

HARVARD LAW REVIEW

BEYOND CAROLENE PRODUCTS†

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I. THE PROMISE OF *CAROLENE PRODUCTS*

"[P]rejudice against discrete and insular minorities may be a special condition . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and [so] may call for a correspondingly more searching judicial inquiry."¹

THESE famous words, appearing in the otherwise unimportant *Carolene Products* case, came at a moment of extraordinary vulnerability for the Supreme Court. They were written in 1938. The

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¹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Although my central concern here will be this passage from the third and final paragraph of *Carolene's* famous footnote four, it will be useful to reproduce the footnote's entire text:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg v. California*, 283 U.S. 359, 369-370; *Lovell v. Griffin*, 303 U.S. 444, 452.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; on restraints upon the dissemination of information, see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-714, 718-720, 722; *Grosjean v. American Press Co.*, 297 U.S. 233; *Lovell v. Griffin*, *supra*; on interferences with political organizations, see *Stromberg v. California*, *supra*, 369; *Fiske v. Kansas*, 274 U.S. 380; *Whitney v. California*, 274 U.S. 357, 373-378; *Herndon v. Lowry*, 301 U.S. 242; and see Holmes, J., in *Gitlow v. New York*, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see *De Jonge v. Oregon*, 299 U.S. 353, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Farrington v. Tokushige*, 273 U.S. 484, or racial minorities, *Nixon v. Herndon*, *supra*; *Nixon v. Condon*, *supra*: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare *McCulloch v. Maryland*, 4 Wheat. 316, 428; *South Carolina v. Barnwell Bros.*, 303 U.S. 177, 184, n.2, and cases cited.

Court was just beginning to dig itself out of the constitutional debris left by its wholesale capitulation to the New Deal a year before. With the decisive triumph of the activist welfare state over the Old Court, an entire world of constitutional meanings, laboriously built up over two generations, had come crashing down upon the Justices' heads. Indeed, the Court had been so politically discredited by its constitutional defense of laissez-faire capitalism that it was hardly obvious whether *any* firm ground remained upon which to rebuild the institution of judicial review. How, then, to begin the work of reconstruction?

Only once before had the Court confronted a similar challenge. Just as the triumphant New Deal Democrats had destroyed the laissez-faire constitutionalism of *Lochner v. New York*, so too a triumphant Republican Congress had destroyed the slavocratic constitutionalism of *Dred Scott v. Sandford* after the Civil War. Just as many contemporary observers doubted the institutional independence — let alone the constitutional importance — of the Supreme Court during Reconstruction,² nobody could be confident about the future of judicial review in the aftermath of the Court-packing crisis.

Only one thing was clear. If the Court were to reassert itself after the Great Depression, it could not do so through the same constitutional rhetoric with which it had rehabilitated itself after the Civil War. During the long period between Reconstruction and New Deal, the Court had risen to the heights of power by insisting upon the fundamental right of free men to pursue their private aims in a free market system. Yet it was precisely this ideological elixir, which had given the judiciary new life after the Civil War, that proved nearly fatal during the constitutional birth agony of the activist welfare state. If the Court were to build a new foundation for judicial review, it would need an entirely new constitutional rhetoric — one that self-consciously recognized that the era of laissez-faire capitalism had ended.

Against this historical background, we may glimpse the promise of *Carolene Products*.³ Rather than look back longingly to a repudiated constitutional order, *Carolene* brilliantly endeavored to turn the Old Court's recent defeat into a judicial victory. As far as *Carolene* was concerned, lawyers could dispense with their traditional effort to organize their concern for individual rights through a constitutional

² A fine study of the Chase Court's retreat before the Reconstruction Congress in *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867), and *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869), may be found in 1 C. FAIRMAN, RECONSTRUCTION AND REUNION 1864-1868, at 366-514 (Oliver Wendell Holmes Devise History of the Supreme Court of the United States No. 6, 1971). Another thoughtful treatment, emphasizing the continuing support for the Court during this time of adversity, is S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968).

³ For a deeper historical grounding, see Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1287-1304 (1982).

rhetoric glorifying private property and free contract. Instead, *Carolene* proposed to make the ideals of the victorious activist Democracy serve as a primary foundation for constitutional rights in the United States.

Fifty years onward, the basic idea is familiar, but it requires re-statement if we are to examine it carefully. *Carolene* promises relief from the problem of legitimacy raised whenever nine elderly lawyers invalidate the legislative decisions of a majority of our elected representatives. The *Carolene* solution is to seize the high ground of democratic theory and establish that the challenged legislation was produced by a profoundly defective process. By demonstrating that the legislative decision itself resulted from an undemocratic procedure, a *Carolene* court hopes to reverse the spin of the countermajoritarian difficulty. For it now may seem that the original legislative decision, not the judicial invalidation, suffers the greater legitimacy deficit.

Assume, for example, that the people of a state, after excluding blacks from the polls, elect an all-white legislature that proceeds to enact some classic Jim Crow legislation. Under the *Carolene* approach, the court does not purport to challenge the substantive value judgments underlying the legislative decision; instead, it simply denies that the Jim Crow statute would have emerged from a fair and open political process in which blacks were allowed to participate. In essence, the court is trumping the statutory conclusions of the deeply flawed real-world legislature by appealing to the hypothetical judgment of an ideally democratic legislature.

No wonder, then, that *Carolene Products* seemed so promising in 1938. Not only did it point the Supreme Court toward the path of racial justice and minority rights, but it also explained why the new road to minority rights was fundamentally different from the old road to property rights that had so recently led the Court to the brink of self-destruction. Whereas the Old Court had protected property owners who enjoyed ample opportunity to safeguard their own interests through the political process, the New Court would accord special protection to those who had been deprived of their fair share of political influence.

No less significantly, the *Carolene* Court sketched its new mission in exceptionally broad strokes. It did not limit its prospective intervention to the straightforward cases in which blacks or other unpopular groups were excluded from the polls or denied other fundamental rights of political expression. *Carolene* suggested an enduring role for the judiciary, one that would continue even after every adult American had secured his right to participate in politics.⁴ To take

⁴ Indeed, one can best appreciate the scope of *Carolene's* concern by contrasting it to the only other assertion of judicial authority that is remotely comparable — the Court's effort, a generation later, to reapportion state legislatures, see *Reynolds v. Sims*, 377 U.S. 533 (1964),

the case that will serve as a paradigm in this essay: the *Carolene* footnote suggests that, even in a world in which blacks voted no less frequently than whites, and in which election districts strictly conformed to the Court's reapportionment decisions, blacks would still possess, by virtue of their discreteness and insularity, a disproportionately small share of influence on legislative policy — a disproportion of such magnitude as to warrant the judicial conclusion that a fair democratic process would have generated outcomes systematically more favorable to minority interests. This suggestion, moreover, animates countless modern discussions — judicial⁵ as well as academic⁶

and the House of Representatives, see *Wesberry v. Sanders*, 376 U.S. 1 (1964). As in *Carolene*, the reapportionment cases go beyond the situation in which the government deprives some group's members of their individual rights of citizenship. They deal instead with the way the political process aggregates citizens' views to form a collective judgment: some citizens have too much influence; others too little. Like *Carolene*, the reapportionment cases try to identify situations of disproportionate influence *without* making substantive judgments about the political interests that the judges think the legislature ought to favor. Instead, the concept of illegitimate influence is elucidated through a formula — "one person, one vote" — grounded on the theory of democratic process.

At this point, however, *Carolene* breaks with the reapportionment cases. In implementing its one-person, one-vote principle, the Court has contented itself with a strictly formal conception of democracy. Although it has been very strict in insisting that each congressional district contain equal numbers of inhabitants, see *Karcher v. Daggett*, 103 S. Ct. 2653 (1983), it has been extremely hesitant about moving beyond formal equality to more substantive conceptions of democratic power-sharing. But see *id.* at 2670-78 (Stevens, J., concurring) (advocating stricter scrutiny of legislative gerrymandering). In contrast, *Carolene Products* takes a strikingly substantive view of the problem. As the *Carolene* footnote makes plain, the Court's concern is not merely with a group's formal right to vote, or its formal right to have its votes counted on a one-person, one-vote basis, but with its capacity to effect *substantive* political outcomes.

⁵ For example, *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973), and *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (discussed further in note 27), explicitly invoked *Carolene's* concern with the political powerlessness of "discrete and insular" minorities to justify special judicial protection for resident aliens. As Justice Powell has noted, moreover, "the influence of Footnote 4 cannot be measured accurately by simple enumeration of cases in which it has been cited." Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 n.4 (1982). Thus, even when it is not cited explicitly, the *Carolene* idea plays a role in standard judicial justifications for strict judicial scrutiny of legislation burdening "suspect" classes. For example, in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Court, in discussing the treatment of the "traditional indicia of suspectness," observed that the critical question is whether "the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 20 (emphasis added).

⁶ Dean Ely's book, *J. ELY, DEMOCRACY AND DISTRUST* (1980), is the most important effort to develop footnote four's larger implications for the practice of judicial review. The high quality of the debate it has engendered attests to the book's value. See, e.g., Estreicher, *Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture*, 56 N.Y.U. L. REV. 547 (1981); *Judicial Review versus Democracy* (Symposium), 42 OHIO ST. L.J. 1 (1981); Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review* (Book Review), 59 TEX. L. REV. 343 (1981); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). Although Ely's work currently dominates the field, important insights may also be found in Cover, *supra* note 3, and L. LUSKY, *BY WHAT RIGHT?* (1975).

