraphs envision judicial protection of relatively neutral pluralist and democratic values (as opposed to the particular values of particular majorities), the first paragraph suggests that the judiciary should enforce the Constitution's openly substantive commitments listed in the Bill of Rights. See Tribe, *supra* note 16, at 1065-70. Moreover, as discussed in the next section of text, to defend these substantive choices on the ground that they, too, are somehow necessary to the protection of democratic values, threatens to call into question the original assumption of value neutrality.

cluded, the more the Court depended upon them in its appointed task of purifying the democratic process. Justice Powell aptly notes that

[f]ar from initiating a jurisprudence of judicial deference to political judgments by the legislature, Footnote 4—on this view—undertook to substitute one activist judicial mission for another. . . . Where the Court before had used the substantive due process clause to protect property rights, now it should use the equal protection clause—a generally forgotten provision that Holmes once dismissed as ‘the usual last resort of constitutional arguments’—as a sword with which to promote the liberty interests of groups disadvantaged by political decisions.<sup>66</sup>

The problem of the footnote is especially powerful in this passage. Here the excluded, the marginalized, and the cast out—judicial activism, the equal protection clause, and disadvantaged minorities—combine to subvert the new constitutional regime. The previously discredited equal protection clause becomes the new champion of substantive values. Arguments about liberty are easily disguised as claims about equality and vice versa—an interchangeability familiar to every student who has taken an introductory course in constitutional law.

Moreover, as soon as the Court tried to exclude substantive due process from consideration, it simply reappeared in a new guise. As many scholars have noted (and especially in the numerous discussions of Dean Ely’s excellent book), one needs a substantive vision—of what kinds of discrimination are invidious, of what kinds of groups are deserving of judicial protection, of the substantive content of fairness, of the rights of due process—in order to determine whether the democratic process has in fact misfired.<sup>67</sup> And here, says Justice Powell,

[one] must pause to wonder. If I am correct about the implicit link between a substantive judgment and a malfunction of process, then one may inquire whether we have not returned in some cases to a kind of substantive due process. And one may also wonder what Stone—who had fought so vigorously against substantive due process—would have had to say about that.<sup>68</sup>

## V. THE PARTIALITY OF CAROLINE PRODUCTS

The metaphors of *Carolene Products* are metaphors of inclusion and exclusion—of filled milk, footnotes, minorities, and defects in the democratic process. Yet *Carolene Products* is also exemplary of an even more basic form of inclusion and exclusion—the inclusion and exclusion that is necessary to theoretical conceptions expressed in our imperfect language. In identifying the pluralist, institutional features of *Carolene Products*, we have discovered that *Carolene Products* is a partial reading of *West Coast Hotel*, a particular path of doctrinal development chosen over

<sup>66</sup> Powell, *supra* note 16, at 1089-90 (quoting *Buck v. Bell*, 274 U.S. 200, 208 (1927)).

<sup>67</sup> See, e.g., Brilmayer, *supra*, note 16; Ackerman, *supra*, note 16; Tribe, *supra* note 16; Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981).

<sup>68</sup> Powell, *supra* note 16, at 1091.

other unarticulated alternatives. Like the development of Christian theology, the sense and direction of *Carolene Products* is partially identical to and partially different from the sense and direction of the texts it builds upon and seeks to interpret, including some aspects of these texts while excluding others.

This inclusion and exclusion, this partiality, is a characteristic feature of law conceived of as *writing*, as the creation of a series of texts through the reading and rereading of previous authoritative materials. Each successive reading is both a partial reading and a partial misreading of what has gone before, each understanding both a partial understanding and a partial misunderstanding. And by misreading and misunderstanding, we do not mean merely mistaking the author's intentions, but rather a selective grasping (or inclusion) of the unspoken possibilities of previous texts, which channels future interpretations and yet also creates new possibilities for understanding (and misunderstanding).<sup>69</sup>

Yet to say that law is a kind of writing is also to say that Law is a kind of *composition*. Law, like religion, is a way of describing the world to ourselves, and in so describing, it helps to create that which it describes. Law remakes the world and ourselves as we use it to regulate and direct our activity. Thus we might say that law is constitutive—not only of itself, but also of our selves, our goals and values, and the society in which we live.<sup>70</sup> Yet the constitution and composition of our texts (and of our lives), is always both inclusion and exclusion; for it is determined both by what is absorbed and what is omitted, what is central and what is peripheral, what is emphasized and what goes unnoticed.

*Carolene Products* exemplifies these facets of law as writing. *Carolene Products* carries with it a dominant conception of political life, which is, of course, partial. This conception is both an inclusion (of a conception of politics, of a practice of judicial review, of a theory of institutional roles) and an exclusion (of alternative conceptions). Moreover, this partiality is not accidental. A deconstructionist would say that the very act of intellectual conception inevitably involves exclusion. The word "conceive" itself, derived from the Latin *concipere*, "to take in," connotes the simultaneous inclusion of some while leaving others outside (just as biological conception can only occur where an egg is fertilized by one sperm to the exclusion of others).

Yet simultaneously deconstruction argues that—unlike the process of biological conception—the marginalization and exclusion necessary for intellectual conception is never complete. Traces of banished and deemphasized alternatives lurk within the dominant conception, supporting it and at the same time calling its dominance into question. This is

<sup>69</sup> See Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 931-42 (1988); Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 774-85 (1987).

<sup>70</sup> See J. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985).

the problem of the footnote writ large, the non-trivial lesson to be learned from the trivial example with which we began this Article. Indeed, our ability to glean important insights from the trivial is itself an example of the deconstructive point.

We have already seen how *Carolene Products* excluded the impurities of *Lochner* only to introduce new impurities in its own conception of judicial review, how it demarcated areas in which the political process was defective only by refusing to see deficiencies in the process as a whole, how it banished value choices from the judicial role only to see them reemerge in other contexts. The history of *Carolene Products* is the history of our discovery of its partiality, of its intellectual marginalizations. For history deconstructs—revealing that the dominant conceptions we use to understand the world at a particular point in time are increasingly inappropriate for solving the problems of later years. As events progress, altering our awareness of social reality, we discover the importance of what our theories marginalized or neglected, and how our conception has sown the seeds of its own destruction, adulteration, and putrefaction in what it has overlooked, in what it has excluded. Ironically, the impurity of a dominant conception—the source of its eventual decomposition and decay—is due less to what it lets in than to what it leaves out. Thus, as we enter the next decade, the next century, we will find that, for all the good *Carolene Products* has done us, its shortcomings will become more and more apparent.<sup>71</sup>

For example, in the innocent division of the world into text and footnote cases, between the heightened scrutiny of footnote four and the non-scrutiny of “Third,” we can see the beginnings of the bankruptcy of equal protection jurisprudence in the 1970s. We cannot place the blame for these difficulties entirely on Justice Stone, who offered footnote four as the beginning of a search for a modern constitutional jurisprudence. Rather, the fault lies in the shortsightedness of his successors, who allowed his suggestions to ossify into an unthinking paradigm of judicial practice. Thus, by the 1970s, Stone’s revolutionary approach had hardened into an equal protection doctrine featuring two tiers of scrutiny, where government action either received no review at all or a virtually irrebuttable presumption of unconstitutionality. The only issue in most cases was which level of scrutiny applied, which in turn reduced to the question whether a suspect class or a fundamental right was affected.

At first, this ossification did not appear to create any significant disadvantages. During the last years of the Warren Era and the first years of the Burger Era, the Supreme Court continued to add new fundamental rights, such as the right to travel in *Shapiro v. Thompson*,<sup>72</sup> the right to marry in *Loving v. Virginia*,<sup>73</sup> and the right of access to courts in *Boddie*

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<sup>71</sup> See Ackerman, *supra* note 16, at 744-46.

<sup>72</sup> 394 U.S. 618 (1969).

<sup>73</sup> 388 U.S. 1 (1967).

*v. Connecticut*.<sup>74</sup> Yet because the two-tier theory seemed to offer no alternative between total deference and total unconstitutionality, the recognition of new fundamental rights and suspect classes was made increasingly difficult. This difficulty suited conservatives like Justice Rehnquist perfectly well, for it guaranteed that the Court would be loath to introduce new theories requiring strict scrutiny. In such situations, the federal courts were left with only the alternative of rational basis review, which in most cases would do little to disturb the economic status quo.

This is not to say that the Supreme Court would not revise the list of suspect classes later on, as it did in the case of gender, or that it would not devise alternative theories of scrutiny, as it did in cases like *Plyler v. Doe*<sup>75</sup> or *City of Cleburne v. Cleburne Living Center*.<sup>76</sup> Nevertheless, the two tier system of equal protection of the 1970s created an orthodox, a doctrinal hurdle, that any new theories of discrimination or essential rights had to overcome. The gender and illegitimacy cases, for example, were regarded as exceptional situations that did not fit easily into the "normal" mode of constitutional analysis. And in those cases where the Court was unable or unwilling to abandon theoretical normalcy—*Dandridge v. Williams*,<sup>77</sup> *Rodriguez*,<sup>78</sup> *Harris v. McCrae*<sup>79</sup> and *Beazer*<sup>80</sup>—it relegated many of the most important types of flaws of the democratic process to the nonprotections of the rational basis test.<sup>81</sup> In this sense, later cases like *Plyler* and *Cleburne* must be understood as sports that

<sup>74</sup> 401 U.S. 371 (1971)(recognizing right of access to courts in specific context of divorce proceedings).

<sup>75</sup> 457 U.S. 202 (1982)(applying equivalent of middle level scrutiny to state's denial of free public education to children of illegal aliens).

<sup>76</sup> 473 U.S. 432 (1985)(applying heightened scrutiny under the guise of rational basis review with respect to discrimination against mentally retarded persons).

<sup>77</sup> 397 U.S. 471 (1970)(upholding maximum welfare grant of \$250 a month regardless of family size).

<sup>78</sup> *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973)(upholding unequal system of public school financing).

<sup>79</sup> 448 U.S. 297 (1980)(upholding federal decision to finance expenses of childbirth under Medicaid program but not medically necessary abortions).

<sup>80</sup> *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979)(upholding policy of not hiring persons receiving methadone maintenance treatment even where applicants had successfully undergone treatment for at least a year).

<sup>81</sup> The partiality and incompleteness of *Carolene Products'* conception of judicial review became apparent in the rapidly evolving social and economic circumstances that followed the Second World War. By the 1970s the nature of the economy and governmental regulation had changed sufficiently that few economic equal protection and due process cases before the federal courts involved direct regulations of freedom of contract. Instead, the very success of the New Deal in fostering redistributive social welfare programs had set the stage for important constitutional questions concerning the distribution of government entitlements like social security, medical benefits, and education. Similarly, many of the so-called economic due process and equal protection cases of the 1970s really involved unsuccessful attempts to give protection to new types of suspect classes and fundamental rights that a changing society viewed as increasingly significant. See Balkin, *Federalism and the Conservative Ideology*, 19 URB. LAW. 459, 489-91 (1987).

reflect a profound dissatisfaction with the gradual stagnation of equal protection doctrine. Moreover, as cases like these become less and less exceptional, they announce the incipient rejection and transformation of the two-tier system, a transformation that we are living through even now.