— in which the political weakness of “discrete and insular minorities” is a crucial, if unexamined, premise in the elaboration of intricate constitutional doctrines.⁷ I shall argue, however, that the *Carolene* formula cannot withstand close scrutiny.

Given the unsettling character of this thesis, it is best to begin by emphasizing its limits. My critique applies exclusively to the paradigm case I have just described, and *not* to the cruder case in which blacks — or other racial or religious minorities — are excluded from the voting booth or deterred from exercising their fundamental rights to speak freely and organize politically.⁸ During *Carolene*’s first half-century, it was these brutal efforts at political exclusion that rightly were of central constitutional concern. Nothing I say is intended to deny the obvious unconstitutionality involved in excluding minorities from the nation’s political life.

My concern here, however, is with the future, not the past. Although America has by no means worked itself clear of past practices of political exclusion, it is not visionary to hope that we will indeed put this grim aspect of history behind us and that, during the next generation, we will inhabit a world that increasingly resembles my paradigm case: a world in which, despite the existence of pervasive social prejudice, minorities can and do participate in large numbers within the normal political process.⁹ In light of this prospect, a reappraisal of *Carolene* is a pressing necessity: its approach to minority rights is profoundly shaped by the old politics of exclusion and yields systematically misleading cues within the new participatory paradigm.

Indeed, if we fail to rethink *Carolene*’s dictum about discrete and insular minorities, we will succeed only in doing two different kinds of damage. On the one hand, we will fail to do justice to the very racial and religious groups that *Carolene* has done so much to protect in the past half-century. By tying their rights to an increasingly unrealistic model of politics, we will place them on the weakest pos-

⁷ Not that there haven’t been expressions of anxiety by some of our most thoughtful commentators. See, e.g., J. ELY, *supra* note 6, at 152–53; Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 NW. U.L. REV. 978, 995–98 (1981); Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 312–14 (1972). These writers, however, have not attempted a systematic analysis of the reasons that led them to doubt *Carolene*’s equation of political powerlessness with “discreteness and insularity.” As a consequence, their expressions of doubt have not much affected the conventional wisdom. Indeed, I believe that Dean Ely himself has not appreciated the extent to which his passing doubts undermine the central thrust of his analysis. See *infra* pp. 734–37.

⁸ In other words, my principal concern here is the footnote’s third and final paragraph (quoted in note 1). I am not challenging the footnote’s second paragraph, which suggests the propriety of special judicial supervision of restrictions upon “those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.” On the role of the footnote’s first paragraph, which envisions judicial intervention on behalf of “specific prohibition[s] of the Constitution,” see pp. 743–44.

⁹ See *infra* notes 35 & 57.

sible foundation. On the other hand, we will fail to do justice to *Carolene's* basic insight into the problem posed by prejudice in a pluralist democracy. The end of the politics of exclusion hardly implies that pluralist democracy now functions fairly; it does mean, however, that the groups most disadvantaged by pluralism in the future will be different from those excluded under the old regime. The victims of sexual discrimination or poverty, rather than racial or religious minorities, will increasingly constitute the groups with the greatest claim upon *Carolene's* concern with the fairness of pluralist process.

To demonstrate the need for doctrinal reorientation, I shall examine separately each of *Carolene's* four operative terms: (1) prejudice, (2) discrete, (3) insular, and (4) minorities. It is by means of these four terms that *Carolene* hopes to identify groups that have been unconstitutionally deprived of their fair share of democratic influence. As America moves toward the participatory paradigm, however, judges can no longer expect these familiar concepts to operate in a way that will allow courts to solve the problem of countermajoritarianism. To explain why, I have found it helpful to examine *Carolene's* four basic terms in reverse order from the way they appear in the standard litany. A concluding section glimpses the path of reconstruction that lies ahead.

II. DISCRETE AND INSULAR MINORITIES?

The *Carolene* formula limits its attention to the asserted political weakness of minorities and fails to consider the analogous case of a politically ineffective majority. In view of *Carolene's* larger ambition to deflect the countermajoritarian difficulty, this is an especially odd omission. Consider again the paradigm case: blacks are participating no less frequently than whites in a political system that satisfies the standards for electoral fairness elaborated in the Court's modern decisions. Despite these formal safeguards, imagine that an all-white legislature manages to get elected, and then enacts a series of laws prohibiting interracial marriage and forbidding interracial adoptions. Would we be less concerned about this outcome if we completed the scenario by assuming that blacks amounted to 75 percent, rather than 12 percent, of the relevant electorate?

Of course not.¹⁰ Indeed, the existence of a commanding black majority would encourage us to intensify our search for a set of structural factors that somehow allowed whites to dominate the ostensibly democratic political process. *Carolene* casually disregards the

¹⁰ Cf. *Palmore v. Sidoti*, 104 S. Ct. 1879 (1984) (holding unconstitutional a state's modification of a child custody decree based upon custodial parent's cohabitation with a person of different race).

easiest case for finding a substantive defect in a formally fair electoral process: the case in which organizational difficulties have prevented a commanding majority of the population from influencing the ongoing flow of legislative decisions. After all, if democracy means anything, it means a regime designed to further the majority's basic interests; that is certainly not what is going on in the case we have hypothesized.

A. *The Principle of Minority Acquiescence*

If we begin with the easy case of an ineffective majority, we can also begin to see how much harder it is to justify the *Carolene* concern for ineffective minorities. To put the point simply, minorities are *supposed* to lose in a democratic system — even when they want very much to win and even when they think (as they often will) that the majority is deeply wrong in ignoring their just complaints. This principle — call it the principle of minority acquiescence — is absolutely central to democratic theory. Of course, a minority may not be denied its right to participate within a democratic framework. Although it must acquiesce in current legislative decisions, it is fully entitled to use all its political resources to induce a future legislative majority to accede to its demands. But *Carolene* promises minorities more than formal rights: it asserts that they are sometimes entitled to demand substantive victory now, not merely the chance of victory later.

The problem this promise raises is all the more acute because *Carolene* refuses to accept the solution that countless others have embraced. It is easy to solve the problem of majority rule by positing the existence of minority rights that are so fundamental as to trump the value of democratic rule itself. Indeed, as the *Carolene* Court was well aware, it is *too* easy to solve the problem in this way. Faced with the political repudiation of *Lochner's* natural rights jurisprudence, the Court was determined to build another foundation for the protection of minority rights: why not redefine the concept of democracy itself in a way that would support the notion that minorities *do* have a right to win some of the time?

B. *The Pluralist Solution*

While the courts speak vaguely of "those political processes ordinarily relied upon to protect minorities," generations of American political scientists have filled in the picture of pluralist democracy presupposed by *Carolene's* distinctive argument for minority rights.¹¹

¹¹ The path of pluralist thinking may be traced from A. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908), through D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1951), to R. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* (1982). Cruder versions of pluralist theory are now common among political economists of the Chicago school. See, e.g., Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

According to this familiar view, it is a naive mistake to speak of democracy as if it involved rule by a single, well-defined majority over a coherent and constant minority. Instead, normal American politics is pluralistic: myriad pressure groups, each typically representing a fraction of the population, bargain with one another for mutual support.

Once this picture of pluralistic politics is accepted, the stage has been set for the rehabilitation of *Carolene's* concern with ineffective minorities. We may now find that there is something about certain minority groups — call them *Carolene* or *C*-groups — that makes it especially difficult for them to strike bargains with potential coalition partners. As a consequence, *C*-groups will find themselves in politically ascendant coalitions much less often than will otherwise comparable groups. Over time, then, *C*-groups will achieve less than their “fair share” of influence upon legislation. And it is for this reason, the pluralist concludes, that *Carolene* rightly suggests that judicial protection for *C*-groups can be defended in a manner responsive to the countermajoritarian difficulty afflicting judicial review. By intervening on behalf of *C*-groups, a *Carolene* court merely produces the substantive outcomes that the *C*-group would have obtained through politics if it had not been so systematically disadvantaged in the ongoing process of pluralist bargaining.

It thus appears, at first glance, that a *Carolene* court can draw upon a well-developed body of pluralist political science to support its special protection of minority rights. When we move beyond intuition to analysis, however, the pluralist argument is full of traps for the unwary. First, it is by no means clear that our Constitution wholeheartedly endorses the bargaining theory of democracy.¹² Second, all that pluralist theory explains is why minority groups can expect to influence legislative outcomes some of the time; it is something very different to explain why minorities may dress up these expectations in the language of constitutional rights and demand judicial protection for them.¹³

I shall defer these fundamental points to the concluding section. My focus here is on a central doctrinal difficulty that persists even if *Carolene's* pluralist foundations are secure. This problem concerns the indiscriminate standard according to which *Carolene* proposes to regulate the judicial protection of *C*-groups. In the common legal understanding, *Carolene* is generally taken to imply that the same level of strict judicial scrutiny should apply to legislation affecting

¹² See Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (arguing that pluralism is only one aspect of the American constitutional tradition); *infra* pp. 741-43.

¹³ I shall take up this question later on pp. 742-43.

each and every C-group. But the pluralist model cannot justify such a uniform judicial approach.