The process of doctrinal ossification culminated in the 1973 decision in *San Antonio Independent School District v. Rodriguez*,<sup>82</sup> in which the Court not only held that education was not a fundamental right but reiterated that poverty was not a suspect classification. With that decision the Court seemingly closed off, for a time, the list of rights and classes that would be counted as "footnote cases"—and would thus receive the benefits of heightened judicial scrutiny. In *Rodriguez*, Justice Powell surveyed the list of fundamental rights and decided arbitrarily that the Court would accept no more of them. In support of this decision, he announced that henceforth no right would be considered fundamental unless it had been explicitly or implicitly recognized in the Constitution.<sup>83</sup> This statement was itself an ossification of doctrine, a decision to consolidate constitutional principles at a particular point in history. For the right to procreate in *Skinner v. Oklahoma*<sup>84</sup> and the right to travel in *Shapiro v. Thompson*<sup>85</sup> were no more and no less implicated in the Constitution than the right to education in *Rodriguez*. The only difference was that the former rights had been mentioned in cases decided before 1973. All Powell could offer in justification of his ipse dixit was that these rights had already been let in the door—and that the Court would not compound that error by adding new rights. Thus, *Rodriguez* symbolized not only a form of doctrinal stagnation, but, ironically, a new form of exclusion—an attempt to place a hermetic seal on the logic of footnote four, to prevent the accelerating conversion of text cases into footnote cases.

As I have said, we cannot lay the blame for *Dandridge* and *Rodriguez* wholly upon Justice Stone. Yet there is a connection between the division of text and footnote and the later problems of the 1970s, between the paradigm of *Carolene Products* and the words of Justice Stewart in *Dandridge v. Williams*:

For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era in which the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488. That era long ago passed into history. . . . To be sure, the cases cited, and many others enunciating this fundamental standard under

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<sup>82</sup> 411 U.S. 1 (1973).

<sup>83</sup> *Id.* at 33-34.

<sup>84</sup> 316 U.S. 535 (1942).

<sup>85</sup> 394 U.S. 618 (1969).

the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, *but we can find no basis for applying a different constitutional standard.* . . . [I]t is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.<sup>86</sup>

How did this state of affairs come about? How was the progressive vision of Justice Stone twisted into a heartless orthodoxy? How was revolutionary politics stultified into conservative dogma, the religious fervor of 1937 made pharisaic? The beginnings of the problem of the 1970s may be found in the articulation and division in footnote four itself, an articulation originally designed to remove obstacles in the path of progressive economic and social policies. Yet within this strategy lay the possibility of its own emasculation and deradicalization.

To understand this, one must recall the haphazard way in which even the most progressive Supreme Court of the century dealt with the problem of poverty. Many of the leading suspect class and fundamental rights cases of the late Warren and early Burger Courts were really decisions designed to protect the rights of the poor or the economically powerless. Certainly this is true of leading cases like *Boddie v. Connecticut*,<sup>87</sup> *Shapiro v. Thompson*,<sup>88</sup> and *Graham v. Richardson*,<sup>89</sup> at least before a more conservative Court gradually sapped them of their transformative force.<sup>90</sup> Yet, at the same time, the Warren and Burger Courts refused to accept poverty as a suspect classification, or promise judicial scrutiny where differential levels of economic power were implicated *per se*.

The resulting doctrinal schizophrenia is too easily explained as the Warren Court's uncompleted progressive agenda rudely truncated by the Burger Court. It reflected a deeper ambivalence. During the 1960s and 1970s the Court clearly sensed the powerlessness of the poor, but was unable or unwilling fully to accept the claim that the democratic process treated lower income classes unfairly *in general*. Instead, the Court picked out fundamental rights whose abridgement affected the poor in significant respects, or else relied upon suspect classes that were, in some contexts, proxies for poverty. This is not to say that these suspect classes (race, national origin, gender, alienage, illegitimacy) and these fundamental rights (access to courts, right to travel) were not important and deserving of protection in their own right. Still, the issue of economic

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<sup>86</sup> 397 U.S. at 484-86 (citations and footnotes omitted) (emphasis added).

<sup>87</sup> 401 U.S. 371 (1971).

<sup>88</sup> 394 U.S. 618 (1969).

<sup>89</sup> 403 U.S. 365 (1971) (holding unconstitutional denial of welfare benefits to aliens).

<sup>90</sup> See also *Goldberg v. Kelly*, 397 U.S. 254 (1970) (creating due process protections for recipients of welfare benefits).

inequality hung around them like an unwelcome relative (a poor relation) whom one does not have the heart to expel but who is certainly not going to receive a permanent invitation to stay.

Hence, in all of the fundamental rights and suspect class cases of the 1960s and 1970s, the issue of economic power was both acknowledged and unacknowledged. The Court was willing to remedy the ineffectiveness of the political process to aid the poor in every way except directly. And in so doing, the Court created rationales for heightened judicial scrutiny that were so awkwardly constructed, so piecemeal, that they created sympathy for Powell's skeptical conclusion in *Rodriguez* that it was time to stop picking out fundamental rights and suspect classes at random, that it was time to bar the door.