Consider, for example, an American constituency that includes 12 percent blacks and .5 percent Jehovah's Witnesses among its population.¹⁴ Doubtless, both groups will be encouraged by the pluralist vision of democracy, since it suggests that neither group will inexorably be excluded from the pluralist bazaar. Nonetheless, it should be plain that these two groups have absolutely no reason to find the prospect of pluralist bargaining *equally* gratifying. To the contrary, the fact that blacks greatly outnumber Witnesses is bound to play an important role in any plausible bargaining theory. Thus, even if the two groups could somehow be compensated for their *Carolene* disadvantages, the Witnesses could not reasonably expect to win substantive victories nearly as often as the blacks.

To put the point more generally, a bargaining approach to *Carolene* does not suggest that each C-group has a right to be treated identically to all other C-groups in the legislative process. Instead, the decisive thought-experiment should involve the comparison of a particular C-group with a hypothetical minority that I shall call an unencumbered or U-group. In each comparison, the relevant U-group should be supposed to contain the same proportion of the population as the C-group that invokes the Court's protection; the U-group differs, however, in that it is unencumbered by the bargaining disadvantages that unconstitutionally burden the C-group. Thus, the *Carolene* question for blacks entails a comparative analysis of the bargaining expectations of a 12 percent minority unencumbered by those structural impediments that unconstitutionally impair blacks' bargaining position in the ongoing pluralist process, while the question for Jehovah's Witnesses involves a comparison with a much smaller U-group.

Such thought-experiments will most naturally result in a sliding scale of *Carolene* concern. On one end of the scale are groups consisting of ineffective majorities or very large minorities that find themselves disadvantaged in the political process by some constitutionally impermissible barrier to bargaining. In cases involving these "major minorities," a court can be quite confident that a comparable U-group would have a decisive impact on the terms of pluralistic legislation. In the middle of the *Carolene* scale are "middling minorities" in the 10 to 20 percent range. Here there is less reason for a court to expect that a U-group of comparable size would radically change the terms

¹⁴ According to the 1980 census, 26.5 million black Americans accounted for 11.7 percent of the total American population of 226.5 million. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS, U.S. SUMMARY 1-20 (1983) (PC80-1-B1). The Jehovah's Witnesses claimed 643,000 active members in the United States in 1984. Telephone call to Kingdom Hall, Brooklyn, New York (Mar. 1984).

of political trade, though its influence would be very substantial in many plausible contexts.¹⁵ And finally, on the other end of the scale, there are groups so small as to elicit little solicitude from courts concerned with correcting the failures of democratic bargaining. When faced with "minor minorities" of .01 percent, for example, a judge might well be unmoved by the enumeration of *Carolene* factors that would generate substantial concern in the case of middling minorities, not to mention major minorities. For the fact is that a *U*-group of .01 percent has little to expect from a democratic political process, unless it is very lucky, or exceptionally adept, in the bargaining process. This point is essential to the responsible elaboration of *Carolene Products* — whose promise, be it recalled, is to permit courts to evade the thrust of the countermajoritarian difficulty by appealing over the heads of real-world legislatures to the hypothetical outcomes of a purified democratic process.

There is, then, an inevitably uneasy relationship between *Carolene's* pluralist approach to democracy and the judicial protection of minority rights. The tension reaches the breaking point in the proverbial case of a minority of one: when the solitary citizen, having little to expect from pluralist bargaining, challenges the invasion of his fundamental rights by the normal political process.¹⁶

My aim here, though, is to work out the doctrinal implications of the *Carolene* formula rather than to criticize its foundations. So let us focus our attention upon those groups, ranging from middling minorities to encumbered majorities, whose role in the bargaining process might well have a significant impact on the ongoing stream of legislative decisions. How does *Carolene* propose to determine whether a group suffers from severe enough bargaining disadvantages to merit special protection? In other words, how are we supposed to distinguish a *C*-group from a *U*-group?

III. DISCRETE AND *INSULAR* MINORITIES?

As in the case of its failure to consider the rightful claims of politically ineffective majorities, *Carolene* disdains the easy case in its

¹⁵ The best courts can hope for in making these judgments is a rough approximation of the orders of magnitude involved. Legal scholars, however, should reflect seriously on recent efforts by analytic political scientists to model the strategic implications of different legislative arrangements and to undertake experimental research that might test their conclusions in simulated negotiating settings. See, e.g., McKelvey & Ordeshook, *An Experimental Study of the Effects of Procedural Rules on Committee Behavior*, 46 J. POL. 182 (1984); Shepsle & Weingast, *When Do Rules of Procedure Matter?*, 46 J. POL. 206 (1984). It may well be possible in a decade or two to use this research to give more structure to commonsense intuitions about bargaining power and procedures in real-world legislatures.

¹⁶ Of course, *Carolene's* defense of judicial review is not limited to the pluralist rationale developed in this section. In particular, *Carolene* raises the prospect of judicial intervention in cases involving "a specific prohibition of the Constitution, such as those in the first ten amendments." See *supra* note 1. For a critique of this alternative approach to the protection of individual rights, see pp. 743-44.

eagerness to pronounce on harder ones. A dispassionate survey of the relevant literature does not reveal a single-minded concern with the political weakness of *insular* minorities. Instead, it expresses a pervasive anxiety over the way in which inequalities of *wealth* distort the operation of a democratic process formally based upon egalitarian principles.¹⁷

I do not suggest that every thoughtful democrat believes that a systematic effort to check the influence of wealth is an indispensable condition of democratic legitimacy. There are respectable arguments — though I am thoroughly unconvinced by them — to support the claim that any effort to purge our regime of its plutocratic vices would prove worse than the disease itself.¹⁸ For the present, however, I need not evaluate these claims on their merits. It is enough that I make my point explicitly conditional: if, as *Caroline* plainly supposes, it is legitimate to move beyond a purely formal conception of democratic rule, we should begin building a substantive conception of undue influence by considering the disproportionate impact wealth has on American politics. It is here where the easy case for undemocratic influence may be established.

Yet, as we all know, *Caroline* does not assert that prejudice against “impoverished and uneducated minorities” may call for a more searching judicial inquiry. Instead, it professes a concern for the status of “discrete and insular minorities.” This way of framing the issue has strongly influenced the judicial understanding of American democracy over the past half-century. Thus, although modern courts regularly express concern about the bargaining position of discrete and insular minorities, they often react skeptically to the very idea that legislatures may constitutionally attempt to curb the influence of wealth over formally democratic processes.¹⁹

It is too kind to *Caroline*, however, to regard it as yet another example of the American judiciary’s eagerness to emphasize the symptom while ignoring the disease. Even when considered as an exercise in symptomatology, *Caroline* is utterly wrongheaded in its diagnosis. Other things being equal, “discreteness and insularity” will normally

¹⁷ For a thoughtful review of the literature emphasizing this point, see Beitz, *Political Finance in the United States: A Survey of Research*, 95 ETHICS 129 (1984).

¹⁸ See, e.g., R. WINTER & J. BOLTON, *CAMPAIGN FINANCING AND POLITICAL FREEDOM* (1973).

¹⁹ The courts, though, have not been very consistent skeptics. The very same opinion that condemns in the strongest terms the effort to neutralize the impact of wealth, see *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (stating that such a policy is “wholly foreign to the First Amendment”), also allows the government to pursue egalitarian objectives — as long as it pursues these goals by offering candidates a public subsidy if they refuse to accept private contributions, see *id.* at 90–108; see also *Republican Nat’l Comm. v. Federal Election Comm’n*, 487 F. Supp. 280, 286–87 (S.D.N.Y.) (three-judge court) (upholding prohibition of private contributions in connection with public subsidy), *aff’d mem.*, 445 U.S. 955 (1980). For a pointed discussion of the subsidy problem, see Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 26–41.

be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics. Except for special cases, the concerns that underlie *Carolene* should lead judges to protect groups that possess the opposite characteristics from the ones *Carolene* emphasizes — groups that are “anonymous and diffuse” rather than “discrete and insular.” It is these groups that both political science and American history indicate are systematically disadvantaged in a pluralist democracy.

A. *The Free-Rider Problem*

To see my point, start with insularity and consider a thought-experiment suggested by the previous argument. Imagine two groups, *I* and *D*, of equal size (say each accounts for 12 percent of the population). The members of one group, the *I*'s, are distributed in an insular way, concentrated in a single massive island within the sea of American life; the *D*'s, on the other hand, are diffused evenly throughout the sea. Is it really so clear that, by virtue of their diffusion throughout American life, the *D*'s will gain systematic advantages over the *I*'s in the normal course of pluralist politics?

Hardly. To begin with the basics, a political interest gains a great advantage if its proponents can form a well-organized lobby to press their cause in the corridors of power. Yet the construction of a pressure group is no easy task. The main obstacle is the familiar free-rider problem.²⁰ Simply because a person would find his interests advanced by the formation of a pressure group, it does not follow that he will spend his own scarce time and energy on political organization. On the contrary, from each individual's selfish viewpoint, abstaining from interest-group activity is a “heads-I-win-tails-you-lose” proposition. If only a few people adopt the do-nothing strategy, the do-nothings will free-ride on the successful lobbying effort of others. If free-riding becomes pervasive, things will not improve much if a single member of the group adds his money and time to the floundering political effort. Either way, it pays for a selfish person to remain a free rider even if he has a lot to gain from concerted lobbying. For this reason, many interests remain ineffectively organized even in pressure-group America.²¹ How, then, does a minority's insularity affect the probability that it will break through the free-rider barrier and achieve organizational effectiveness?

Far from being a patent disadvantage, insularity can help *I*-groups in at least four different ways, all of which depend upon a single sociological assumption that we should identify at the outset: however oppressed the *I*'s may be in other respects, they have not been prevented from building up a dense communal life for themselves on

²⁰ The classic statement of this problem is to be found in M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 5-65 (1965).

²¹ See *id.* at 165-67.

their tight little island. Thus, wherever an *I* looks, he will find himself in businesses and churches, schools and labor unions, composed largely of people speaking in distinctively *I*-accents about the daily problems of social life. This fundamental fact will generate a whole series of advantages for *I*-members who seek to organize for political purposes.

First, insularity will help breed sentiments of group solidarity. Given an *I*'s daily immersion in social realities that reaffirm his group identity, the typical *I* will conceive his *I*-ness as something much more than an incidental fact about himself. Instead, *I*-ness will serve as a fundamental feature of self-identity — one that will encourage each *I* to view the political activities of the group from a perspective that transcends the purely instrumental. Thus, when a black or a Jew gives \$25 to the NAACP or the Anti-Defamation League, he is not merely, or even principally, gambling that his small bit of money will perceptibly increase his chance of enjoying the fruits of future lobbying victories. Rather, the contribution is a means by which the donor can symbolize the seriousness of his own commitment to his *I*-ness. By contributing to the group cause, I demonstrate to myself, as well as others, that I am serious about the values I profess to hold. Here, at last, is one commodity — group identification — that is immune from the free-rider problem: for if I do not give even a few dollars to the group cause, can I plausibly say, even to myself, that I take my *I*-ness seriously?²²

But insularity does more than engender the sentiment of group solidarity that encourages symbolic contributions — contributions that, when multiplied thousands of times, add up to very substantial resources for the interest group receiving them. It also aids the *I*-group in a second way by providing it with a new range of social sanctions to impose upon would-be free riders. An *I* who refuses to contribute to his interest group cannot expect this fact to be kept secret from his fellow *I*'s — news travels fast along the grapevine in an insular community. Thus, the shirker cannot reasonably hope to evade the moral disapproval of other *I*'s when they learn that he has failed to do his fair share to support the group cause. This stigma may not only lead to embarrassment, but may also result in very concrete material disadvantages in an *I*'s day-to-day dealings with his fellow group members.²³ Only by uprooting himself from his insular community can an *I* hope to escape the opprobrium his free-riding may engender. In contrast, a member of a diffuse *D*-group need not suffer such severe dislocation in order to avoid the disapproval of his fellow group members. Instead, he may insulate himself from their

²² For a related observation, see A. HIRSCHMAN, *SHIFTING INVOLVEMENTS* 85–91 (1982).

²³ For an interesting effort to model phenomena of this kind, see Boorman & Levitt, *The Cascade Effect: An Essay in Disequilibrium Theory*, in *RESEARCH METHODS IN SOCIAL NETWORKS ANALYSIS* (L. Freeman, A. Romney & D. White eds. forthcoming 1985).

displeasure by assimilating into the majoritarian mainstream — undoubtedly a costly process, but typically less costly than the social stigma heaped on the free-riding *I*. In short, as compared to an *I*, a *D* is both less likely to view his group membership as fundamental to his self-identity and less likely to suffer severe sanctions at the hands of his fellow group members if he fails to do his fair share to support their common objectives.

B. Organizational Costs

It follows, then, that the average *I* is more likely to contribute his time and money to the group cause than is an otherwise comparable *D*. Yet this conclusion tells only half the story: not only will an *I*-group receive more resources from its constituency, but *I*'s will also find it cheaper to organize themselves for effective political action. First, the dense communications network generated by insularity dramatically reduces one of the heaviest costs involved in effective political lobbying: the cost of communicating with a mass membership. To get its messages out to its constituency, an insular political group can often avail itself of the communications channels already established by the group's churches, businesses, or labor unions. In contrast, a *D*-group must somehow locate and reach people who interact with one another much less frequently and who have fewer channels already established for the cheap transmission of *D*-group concerns.

Second, the organic character of insular life greatly reduces the costs of selecting credible political leaders. The *I*-group can draw upon a pool of people who have already earned the respect of their fellow *I*'s in other communal contexts: ministers and rabbis, successful lawyers, businessmen, union leaders. In contrast, even if *D*-group members manage to overcome the communications barrier, they must often take the risk of selecting political leaders who have not been tested and observed in other leadership settings.

C. Insularity and Congressional Influence

So insularity is an asset, both in increasing a group's political resources and in reducing its organizational costs. Yet before we render an overall assessment, we must consider the way insularity is likely to affect the attitude of the people upon whom all the bargaining pressure must ultimately be brought to bear: politicians seeking to gain, and retain, elective office. Here we must refine our definitions if we are to make analytic progress. Thus far, I have used "insularity" to refer to the tendency of group members to interact with great frequency in a variety of social contexts.²⁴ If the term is conceived

²⁴ Although this definition serves well enough for purposes of the present argument, it contains two distinct ideas. The first — call it *breadth* — involves the number of different

in this sociological way, people who live far apart from one another may still be members of a single *I*-group, especially under modern conditions. Conversely, it is easy for people living cheek by jowl to fail to qualify as an insular minority from a sociological point of view.

We have reached a point, however, where it is necessary to introduce an explicitly geographic concept of insularity into the discussion — for the simple reason that geography is of the first importance in assessing a group's influence within the American political system. For present purposes, it will suffice to restrict our speculations to two simple geographic alternatives. On the one hand, our sociologically insular minority might also be geographically insular: concentrated in a relatively small number of places in the United States. On the other hand, geographic insularity might not accompany sociological insularity. Indeed, at the limit, the *I*-group might be evenly spread over the fifty states and 435 congressional districts. For heuristic purposes, let us begin with the alternative that is empirically less common, but analytically more tractable. Suppose that an *I*-group is distributed in a geographically diffuse way: if it contains 12 percent of the national population, it accounts for 12 percent of each congressional district. Now compare this geographically diffuse *I*-group with a *D*-group that is both sociologically and geographically diffuse. Other things being equal, which group is more likely to succeed in influencing Congressmen?

The previous analysis suggests that the *I*-group will probably have greater influence. Such a group is more likely to form a political lobby peopled by credible leaders who remain in close touch with the insular constituency they represent. When such lobbyists threaten a Congressman with electoral retribution, they can expect a respectful hearing. Even if the interest-group leaders can influence only 10 to 20 percent of their 12 percent of the population, no sensible politician would lightly forfeit 1 to 2 percent of the vote. Of course, if it happens that the *I*-group's interests are diametrically opposed to those of other groups within a Congressman's electoral coalition, a reelection-maximizing politician might decide to ignore the *I*-group's demands. Yet his reluctance to forsake the group will be greater than it would be if he were dealing with a comparable *D*-group. The *D*-group is less likely to have a well-organized lobby to press its cause. It is also less likely to have the communications network necessary for the lobby's leaders credibly to threaten Congressmen with the prospect of electoral

sociological settings in which a group interacts. A group is more insular in this respect as it interacts in more settings: schools, churches, unions, and so forth. The second idea — call it *intensity* — involves the importance members attach to any particular social setting. Thus, some insular groups may enjoy ties of great breadth but little intensity, whereas others may experience only a few narrow, but intense, sociological bonds. Although it is not necessary to emphasize the distinction between breadth and intensity in this essay, the distinction may become quite important in future work. See *infra* note 28.

retribution. In short, even if the *I*-group is distributed evenly throughout the nation, it has a greater ability to exert political influence through the ultimate currency of democratic politics: votes on election day.

This conclusion is reinforced when we turn to the more realistic case in which the middling *I*-group is distributed very unevenly throughout the country. In this scenario, a middling minority could reasonably expect to be a local majority — or at least a decisive voting bloc — in 20 to 30 congressional districts. For the representatives of these districts, the support of the *I*-group amounts to nothing less than the stuff of political survival. In fact, for all our *Carolene* talk about the powerlessness of insular groups, we are perfectly aware of the enormous power such voting blocs have in American politics. The story of the protective tariff is, I suppose, the classic illustration of insularity's power in American history.²⁵ Over the past half-century, we have been treated to an enormous number of welfare-state variations on the theme of insularity by the farm bloc, the steel lobby, the auto lobby, and others too numerous to mention.²⁶ In this standard scenario of pluralistic politics, it is precisely the diffuse character of the majority forced to pay the bill for tariffs, agricultural subsidies, and the like, that allows strategically located Congressmen to deliver the goods to their well-organized local constituents. Given these familiar stories, it is really quite remarkable to hear lawyers profess concern that insular interests have too little influence in Congress. Instead, the American system typically deprives *diffuse* groups of their rightful say over the course of legislative policy. If there is anything to *Carolene Products*, then, it cannot be a minority's insularity, taken by itself — something more must be involved.

IV. DISCRETE AND INSULAR MINORITIES?

Could that something be the "discreteness" of a *Carolene* minority?

I begin with a question because it is not obvious whether most constitutional lawyers endow the word "discrete" with independent

²⁵ The classic study on this subject is E. SCHATTSCHNEIDER, *POLITICS, PRESSURES AND THE TARIFF* (1935).