The source of the deep-rooted ambivalence that ultimately led to *Dandridge* and *Rodriguez* is not the series of appointments made to the Court between 1937 and 1971, although that undoubtedly had some impact. The source of the problem is in the ideology of democratic pluralism reflected in the intellectual framework of *Carolene Products*—in footnote four and the text, "Third," that surrounds it. Within Justice Stone's list of the causes of failures of democratic process, no mention is made of what seems today to be the most obvious cause of all—disparities in political power caused by differences in economic power. In 1938, Stone saw unreasoning prejudice, censorship, and limited access to the ballot box as the chief factors adulterating the purity of self-rule, and given the experiences of his day, these assumptions cannot be too much faulted. Yet fifty years of history would prove this viewpoint seriously inadequate. Today, in a country where traditional civil liberties are relatively well protected, we can see that disparities in wealth and economic power may poison the democratic process every bit as much as the imperfections Stone identified in his famous footnote.

Footnote four's blindness to these impurities is not accidental—it is inherent in its logical structure. The importance of this logic consists less in what footnote four says than in what it does *not* say. In the second paragraph of footnote four, when Stone decries "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," he does not consider the possibility that relative economic strength also affects the possibility of subsequent repeal. Nor does he imagine that governmental action that *creates or reinforces disparities in economic wealth and power* might have exactly the same self-sustaining effect as governmental action that more directly affects political rights of speech and suffrage. To use the famous example of *Williamson v. Lee Optical*,<sup>91</sup> if ophthalmologists and optometrists use draconian regulations to drive opticians out of business, it is hardly likely that the latter group's weakened economic condition will enhance their

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<sup>91</sup> 348 U.S. 483 (1955).

political effectiveness in a subsequent battle for repeal. Moreover, as proponents of campaign finance laws have argued for years, freedom of speech means little if no one can hear you, either because you lack the money to make yourself heard effectively or because your opponents have drowned out your message by means of their superior resources.

Similarly, in paragraph three of footnote four, Stone speaks of "prejudice against discrete and insular minorities [as] a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." This implies that minorities are closed out of the process because others will not deal with them in the political arena. Yet paragraph three does not consider that the true cause of political powerlessness of minorities might be disparities in economic status which are the effects of previous prejudice or previous exclusions from the political process. By focusing on pluralist bargaining strategies, paragraph three captures the important insight that majorities can adopt *self-reproducing* strategies for retaining power. Yet at the same time, paragraph three declines to push the analysis of self-reproduction of status and power back one step further—it does not contemplate that dominant economic and social forces might combine to perpetuate an economic underclass, or create minority subcultures that feature poverty, lack of education, learned helplessness, and self-destructive behavior.

If the footnote is blind to these possibilities, it is because it defines itself in terms of a text (the body of the opinion) which thrives upon that blindness. For the argument of "Third" depends upon the assumption that differences in wealth or economic power cannot by themselves be possible causes of failures of the political process, cannot result in self-reproducing stratifications of political power. This assumption was in turn necessitated by *Carolene Products'* peculiar interpretation of *West Coast Hotel* and the particular blindness of the *Lochner* era.

From the failures of the *Lochner* era, *Carolene Products* gleaned two important and interrelated lessons. The first lesson was that regulation with redistributive consequences could be in the public interest in spite of, and indeed because of, its redistributive effects. The second, which appeared to follow from the first, was that the judiciary should no longer concern itself with struggles over economic rights. If the faith of the revolution of 1937 consisted precisely in the belief that the distribution of wealth in society was none of its business (except in the case of a simple taking), how could the Court concern itself with the effect of wealth in other contexts—that is, with its effects on the democratic process? Thus, once again we see how much the logic of footnote four depends upon the logic of the opinion that surrounds it. The agnosticism of Stone, the faith of "Third," was that a properly functioning political process would regulate the economy and redistribute wealth in the public interest—the

Court would only remain concerned with the formal structures of the political process (the subject of the footnote).

In divorcing the structure of procedure from the structure of the economy, *Carolene Products* proclaimed the essential independence of political from economic liberty, and political from economic equality. That this, too, was the lesson of the *Lochner* era seemed the most obvious reading of the revolution wrought by *West Coast Hotel*. Yet here again everything depended upon the partiality of a particular reading and upon its accompanying blindnesses. We have seen that an institutional reading of *West Coast Hotel* misses its more radical, humanitarian aspects. For by daring to label the common law regime of property and contract a "subsidy for unconscionable employers,"<sup>92</sup> *West Coast Hotel* affirmed the connection between economic equality and substantive liberty, between economic power and political right. If the legislature was *right* to alter the economic status quo because that regime violated human liberty, then the distribution of economic power in society had everything to do with the liberty guaranteed by the due process clause. The lesson of *Lochner* was that courts should not hinder legislatures from pursuing human rights through alteration of property rights; and that the state was responsible for the reproduction of disparities in economic power achieved through maintenance of the status quo.