²⁶ For a thoughtful review of the political science literature, see G. WILSON, *INTEREST GROUPS IN THE UNITED STATES* (1981). For some recent work by political scientists extending the scope of pluralist analysis, see R. ARNOLD, *CONGRESS AND THE BUREAUCRACY* (1979); M. FIORINA, *CONGRESS — KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977); and J. WILSON, *THE POLITICS OF REGULATION* (1980). The role of interest groups in politics has also been a growing concern of economists. See, e.g., R. NOLL & B. OWEN, *THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS* (1983); Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 *AM. ECON. REV.* 279 (1984); B. PASHIGIAN, *ENVIRONMENTAL REGULATION: WHOSE SELF-INTERESTS ARE BEING PROTECTED?* (Center for the Study of the Economy and the State, Working Paper No. 022, Feb. 1984).

significance in their understanding of the *Caroline* doctrine.²⁷ Nonetheless, we can conceive the term in a way that adds something important to the overall formula. I propose to define a minority as "discrete" when its members are marked out in ways that make it relatively easy for others to identify them. For instance, there is nothing a black woman may plausibly do to hide the fact that she is black or female. Like it or not, she will have to deal with the social expectations and stereotypes generated by her evident group characteristics. In contrast, other minorities are socially defined in ways that give individual members the chance to avoid easy identification. A homosexual, for example, can keep her sexual preference a very private affair and thereby avoid much of the public opprobrium attached to her minority status. It is for this reason that I shall call homosexuals, and groups like them, "anonymous" minorities and contrast them with "discrete" minorities of the kind paradigmatically exemplified by blacks.

This way of defining terms allows us to complement our analysis of insularity in a natural way. While the insularity-diffuseness continuum measures the intensity and breadth of *intragroup* interaction, the discreteness-anonymity continuum measures the ease with which people *outside* a group can identify group members. It should be plain that these two continua are not invariably associated with one another. Blacks, for example, are both discrete and insular, whereas women are discrete yet diffuse; homosexuals are anonymous but may be somewhat insular,²⁸ whereas the poor are both relatively anonymous and diffuse. Because there is no necessary correlation between

²⁷ A notable exception, however, is the person who witnessed footnote four's birth, Professor Louis Lusky. In one discussion, Lusky adopts a conception of discreteness very similar to the one advanced here. Defining it to mean "separate or distinct," Lusky rejects *Graham v. Richardson's* finding that aliens constitute a "discrete and insular minority," 403 U.S. 365, 372 (1971), on the ground, among others, that "many of them, who are Anglophones, pass unnoticed." Lusky, *Footnote Redux: A Caroline Products Reminiscence*, 82 COLUM. L. REV. 1093, 1105 n.72 (1982). Although Lusky is right to say that this deprives Anglophones of "discreteness," I cannot agree with his further suggestion that English-speaking aliens should be deprived of *Caroline* protection. As I stressed at the outset, *see supra* p. 717, this essay considers the relative disadvantage of only those groups that are participating actively in the normal political process, not those categorically excluded from participation. Aliens, of course, are the prototype of the latter group. In *Caroline* terms, the justification for their judicial protection appears in footnote four's second paragraph, *see supra* note 1, which I accept as valid, not the third paragraph, whose future is the subject of this essay.

²⁸ At this point the distinction between intensity and breadth, *see supra* note 24, may be helpful in refining the text's qualifying "somewhat." Although homosexuals do not characteristically share a broad range of social settings in which they interact as homosexuals, a few social contexts do serve as loci for an intense reaffirmation of homosexual identities — most notably, the network of homosexual bars and restaurants found in major American cities. Predictably, this network provided an important organizational focus for the recent political movement on behalf of homosexual rights. *See* J. D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* 129-250 (1983).

discreteness and insularity, I shall treat discreteness as a distinct subject for analysis and consider how a group's place on the discreteness-anonymity continuum can be expected to add to, or detract from, its probable political influence.

Carolene takes a straightforward position on this question. In its view, discreteness is a political liability. Once again, however, the only thing that is obvious is that this is not obvious. The main reason why has been elegantly developed in Albert Hirschman's modern classic, *Exit, Voice and Loyalty*.²⁹ The book's title refers to three nonviolent ways of responding to an unsatisfactory situation: if you dislike something, you may try to avoid it (exit), you may complain about it (voice), or you may grin-and-hope-for-improvement (loyalty). Although these three responses may be related to one another in a number of ways, the relationship between two of them — exit and voice — is of special relevance here. People do not respond to a bad situation by engaging in a random pattern of avoidance and protest. Instead, according to Hirschman, an inverse relationship obtains: the more exit, the less voice, and vice versa. The reason for this is straightforward: the easier it is to avoid a bad situation, the less it will seem worthwhile to complain, and vice versa.

This inverse relationship holds significant implications for the relative political strength of minorities at different points on the discreteness-anonymity scale.³⁰ If you are a black in America today, you know there is no way you can avoid the impact of the larger public's views about the significance of blackness. Because exit is not possible, there is only one way to do something about disadvantageous racial stereotypes: complain about them. Among efficacious forms of complaint, the possibility of organized political action will surely rank high.

This is not to say, of course, that individual blacks, or members of other discrete minorities, will necessarily lend their support to interest-group activity. They may, instead, succumb to the temptations of free-riding and thus deprive the group of vital political resources. But even if discreteness is no cure-all for selfishness, it does free a minority from the organizational problem confronting an anonymous group of comparable size. To see my point, compare the problem faced by black political organizers with the one confronting organizers of the homosexual community. As a member of an anonymous group, each homosexual can seek to minimize the personal harm due to prejudice by keeping his or her sexual preference a tightly held secret. Although this is hardly a fully satisfactory response,

²⁹ A. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970).

³⁰ Although Hirschman explores the way his insight illuminates a variety of social contexts, see *id.* at 44-54, he has not himself considered the application developed in the paragraphs that follow.

secrecy does enable homosexuals to "exit" from prejudice in a way that blacks cannot. This means that a homosexual group must confront an organizational problem that does not arise for its black counterpart: somehow the group must induce each anonymous homosexual to reveal his or her sexual preference to the larger public and to bear the private costs this public declaration may involve.

Although some, perhaps many, homosexuals may be willing to pay this price, the fact that each must individually choose to pay it means that this anonymous group is less likely to be politically efficacious than is an otherwise comparable but discrete minority. For, by definition, discrete groups do not have to convince their constituents to "come out of the closet" before they can engage in effective political activity. So it would seem that *Caroline Products* is wrong again: a court concerned with pluralist bargaining power should be more, not less, attentive to the claims of anonymous minorities than to those of discrete ones.

V. PREJUDICE

But surely it is time to stop playing *Hamlet* without the Prince. The whole point of *Caroline's* concern with "discrete and insular minorities" cannot be understood, I am sure you are thinking, without grasping the final term of the formula: prejudice. Indeed, it has been one of my aims to provoke precisely this reaction. By detailing all the ways discrete and insular minorities gain political advantage over diffuse and anonymous groups, I have meant to emphasize how heavy a burden the idea of prejudice must carry in the overall argument for *Caroline Products*. The burden is of two kinds: one empirical, the other conceptual. To take them one at a time, I shall defer all problems involved in conceptualizing prejudice³¹ so that we may first focus upon the empirical side of the matter.

A. Questions of Fact

Caroline's empirical inadequacy stems from its underinclusive conception of the impact of prejudice upon American society. It is easy to identify groups in the population that are not discrete and insular but that are nonetheless the victims of prejudice, as that term is commonly understood. Thus, the fact that homosexuals are a relatively anonymous minority has not saved the group from severe prejudice. Nor is sexism a nonproblem merely because women are a diffuse, if discrete, majority. Prejudice is generated by a bewildering variety of social conditions. Although some *Caroline* minorities are seriously victimized, they are not the only ones stigmatized; nor is it

³¹ See *infra* pp. 737-40.

obvious that all *Carolene* minorities are stigmatized more grievously than any other non-*Carolene* group. Why should the concern with "prejudice" justify *Carolene's* narrow fixation upon "discrete and insular" minorities?

The answer seemed easy in a world in which members of the paradigmatic *Carolene* minority group — blacks — were effectively barred from voting and political participation. Something is better than nothing: whatever the organizational problems engendered by anonymity and diffuseness, surely they are not nearly so devastating as total disenfranchisement.³² As we turn toward the future, however, it is far less clear that such selective perception makes constitutional sense. Nonetheless, I shall give *Carolene* the benefit of the doubt by sketching a "pariah" model of the political process in which *Carolene's* emphasis on the fate of discrete and insular minorities will still seem empirically plausible.³³ As we move beyond the pariah model, however, anonymous or diffuse minorities will increasingly emerge as the groups that can raise the most serious complaints of pluralist disempowerment.

1. *The Pariah Model.* — Assume a polity in which middling minorities — in the 10 to 20 percent range — attain majority status in a significant number of congressional districts because of the way their insularity interacts with the geographic biases of the American political system. Nonetheless, the minority representatives these groups elect are entirely ineffective in Congress — because all remaining Congressmen refuse to bargain with them in any way. Thus, imagine that you are a nonminority Congressman trying to get a legislative coalition together to support a bill of central importance to your district. After extensive wheeling and dealing, you come within 20 votes of your goal, but the only possible source of support remaining is a bloc of 25 minority Congressmen. Despite your fervent desire to pass the bill for your district, you do not even try to interest them in joining your legislative coalition. Defeat of your priority bill is preferable to victory with the aid of congressional pariahs. And so you grin and bear it as your bill goes down to defeat, thanks to your refusal to deal.