By neglecting this possible interpretation of *West Coast Hotel*, by understanding it as the strict separation of political and economic liberty (conceived in noncommon-law terms), the pluralist faith of *Carolene Products* reintroduced, at a new level, the very evil that *West Coast Hotel* found in *Lochner*. If the *Lochner* court had seen differences in economic status as natural and not seriously affecting human rights, so now *Carolene Products* saw differences in political power stemming from differences in economic power as prepolitical and not seriously threatening the purity of the democratic process. Just as *Lochner* saw the right of economic participation as unaffected by differences in wealth, so now *Carolene Products* assumed that the rights of political participation were unaffected by these differences. Indeed, the pluralist credo of *Carolene Products* is hardly different than the famous *Lochnerian* credo of *Coppage v. Kansas*,<sup>93</sup> with the notion of political liberty substituted for that of liberty of contract:

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties [participating in the political process] are not equally unhampered by circumstances. This applies to all [political bargains]. . . . Indeed a little reflection will show that wherever the right of private property and [political liberty] co-exist, each party when [participating in the political process] is inevitably more or less influenced by the question whether he has much property,

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<sup>92</sup> 379 U.S. at 399.

<sup>93</sup> 236 U.S. 1 (1915).

or little, or none; for [the political bargain] is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold [political liberty] and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.<sup>94</sup>

Why was the abandonment of *West Coast Hotel's* more progressive tendencies so easy for a Court that viewed itself as liberal and progressive? Why was it content to exchange the wheat for the chaff? We must remember that in *West Coast Hotel*, the Court believed that the Washington legislature had acted to protect the rights of the poor. The Court was optimistic that the democratic process usually would recognize the need to move towards egalitarian measures, if only the heavy hand of the federal judiciary were removed. In this sense, the paradigm of *West Coast Hotel* gave the Court a false optimism; it led the Court to believe that there was something about the *institution* of democratic legislatures that made them more likely to regulate the economy and redistribute wealth in the public interest. Conversely, the Court assumed that the *Lochner* Court's reactionary tendencies were inherent in the structure of an unelected judiciary, even though the result in *West Coast Hotel* itself belied this very assumption. Thus, from the perspective of a particular moment in history, the new liberal Roosevelt majority believed that institutional and substantive concerns were tied together in a much more permanent way than later historical experience would confirm. If the assumption of a connection between institutions and values seems particularly naive today, we should remember that it is a mistake frequently made. The Warren Court led many liberal thinkers to precisely the opposite institutional conclusions, and it was not until the rise of the Burger Court that liberal commentators once again began to recognize the ambivalent relationship between substantive and institutional considerations.

The historical situation in which the Roosevelt Court acted led to its institutional delusions, its value-free rhetoric of deference to democracy. Yet by disregarding the effects of differences in economic power on the proper functioning of the political process, the *Carolene Products* Court betrayed the revolutionary ideas of *West Coast Hotel*. In the very act of casting out *Lochner*, it depended upon *Lochner*-like premises. In its exclusion of impurities from the democratic process, it left untouched the strongest source of adulteration. The *Carolene* product of *Carolene Products* is, and always has been, adulterated—an impure substance created by a dual substitution: The replacement of the substantive interpretation of *West Coast Hotel* by an institutional one, and the exchange of

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<sup>94</sup> *Id.* at 17 (substitutions in brackets).

the theory of judicial review in "Second" for that in "Third." And even as these substitutions are made, they are concealed behind a myth of purity: An ideal legislature that has never sat, moved by artificial purposes that were never expressed, in the service of an artificial public good that has never existed.

## VI. LAW AND LITERATURE

If there is a recurrent theme to our discussion of *Carolene Products*, it is the exclusion that is never fully exclusive, the purity that remains always slightly impure. We have seen the themes of purity and impurity, inclusion and exclusion, so obviously the concern of the subject of this opinion (the shipment of filled milk in interstate commerce) follow us doggedly as we investigate its more theoretical aspects (the protection of civil liberties and the theory of judicial review). There is a peculiar irony and self-commentary even in this. For lawyers do not generally think that the metaphorical, figurative, or syntactical features of legal texts should play any role in discussions of the meaning of these texts. Such concerns are not only extraneous to good legal analysis, but indeed, may tend to confuse the issue. Yet the more we profess our lack of interest in the metaphorical, figurative, and syntactic features of the text, (as yet another form of impurity to be excluded from legal analysis) the more assuredly they return to trouble the logic of the opinion. Once again, our ability to exclude and marginalize these elements is never complete; our attempt at purifying legal discourse of its literary aspects (leaving only reliable logic and fact) is always impure.

But surely, you will object, this conclusion follows only because I have deliberately tortured the text of *Carolene Products*, deliberately sought out its figurations and metaphors. In short, I have treated this legal text as if it were a poem! Yet why should anyone treat this opinion as a literary text, focusing on its plays on words, puns, and verbal associations? What are such matters doing in a *law review article*?

Does not this very question pose the issue of marginalization all over again? Does it not depend upon a vision of legal writing defined in terms of exclusion? Perhaps, only half jokingly, we should raise a *Carolene Products* defense in response: We need special protection for these figural aspects of the legal text, which are unlikely to be given due consideration by the normal process of legal analysis. Prejudice against discrete and insular metaphors may be a special condition which tends seriously to curtail those scholarly processes ordinarily to be relied upon for intellectual inquiry. (And yet—here I introduce a dangerous thought half whispered—perhaps metaphors in legal texts are not discrete and insular, something so easily excluded. Perhaps as Professor Ackerman tells us, the groups most seriously discriminated against are diffuse and any-

mous groups hidden within the body politic itself.<sup>95</sup> Perhaps legal analysis is itself inescapably figural, metaphorical, even as it denies this.)