Sound implausible? Nonetheless, there are conditions in which a nonminority Congressman, concerned with maximizing his chances of reelection, might treat his minority brethren like complete pariahs. Imagine, for example, that a majority Congressman's constituency

³² See A. BICKEL & B. SCHMIDT, *THE JUDICIARY AND RESPONSIBLE GOVERNMENT* 908-90 (Oliver Wendell Holmes Devise History of the Supreme Court of the United States No. 9, 1984) (recounting the Supreme Court's response to the disenfranchisement of blacks).

³³ Even within this "pariah" model, however, it is possible that some anonymous or diffuse groups might be as politically disadvantaged by prejudice as any discrete and insular minority. The point of sketching the pariah model is simply to describe a political system in which *Carolene's* narrow focus, although not necessarily correct, becomes "empirically plausible."

were so prejudiced against the discrete and insular minority that *no* legislative benefit the Congressmen might deliver would, in their eyes, compensate them for the ideological affront they would suffer from seeing their Representative soliciting minority support. The magnitude of this prejudice must be very great indeed to preempt concern for practical matters. Moreover, this condition, let us call it "preemptive prejudice," must pervade a very substantial number of congressional districts before the pariah model is applicable. Yet it is only by indulging in something like these strong empirical assumptions that *Caroline* can claim that the effects of prejudice *plainly* outweigh the political advantages enjoyed by minorities that are discrete and insular.³⁴

2. *Beyond the Pariah Model.* — Once we deny the general empirical validity of the pariah model, our assessment of the political impact of a discrete and insular group will invariably be more complex. Such a minority may be expected to bring to the bargaining process an asset that many diffuse and anonymous groups lack — namely, 20 to 25 Representatives devoted to the energetic pursuit of the minority's interests.³⁵ Whether this substantial bargaining advan-

³⁴ By introducing the idea of monitoring costs, it is possible to weaken the preemptive-prejudice condition and still come up with the pariah result. In the monitoring-cost model, we may assume that if the Representative had a chance to provide his constituents with all the facts about his bargaining situation, he *would* be able to convince most of them that bargaining with the pariahs was worthwhile. The trouble is that most of the Congressman's constituents do not have the time or inclination to follow the kind of blow-by-blow account of the goings-on in Washington that might make their Congressman's deal with the pariahs seem rational. Given the existence of monitoring costs, it is conceivable that constituents might follow a *per se* rule against deals with pariahs in the belief that such deals are so rarely justified that it is not worthwhile evaluating them individually.

Nonetheless, although this response is one way constituents might react to heavy monitoring costs, I do not think it a likely response. Most of us are perfectly aware that politics often makes for strange bedfellows, and that our Congressman cannot be expected to vote on all matters precisely the way we want him to. Except under exceptional circumstances, we will not turn against a Congressman on the basis of a few votes.

If this observation is true, introducing monitoring costs into the model might make the pariah result seem less likely, rather than more so. Monitoring costs may enable majority Congressmen to bargain with their minority colleagues in ways they hope their prejudiced constituents will readily forgive — or will not even discover. Thus, even after including monitoring costs, the pariah model will begin to seem a plausible description of political reality only if society is plagued by prejudice that is both pervasive and exceptionally intense.

³⁵ Twenty-one blacks served in the House of Representatives in 1984. The number of black Congressmen has increased steadily over the past three decades: from two Representatives in the early 1950s, to four in 1960, to nine Representatives and one Senator (Edward Brooke of Massachusetts) in 1970, to 17 Representatives in 1980. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES* 154, 156 (1979) (P-23, No. 80); T. CAVANAGH & D. STOCKTON, *BLACK ELECTED OFFICIALS AND THEIR CONSTITUENCIES* 2 (1983). Hispanic representation in Congress has undergone a similar increase. One Hispanic Congressman was elected in 1960, six in 1970, and eleven in 1984; this last figure includes two Senators, Dennis Chavez and Joseph Montoya, both of New Mexico. Telephone interview with Lisa Navarrete, spokesperson for the

tage is completely negated by prejudice will depend upon many particular institutional factors that will change from decade to decade, if not day to day — facts, moreover, that the Supreme Court of the United States would have special difficulties elaborating upon in a judicial opinion.

It is within this context that I turn to a very different approach to *Carolene* presented by John Hart Ely in his important work, *Democracy and Distrust*.³⁶ Among its many virtues, the book explicitly recognizes that the conventional *Carolene* wisdom about the powerlessness of discrete and insular minorities is “in need of some reexamination.”³⁷ Yet Dean Ely does not attempt the interest-group analysis that has thus far engaged our energies. Instead, he relies exclusively on a social-psychological approach to the legislative process. On his view, the critical thing about prejudice is the way it allows legislators to stereotype “discrete and insular” minorities. It is this legislative propensity to divide the world into “we-they” categories that, according to Ely, lies at the core of *Carolene*’s concern: “we” legislators will both overestimate the dangers posed by the “they” group and underestimate its similarities to the “we” group. As a consequence, legislation that disadvantages “they” groups will be based on an intolerably distorted perception of social reality.³⁸

Even if we were to accept a “we-they” view of legislative psychology,³⁹ Ely’s failure to recognize the limits of the pariah model

Congressional Hispanic Caucus, Inc. (Sept. 6, 1984). According to the Census Bureau, Hispanics accounted for 6.4% of the American population in 1980. See BUREAU OF THE CENSUS, *supra* note 14, at 1-21.

³⁶ J. ELY, *supra* note 6.

³⁷ *Id.* at 152.

³⁸ See *id.* at 157-60.

³⁹ I, for one, do not find Ely’s social psychology persuasive. No doubt many people are trapped by “we-they” stereotypes of the kind Ely describes. Yet Ely is not concerned with humankind in general, but with the particular people who serve as legislators. When we narrow our focus to this small group, I do not believe that Ely’s simplistic psychology is the norm. No good politician is eager to antagonize *any* portion of his constituency unnecessarily — if only because he can never tell whether, in five or ten years, he will desperately require the support of a group that is now electorally unnecessary. Rather than alienate groups of voters, most would-be politicians — right, left, and center — make the rounds of *all* significant social and ethnic groups in our society. In this endless round of labor-union breakfasts, bankers’ lunches, and Knights of Columbus dinners, would-be Congressmen may be expected to be extremely attentive to currents of opinion — especially among groups who are not their natural allies — in an effort to discover ways to reach out to otherwise indifferent or hostile constituencies. If a Congressman learns anything from these countless hours on the hustings, it is that people very different from himself are people too, and that he can understand distinctive points of view even if he has not lived his whole life with every group in America.

Of course, a politician may have to make some hard decisions about the particular interests he will champion in forthcoming elections. And, in the end, he may well decide that an all-out appeal to prejudice is in his best electoral interest. Yet it is naive to assume that most successful politicians make such decisions on the basis of simplistic “we-they” stereotypes rather than hard-headed electoral calculations. Certainly this is not the consensus of modern political

serves as an independent ground for questioning his conclusions. Quite simply, our efforts in bargaining theory have led us to expect that "middling minorities" of the "discrete and insular" kind will elect a significant number of Representatives — say 20 to 25 — who are extremely responsive to their interests. As long as these politicians are not treated like pariahs, they can become a potent legislative force — trading votes with other legislators to further the objectives of their own constituents. Thus, if minority politicians also harbor "we-they" prejudices, the legislative dynamic will inevitably be far more complex than Ely allows. Rather than remorselessly reflecting a monochromatic view of social reality, legislation will be the joint product of different "we-they" prejudices held by the different politicians sitting around the legislative bargaining table. This is more than diffuse or anonymous minorities can expect: *their* representatives may not even *be* at the bargaining table.⁴⁰ As soon as he moves beyond the narrow confines of the pariah model, Dean Ely cannot rehabilitate *Carolene's* exclusive focus on discrete and insular minorities through "we-they" psychology alone.

Dean Ely seems aware of all this. Although *Democracy and Distrust* does not contain a fully developed analysis of minority legislative power, it does hint at an approach different from the one I advance here. Dean Ely suggests that minority politicians may suffer from a distinctive psychological affliction: while other Congressmen act on "we-they" prejudices in favor of their own constituents, minority politicians may accept the very stereotypes they should be challenging.⁴¹

scientists. To the contrary, an important strand of recent work explicitly tries to model American Congressmen as rational vote-maximizers. See, e.g., M. FIORINA, *supra* note 26, at 39-49; D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 3-5, 13-38 (1974). Dean Ely does not discuss this literature in *Democracy and Distrust*.

⁴⁰ This is not to say that *all* anonymous or diffuse minorities are worse off than *all* discrete and insular ones. On the one hand, prejudice against a discrete and insular minority may, as in the pariah model, entirely offset the group's other organizational advantages. See *supra* pp. 732-33. On the other hand, the organizational disadvantages suffered by an anonymous and diffuse group may sometimes be offset by a "third-party beneficiary" effect. In such cases, a group does not gain power through its own direct organizational efforts, but is instead the happy beneficiary of political deals struck by other, better organized interests. This third-party effect may operate so powerfully that it more than compensates the group for its weaknesses in direct bargaining. When this is so, I do not mean to suggest that a diffuse or anonymous group may rightly claim systematic disadvantage in the ongoing pluralist process.