But let us return to the question at hand: Why should one make so much of the literary characteristics we find in *Carolene Products*? Surely they are accidental to the structure of the argument—to the real issues of civil rights, judicial power and legislative discretion. These theoretical issues just happened to arise in a case involving the exclusion of impure milk from interstate commerce—they could have arisen in a case involving regulation of hours and wages, or even the manufacture of ball bearings. Nor are the syntactic features of the opinion any less contingent: the Court's discussion of minority rights could easily have been made in the body of the opinion, rather than in a footnote. Why, then, pay attention to such contingencies, such unessential details?

These objections disregard, overlook, and exclude what literary scholars term an *economy*, a lucky condensation of features in a given text. A poem or an aphorism communicates effectively because of its play upon words, because of its witty connection between expression and intention. The literary critic does not turn up her nose at the happy associations between surface features of discourse; she knows that the connections of sound and style among the various elements of a poem are rich sources of meaning. She knows as well that such meaning cannot always be captured through a prose description of a poem's methods and processes of signification. Nor does a politician eschew aphorisms when they elucidate a point, and yet such aphorisms gain their persuasive force from puns, rhymes, or other surface features of language.

We have indeed been fortunate to discover, in this opinion about the exclusion of impure milk, a happy confluence of metaphors that aid us in exposing the flaws and difficulties of the modern theory of judicial review first articulated in *Carolene Products*. But this providence is merely a *symptom* of a deeper logic at work in Stone's opinion, a logic that would have doubtless manifested itself if Stone had chosen different words, or even if we had used another post-1937 opinion instead. Even if we accept the distinction between surface features of a text and its logic, we do not shun those surface features if they condense the problematics of the text in a provocative or imaginative way.

Thus my use of metaphor and figuration must be understood as a shortcut to understanding the structures and tensions of logic in modern constitutional jurisprudence, by exploiting the textual economies in a particular legal opinion. If I had been given, not *Carolene Products*, but *Williamson v. Lee Optical*, an opinion that depends upon the same pluralist conception of politics, I would have found the same difficulties, the same troubling features, even though the words and metaphors used would be different ones. Yet, I have no doubt, other surface features of

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<sup>95</sup> Ackerman, *supra* note 16, at 724.

that opinion would call attention to themselves and bring us to the same conclusions about the limitations of post-1937 jurisprudence.<sup>96</sup> As Derrida explains, if we had chosen a different opinion, a different description, “the effect would be the same, the only loss being a certain economic condensation or accumulation, which has not gone unnoticed.”<sup>97</sup>

By celebrating the textuality of a legal text, we are, in Jonathan Culler’s phrase—“betting with words”—seeking to find a happy economy or condensation of meaning in the ways in which the text refers to itself and to its metaphors and processes of signification.<sup>98</sup> For example, in his famous essay, “Plato’s Pharmacy,”<sup>99</sup> Derrida focuses on the use of the Greek word *pharmakon* (remedy) in Plato’s *Phaedrus*. Derrida concludes that it is a “lucky” word—it condenses much in its philological derivations and its resemblances to other words, like the Greek words for poison (also translated as *pharmakon*), magician, sorcerer, and wizard (all translated as *pharmakeus*), and scapegoat (*pharmakos*). Thus armed, Derrida gives us an elaborate critique of Plato’s philosophical system. Similarly, the words in the text of *Carolene Products* are also “lucky” words. They possess a strange economy that is equally uncanny, that

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<sup>96</sup> In *Williamson v. Lee Optical*, 348 U.S. 483 (1955), the Court allows a lobby of ophthalmologists and optometrists to place serious restrictions on the practice of opticians. The rationale of the law is that opticians need regulation to avoid injury to their customers’ vision. Yet this case, which concerns a regulation designed to help the public see more clearly, is also a case about blindness and distorted vision. The restrictions on optical services (as a potentially deceptive trade practice) involve their own deceptions, as raw political power disguises itself in the form of the public interest. The optician may not fit lenses to glasses without a prescription, a requirement created by a previous prescription by the legislature, which distorts the public’s vision even as it attempts to protect it. At the same time, the rational basis test requires the Court to blind itself to the political struggle behind the statute, the victory of one lobby over another. In holding as it does, the Court assumes that it is not responsible if the legislature cannot see what is really in the public interest, or even if the legislature deliberately chooses to deceive the public. Perhaps this is because, as the Court seems to suggest, that there is no preexisting public interest to see in the first place.

Yet in the blindness of *Williamson*, all have trouble seeing—the Court as well as legislatures and the public. In *Williamson*, a case about the protection of vision, we witness the virtual *elimination* of vision (scrutiny). Not only does Justice Douglas not scrutinize the statute closely, he deliberately looks the other way. He refuses to see what is obvious on the face of the statute—that this regulation was designed to favor ophthalmologists and optometrists over opticians, and in particular, to curtail the growth of cut-rate volume optical services in department stores. (Today, of course, we might look at some of the restrictions—those on advertising, for example—with different eyes.) The rational basis test of *Williamson* is not a neutral act of judicial deference. It is a lens through which one views the political process—rose colored glasses, if you will. It is a distortion of vision in which the pluralist bargaining process is made to appear fair and not in need of judicial supervision. The Due Process game envisioned in *Williamson* requires the Court to make up reasons to justify the statute, to see things that aren’t really there, or at least to view them in their best light. The Court, faced with claims of naked redistribution, refuses to see the nakedness. It declines to correct the legislature’s shortsightedness. Its credo, in this and every other economic regulation case, is that the majority rules—the eyes have it.