My point is simply that *some* anonymous or diffuse groups — homosexuals, women, the poor — cannot in fact expect more from the third-party beneficiary effect than can many classic discrete and insular minorities. In such cases, the organizational weaknesses of anonymous or diffuse groups make them more disadvantaged in pluralist bargaining, all else remaining equal, than the groups upon whom *Carolene* courts have focused their concern. Advocates for such diffuse or anonymous interests, then, should no longer be embarrassed by their groups' evident differences from the classic discrete and insular minority. For it is precisely these differences that make their constitutional case stronger, not weaker.

⁴¹ See J. ELY, *supra* note 6, at 165-66.

If this point were conceded, Ely's argument would take on a self-sealing quality: no matter how actively minority representatives participated in the bargaining process, they would only reinforce, and never challenge, prevailing prejudices.

Dean Ely shows great restraint in dealing with this suggestion of minority "false consciousness." While he says that "[t]he general idea is one that in some contexts has merit,"⁴² his book does not, in fact, spend very much space defending and elaborating it.⁴³ I believe, moreover, that an appeal to "false consciousness" cannot be elaborated in a way that makes constitutional sense.

The first question to ask about "false consciousness" is an empirical one: will the rising generation of minority politicians in fact passively accept debasing stereotypes? I see no reason to project such a grim image upon our future. To the contrary, the classic prejudices are under vigorous challenge by powerful voices emerging from a broad range of discrete and insular communities. This is not to say, of course, that minority-group representatives will unanimously agree about matters of public policy. But I do not believe it useful to analyze these inevitable — and often reasonable — disagreements by labeling one or another group of disputants as the victims of "false consciousness."

The second question is: even if some social psychologist could "prove" the existence of false consciousness, should the Supreme Court transform this social phenomenon into an assumption of constitutional law? We are dealing here not with an academic scientific inquiry, but

⁴² *Id.* at 165.

⁴³ Indeed, Dean Ely devotes most of his brief discussion to explaining why he does not think that women as a class have internalized an unquestioning acceptance of male stereotypes. *See id.* at 165-66. In contrast, he spends less time explaining the conditions under which the problem of false consciousness might rise to constitutional significance. All he does is quote with approval a brief passage from a concurring opinion by Justice Marshall: "Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority." *Id.* (quoting *Castaneda v. Partida*, 430 U.S. 482, 503 (1977) (Marshall, J., concurring)). The great studies cited by Justice Marshall, however, date from the 1940s and 1950s, *see, e.g.*, G. ALLPORT, *THE NATURE OF PREJUDICE* 150-53 (1954); A. ROSE, *THE NEGRO'S MORALE* 85-95 (1949); Bettelheim, *Individual and Mass Behavior in Extreme Situations*, 38 *J. ABNORMAL & SOC. PSYCHOLOGY* 417 (1943), and their conclusions should not be projected mechanically onto the psyches of the next generation's minority politicians. Moreover, the case in which Justice Marshall made his remarks involves a problem different from the one that concerns us here. The question in *Castaneda* was simply whether the fact that Spanish speakers were the "governing majority" in a county should lead to a change of the rules establishing a prima facie case of intentional discrimination against the selection of Mexican-American grand jurors. In holding that the elements of a prima facie case were constitutionally unaffected, the Court was simply recognizing that bias in the administration of the law can outlive the political conditions that gave rise to it. This conclusion in no way implies, however, that minority politicians will systematically suffer from a pernicious form of false consciousness.

with a question of institutional relationships. In branding minority politicians as victims of "false consciousness" on the pages of the *United States Reports*,⁴⁴ the Supreme Court would be consigning them to a peculiarly demeaning constitutional status. Henceforth, they — and they alone — would be deemed constitutionally incapable of discharging the representative functions of democratically elected legislators. Such a declaration would make a mockery of *Carolene's* promise. Rather than attempting to approximate the results of a perfect pluralist democracy, the Court would be protecting minority rights by emphatically impugning the capacity of these very same minorities to engage in democratic politics at all.

Once we reject the appeal to false consciousness, I see no way to avoid reformulating *Carolene's* implications if it is to serve the needs of a polity moving beyond the pariah model. This doctrinal reorientation, it bears repeating, does *not* suppose that we have reached a point in our history in which prejudice against discrete and insular minorities has become a thing of the past. Instead, it simply recognizes that many of these groups can deal with the problem politically in ways that other victims of prejudice may be powerless to match. It is the members of anonymous or diffuse groups who, in the future, will have the greatest cause to complain that pluralist bargaining exposes them to systematic — and undemocratic — disadvantage.

B. Questions of Value

But *Carolene's* failure to recognize the political predicament of anonymous or diffuse groups that are victims of prejudice is only half the problem; the other half is more conceptual, but no less troubling. The idea of "prejudice" is simply unequal to the task assigned it within the overall *Carolene* analysis. Recall that *Carolene's* promise is a form of argument that allows a court to say that it is purifying the democratic process rather than imposing its own substantive values upon the political branches. And yet it is just this process orientation that is at risk when a *Carolene* court undertakes to identify the prejudices that entitle a group to special protection from the vagaries of pluralist politics. One person's "prejudice" is, notoriously, another's "principle." How, then, do we identify a group for *Carolene*

⁴⁴ It would be no more acceptable for a court to excise the offensive language from its opinion and covertly use the offensive principle as an operating premise of its constitutional approach to minority rights. See Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 2-3, 19-22 (1979). Indeed, I believe such an approach would be even more disrespectful of minority groups than would a candid declaration of constitutional principle. Whatever may be said in support of mystification in other contexts, see G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 172-81 (1982); G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 17-28, 195-99 (1978), I cannot believe that thoughtful lawyers would embrace it in this one.

protection without performing the substantive analysis of constitutional values that *Carolene* hopes to avoid?

The kind of answer required is clear enough. To redeem *Carolene's* promise, the judicial identification of a prejudice cannot depend upon the substance of the suspect view, but must turn on the way in which legislators come to hold their belief. The process-oriented argument goes something like this: although each of us cannot always expect to convince our legislators, we can at least insist that they treat our claims with respect. At the very least, they should thoughtfully consider our moral and empirical arguments, rejecting them only after conscientiously deciding that they are inconsistent with the public interest. If a group fails to receive this treatment, it suffers a special wrong, one quite distinct from its substantive treatment on the merits.⁴⁵ And it is this purely processual kind of prejudice that constitutes the grievance *Carolene* courts may endeavor to remedy without engaging in the suspect task of prescribing substantive values.

Of course, no one imagines that it will be easy for the courts to act effectively on behalf of the victims of purely processual prejudice. To the contrary, a rich and provocative literature describes the difficulties involved in legislative mind reading.⁴⁶ For present purposes, I shall assume that the partisans of the process approach can solve these problems in one way or another. My own objections to the enterprise arise only after these threshold difficulties have been overcome. Thus, I shall assume that judges can accurately gauge the quality of legislative deliberation behind a statute, and I shall ask you to speculate about what they would find if they deployed their high-powered techniques on a representative range of legislation.

To begin with the obvious: judges would find that a lot of purely processual prejudice does exist in the case of classic discrete and insular minorities. There are plenty of racial and religious bigots who have never stopped for a moment to consider the arguments and interests on the other side. But this obvious fact is hardly sufficient to justify *Carolene's* selective focus on discrete and insular minorities.

⁴⁵ For insightful elaborations of this theme, see J. ELY, *supra* note 6, at 81-86, and Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689-98 (1984).

⁴⁶ The Court's uncertainties on this subject, compare *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971) (statute's effect, not legislature's motive, is the central issue for equal protection analysis), with *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (discriminatory intent is necessary to establishing equal protection violation), has generated an unending stream of commentary. Among the works I have found most enlightening are J. ELY, *supra* note 6, at 136-45; Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828 (1983); Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978); and Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto De Jure Distinction*, 86 YALE L.J. 317 (1976).

The critical question, instead, is whether purely processual prejudice is more characteristic in this context than in the political treatment of other interests and opinions. What of the prejudice middle-class legislators may have toward the poor? Heterosexuals toward homosexuals? More fundamentally, are we right to assume that only those *opposed* to "progressive" causes can be processually prejudiced?

Let me propose a test case. Imagine that, after reading Herbert Wechsler's famous essay,⁴⁷ a group of conservative legalists becomes sincerely convinced that *Brown v. Board of Education* could not in fact be based on neutral principles and so does not deserve its place as a cornerstone of our constitutional law. Acting on this conviction, the group begins a campaign advocating a constitutional amendment to repeal *Brown* and generates some modest interest among conservatives across the country. Arriving in Washington, D.C., with their legal process arguments elaborately developed, the group proceeds to the lobbies of Congress. How do you think the group would be received? Would most Representatives be willing and able to confront the Wechslerian arguments with a thoughtful defense of our constitutional commitment to equality? Or would they respond in a *processually* prejudiced fashion — peremptorily brushing aside the Wechslerians' arguments with a catch-phrase or two that fails to join issue?

This is, in principle, an empirical question — though, like many others, it will never get a good empirical answer. Nonetheless, if my study of politics has taught me anything, I would not expect the agitating Wechslerians to receive a processually unprejudiced response on Capitol Hill. As far as I can tell, any large representative assembly will contain a bewildering variety of human types — from the elaborately thoughtful to the superficially unquestioning.⁴⁸ It is simply self-congratulatory to suppose that the members of our own persuasion have reached their convictions in a deeply reflective way, whereas those espousing opinions we hate are superficial. Instead, a thoughtful judge can expect to find an abundance of stereotype-mongers and knee-jerks on *all* sides of *every* important issue — as well as many who have struggled their way to more considered judgments. Given the complexity of the human comedy, a judge is bound on a fool's errand if he imagines that the good guys and bad guys of American politics can be neatly classified according to the seriousness with which they have considered opposing points of view. Processual prejudice is a pervasive problem in the American political system.