<sup>97</sup> J. DERRIDA, *DISSEMINATION* 220 (1981).

<sup>98</sup> J. CULLER, *ON DECONSTRUCTION* 146 (1982).

<sup>99</sup> J. DERRIDA, *Plato’s Pharmacy*, in *DISSEMINATION* 61 (1981).

troubles the substantive argument of the opinion, unveils its hidden assumptions, and silently rebukes it for its exclusions. Like Derrida, our bet with words has indeed unearthed a useful condensation (and not only of milk).

At the same time, there is another, equally important, and yet almost contradictory reason to be concerned with the surface features of legal language. To neglect the economies of expression within a text is to deny its writtenness, its textuality, its *text-ure*. Disregarding the contingent or surface features of legal language features is symptomatic of the very issue of marginalization, exclusion, and false preservation of purity that we have noted before. We believe that we preserve the real, pure meaning of the text we call *Carolene Products* by excluding superficial, contingent features of the text. We believe that we thus purify it, claiming that the same ideas could have been stated another way, unlike a poem, which resists paraphrase. Yet in so doing, we deliberately place blinders on the ways in which textuality (metaphor, expression, and so forth) affect our ways of thinking about legal problems.<sup>100</sup>

Does this mean that the lawyer should become a literary critic? Note the use of the word "become"—as if the lawyer were not one already. Has no one noticed that recent commentaries on *Carolene Products* are already brilliant examples of textual criticism? I am thinking, in particular, of the contributions of Professors Brilmayer and Ackerman.<sup>101</sup> Professor Ackerman shows us that Stone's famous metaphor "discrete and insular minorities" misleads us about the ways in which the political process fails us. By demonstrating that diffuseness and anonymity can as easily lead to underrepresentation, Ackerman reveals the partiality and incompleteness of Stone's original language.<sup>102</sup> Professor Brilmayer explains how the logic of *Carolene Products*, pursued to its conclusion, defeats its assumption that the political process adequately represents minorities except where legislation directly discriminates against them. She argues convincingly that the impurity in the process caused by underrepresentation cannot be cabined in, that it infects even neutral statutes. She concludes that the value-free rhetoric of representation in *Carolene Products* undermines itself, ultimately revealing its

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<sup>100</sup> As Justice Cardozo warned us long ago: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often in enslaving it." *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926). Yet Cardozo's admonition does not go far enough. It does not warn us that our language is already and always inescapably metaphorical and figural; that a logically pure language, divorced from metaphor, has never existed. Moreover, our attempts at excluding metaphor result in a dual impurity—first, because the figural can never be completely banished from discourse, only neglected or overlooked, and second, because any claim that legal thought can rest upon a wholly nonmetaphorical ground involves its own adulteration and deception.

<sup>101</sup> Brilmayer, *supra* note 16; Ackerman, *supra* note 16.

<sup>102</sup> Ackerman, *supra* note 16, at 724-31.

value-laden content.<sup>103</sup>

Are Professors Ackerman and Brilmayer legal critics or literary critics? Why ask such a question? Can we not admit that they are simply critics, or if one must have an introductory adjective, *textual* critics? They too, rely upon the processes of signification in this text (which we call an "opinion"). They too, are equally interested in the problematics of its language, except that at first glance they appear to investigate only a particular aspect of that problematics that we are used to hearing about in a particular academic context. Yet the problems of signification that we see as essentially "legal" in nature (whether such and such is a good distinction, a sound argument, a good description of the relevant facts), are affected by the writer's choice of language, and more importantly, by those linguistic and cultural factors that she did not choose, but were chosen for her. Is it not clear that the difficulties Ackerman locates in the ideology of *Carolene Products* are reflected in the choice of an adventitious metaphor? Is it not obvious that the logical flaws Brilmayer unearths find their source in the rhetoric of value neutrality and pluralist democracy?

Perhaps you are impatient with this line of reasoning, this deconstructive dancing around the point. You reiterate your objection as follows: "Look here. I am reading a law review article in a law review. What you are suggesting does not fit the format of good legal analysis, it is not appropriate, it does not fit within an acceptable framework." Yet why is it impossible for legal analysis to look further than the cut and slash of logical argument? Why do we believe that logical argument is hermetically sealed off from the vagaries of language—from the subtle but insidious influence of surface characteristics of language, such as metaphor, rhyming, etymological and phonic similarity? Derrida argues that this is the very mistake that philosophers make in their insistence that philosophy is not simply another form of writing, that it can be shorn of its metaphorical baggage.

Why could a system of legal argument not rely on literary features of language, on puns and plays on words? Consider the Rabbis of the Talmud and the Midrash, for example. They saw their task as infinitely more important than merely the development of a system of secular regulation—for they were expounding the Divine law as received in the Torah. Yet in interpreting the Holy Scriptures they had no scruples about making a clever play on words or even misreading or mispronouncing a word in order to make a legal or ethical point. They well understood that such aphorisms effected an economy, or condensation, that was available in the text and could be exploited for the purpose of understanding the text. These same Rabbis made much of mistakes and errors in spelling and grammar in the Torah. Far from regarding mistakes as

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<sup>103</sup> Brilmayer, *supra* note 16, at 1330-34.

surface characteristics of a legal text to be disregarded, they assumed instead that no such mistakes existed without a hermeneutical purpose. Hence, they devised elaborate explanations for why errors were placed in the text, even making use of numerology in order to explain their deeper meanings. And such arguments were accepted not because they convinced logically, but because they revealed important facets of the text not discoverable through logic alone.

If we reject such wordplay and argumentation in our own legal texts, is this because we are so much wiser than the Rabbis of the Talmud and the Midrash, so much more advanced in our legal reasoning processes, or is it because of our cultural background, our self-imposed blinders and limitations, our *decision* to seal off the legal from the literary? We assume, without argument (based, one might think, on political and social factors of modern Western life) that good "legal" or "philosophical" reasoning cannot be the same as good literary analysis, that the textual analysis involved in one case is not the same textual analysis involved in the other. We assume, again without argument, that the problematics of texts must be divided up into those problematics that are suitable for lawyers to investigate (how well the argument is constructed, its reliance on logic and facts) and those that are suitable for the literary critic. Yet the division of these problematics is itself problematical.

Perhaps you will concede that if *Carolene Products* had been a religious document, or a Talmudic text, the type of analysis I have presented here might seem more acceptable. Yet, you may say, *Carolene Products* is not a religious text, and therefore this type of analysis is inappropriate. But this argument reveals its own cultural dependencies, its own nonlogical basis, the moment it is stated. It demonstrates that proper textual analysis (even for legal texts like the Torah) depends upon context, upon history, upon a tradition of hermeneutical practices, and is therefore not simply given, not simply immanent in the text itself. Anglo-American lawyers, and, I dare say, Western lawyers in general, have isolated a number of modes of dealing with texts, called them proper legal analysis, and discarded all other approaches. You may say that is because these modes of analysis deal with the intention or logic of the writer's argument. And I respond that the intention of the author, or the reasoning of her argument, is often irrelevant to legal analysis in the West, because we often read texts in ways contrary to the intention or the reasoning of the persons who created them. What we call legal analysis or the logical analysis of a text, then, is simply the creation of a specific hermeneutical tradition of reading and rereading. And it is the height of arrogance for us to claim that a text can teach us no more than what we can glean from it using the limited tools that constitute Western Legal Analysis.

I must note here parenthetically that one of Plato's great achievements was his struggle to create a separate discipline of philosophy, one that divorced philosophical argument from the figural language of the

poets and the wordplay of the Sophists. Thus, in the *Euthydemus*, he has Socrates confront and defeat two brothers, who are known as eristics, or “fighters with words,” and who routinely use puns in an effort to trip up their opponents.<sup>104</sup> The brothers’ practice seems so odd to us, who work in Plato’s shadow, that we cannot understand why anyone ever thought their arguments convincing. This more than anything else demonstrates the extent of Plato’s victory in establishing a paradigm of philosophical argument. But in his great philosophical achievements, has Plato saved us from error, or has he merely intervened in the linguistic field by dividing the world into philosophical discourse, which is literary without knowing it, and literary discourse, which is self-consciously literary?

Viewed in this light, it is no accident that Plato distrusted poetry, for poetry posed the greatest threat to a self-contained discipline of philosophy. Plato was suspicious of poets both for their capacity to persuade people through non-philosophical means and for their capacity to lead people astray. Yet poets could both persuade and mislead precisely because they reveled in the ungainliness, the irrepressibility of language, while philosophers viewed language only as an unfortunate necessity, a wild beast that needed to be tamed. For the poet, the blessing of language was its infinite equivocality, its rich evocativeness. For the philosopher (and today for the lawyer) the curse of language was its opacity—for ideally, language should be transparent to reason.

In this essay, I have attempted to question the unspoken assumptions we make in reading legal texts. I have taken seriously the deconstructive claim that a text, even a legal text, may contain an economy: a savings, condensation, or husbanding of resources. I have noted some of the many economies at work in *Carolene Products*: the ability of this text to say many different and often contradictory things on many different levels at the same time, depending upon our focus. For my part, I do not think that we should turn up our noses to such economies, as one does to a bottle of spoiled milk. Rather, we should exploit these economies, examine the processes of signification in legal texts more closely, in the hope that we can understand the unconscious and unarticulated ways in which we create our world through our use of language. We should, in short, become rhetorical or literary economists—studying the ways in which our language conveys more than is meant, in which our language traps us, and in which our language talks about itself, reinforcing or contradicting what it says.

It is appropriate that there should be an economy in *Carolene Products*, a case about the regulation of the economy, and that this economy should remain unregulated, that is, without boundaries, uncanny and uncontainable. The opinion, which concerns the need for economic regula-

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<sup>104</sup> PLATO, *Euthydemus*, in THE COLLECTED DIALOGUES OF PLATO 385 (E. Hamilton & H. Cairns eds. 1961).

tion, itself demonstrates the unregulatability of the economy of a text. For what is orthodox legal analysis but an attempt to regulate this economy—to delimit a certain set of features about a text that are appropriate for the reader to consider? Yet the very act of regulating the economies of a text robs the text of its richness (thus destroying its economy) and at the same time guarantees that its economies of expression will be on the outside, (like businesses that move away from a heavily regulated state) peering in and mocking the utopia that the regulator has sought to create. Shall we accept this regulation as the only possible regime, or shall we dare to reap the hidden economies of our legal texts? The texts await us, offering unbounded opportunities. We lack only the entrepreneurs.<sup>4</sup>

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<sup>4</sup> [Note to the editors of the Law Review—place the entire text of this Article (including this footnote with these instructions) in this footnote. If this causes a problem of infinite regress, improvise].