But if this is right, *Carolene* cannot justify its concern with discrete and insular minorities without calling on judges to engage in a very

⁴⁷ Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

⁴⁸ For a revealing sketch of the diverse foundations of congressional judgment, see J. KINGDON, *CONGRESSMEN'S VOTING DECISIONS* 227-40 (2d ed. 1981).

different kind of judgment, one dealing with the *substance* of racial and religious prejudice. In doing so, the judge need not try to play the elaborate psychological and political guessing game required to assess the extent to which a statute is the product of a prejudiced refusal to give a respectful hearing to disfavored interests and opinions. Instead, she proceeds to a more familiar judicial inquiry into the nature of the substantive reasons that might plausibly justify the legislature's assertion of authority. If the only plausible reasons for the statute's enactment offend substantive constitutional principles, the groups aggrieved by the statute are declared victims of "prejudice"; if not, not. Although this judicial inquiry into the rational foundations of a statute may sometimes require a focused inquiry into the data available to, or even the subjective opinions of, particular public officials,⁴⁹ the critical legal question is of a very different kind: why are the political principles endorsed by some groups judicially recognized as vindicating the constitutionality of a statute, while others are viewed as inadmissible "prejudices" delegitimizing a statute's claim to constitutionality?

If *Carolene* somehow hoped to find a shortcut around this substantive inquiry into constitutional values, its journey was fated to fail from the outset. The difference between the things we call "prejudice" and the things we call "principle" is in the end a substantive moral difference. And if the courts are authorized to protect the victims of certain "prejudices," it can only be because the Constitution has placed certain normative judgments beyond the pale of legitimacy.⁵⁰

VI. FROM CRITIQUE TO RECONSTRUCTION

Paradoxically, it is by reflecting upon this last mistake that we may begin to reorganize *Carolene* in a way that will renew its promise for the next generation. Our discussion suggests that, in responding to "prejudice against discrete and insular minorities," *Carolene* courts have in fact been trying to force a single formula to express two very different insights. *Carolene*'s first insight is that some groups suffer from systematic disadvantages in pursuing their interests in the pluralist bargaining process normally central to American politics. On this view, the Court appears as a perfecter of pluralist democracy. It

⁴⁹ For the most recent judicial exploration of this quagmire, see the concurring and dissenting opinions of Justices Brennan and Rehnquist in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679, 687 (1981).

⁵⁰ I do not wish to suggest that this is a new discovery. For thoughtful elaborations of parallel themes, see Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 134-37 (1981), and Tribe, *supra* note 6, at 1072-77.

corrects political results generated by unfair bargaining advantages but does not question the substantive values pursued by the participants.

Carolene's emphasis on "prejudice," however, announces a second, quite different, conception of judicial review. Here the courts do not enter as the perfecters of pluralist democracy, but as pluralism's ultimate critics. In exercising this critical function, courts insist that there are certain substantive principles — *Carolene* calls them "prejudices" — that pluralist politicians are simply not allowed to bargain over in normal American politics. It is only when statutes emerging from the pluralist process do not offend these constraining constitutional values that they have the force of law in our political system.

By collapsing the perfecting and critical functions of judicial review into a single formula, *Carolene* poses a formidable intellectual problem for lawyers in the years ahead. Indeed, I believe the future vitality of both functions will significantly depend upon the success with which constitutional lawyers manage to disentangle the two themes from one another — and so permit each to receive the sustained doctrinal elaboration it deserves.

Consider first the Supreme Court's function as a perfecter of pluralist democracy. Here *Carolene's* fundamental concern seems more salient today than when first announced a half-century ago. In 1938, Americans were only just beginning to move beyond a political system that limited interest-group struggle over federal policy to a few classic pork-barrel issues: the tariff, internal improvements, land distribution, and the like. Yet *Carolene* was remarkably prescient in recognizing that the downfall of the Old Court's laissez-faire jurisprudence had transformed the structure of pluralist bargaining into an issue of prime constitutional importance. In the system of activist government inaugurated by the New Deal, the course of pluralist bargaining would have a profound and pervasive impact upon the shape of every American's life. Within this setting, the existence of systematic bargaining disadvantage erodes the perceived legitimacy of our constitutional regime in the eyes of broad segments of the American population. If *Carolene* had not already impressed a concern with the integrity of the pluralist process onto our constitutional consciousness, another case would inevitably have made the same point.

The problem comes only in the way in which *Carolene* elaborates its fundamental insight in terms of judicial doctrine. Even in this regard it would be wrong to judge *Carolene's* focus upon "discrete and insular minorities" too harshly. The case was handed down in the shadow of the infamous Nuremberg laws, which had stripped German Jews of all their previously established civil rights. This served to recall, in the starkest way, the grim process by which black Americans had been stripped of their civil rights in the aftermath of

Reconstruction.⁵¹ In both cases, the dreadful consequences of political exclusion were plain to all who cared to look. Moreover, it was — and remains — obvious that the political decision to disenfranchise these groups was made vastly easier by virtue of their discreteness and insularity. It was precisely these characteristics that permitted German Nazis and American white supremacists to portray Jews and blacks as aliens within the body politic, to be used and abused in any way the master race desired.

Against this historical background,⁵² the *Carolene* Court was absolutely right to emphasize the special vulnerability of discrete and insular minorities, as well as the fundamental importance of ensuring their effective participation in the democratic process. After a generation of renewed struggle for civil rights, however, it no longer follows that the discreteness or insularity of a group will continue to serve as a decisive disadvantage in the ongoing process of pluralist bargaining. Rather than find this fact embarrassing, constitutional lawyers ought to be proud of it. It suggests that, despite the racial and religious prejudices that still haunt our society, Americans *have* made some progress toward a more just polity.

It will be a tragedy, however, if the progress we have made serves to justify a refusal to develop and extend *Carolene's* concern with the integrity of pluralist process to contemporary conditions. Long after discrete and insular minorities have gained strong representation at the pluralist bargaining table, there will remain many other groups who fail to achieve influence remotely proportionate to their numbers: groups that are discrete and diffuse (like women), or anonymous and somewhat insular (like homosexuals), or *both* diffuse and anonymous (like the victims of poverty). If we are to treat *Carolene* as something more than a tired formula, constitutional lawyers must develop paradigms that detail the systematic disadvantages that undermine our system's legitimacy in dealing with the grievances of these diffuse or anonymous groups.

At the same time that we enrich the capacity of constitutional law to perfect pluralist democracy, we must also reaffirm a second fundamental mission for judicial review: to expound the ultimate limits imposed on pluralist bargaining by the American constitutional system. In the exercise of this critical function, the courts insist that, for all our plural differences, We the People of the United States *do* have a set of fundamental commitments that bind us together in ways that our interest-group representatives are not normally elected to modify. It is this idea of higher law that must be taken with renewed seriousness if we are to sustain judicial protection for racial and religious minorities in the coming generation. Although, as we have

⁵¹ See A. BICKEL & B. SCHMIDT, *supra* note 32, at 721–990.

⁵² For further elaboration, see Cover, *supra* note 3, at 1294–1304.

seen, the *Carolene* effort to protect minorities ultimately required the elaboration of substantive constitutional principles, the *Carolene* tradition's reliance on bad political science has made it seem possible to avoid the sustained inquiry into democratic theory that substantive judicial review entails. More particularly, *Carolene's* focus on pluralist bargaining has subtly encouraged the belief that pluralism is the alpha and the omega of the American constitutional system, and that any effort by the courts to challenge the substantive values generated by legislative compromise is necessarily antidemocratic.

We must repudiate this reduction of the American Constitution to a simple system of pluralist bargaining if we are to reassert the legitimacy of the courts' critical function. Although the bargaining model captures an important aspect of American politics, it does not do justice to the most fundamental episodes of our constitutional history. We make a mistake, for example, to view the enactment of the Bill of Rights and the Civil War Amendments as if they were outcomes of ordinary pluralist bargaining. Instead, these constitutional achievements represent the highest legal expression of a different kind of politics — one characterized by mass mobilization and struggle that, after experiences like the Revolution and the Civil War, yielded fundamental principles transcending the normal processes of interest-group accommodation. It is only by reasserting the relevance of this tradition of constitutional politics, as I have called it,⁵³ that we shall gain the necessary perspective to put pluralist bargaining in its place as one — but only one — form of American democracy, and the lesser form at that.

Not that the *Carolene* tradition — or *Carolene* itself — is entirely oblivious to the limits of pluralist bargaining. Indeed, it was just this issue that initially provoked Chief Justice Hughes to press for a revision of *Carolene* in the opinion-writing process. While Justice Stone's early draft had focused exclusively on the pluralist perfection rationale, the Chief Justice believed that something essential was missing in the case for judicial review. In response to this expression of concern, Justice Stone added a first paragraph to footnote four that takes our higher-law tradition more explicitly into account. Thus, before addressing the pluralist themes we have considered here, *Carolene* noted that "the presumption of constitutionality" may also be overcome "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments."⁵⁴

In calling the Bill of Rights "specific," Justice Stone doubtless wished to emphasize that the Court had learned its lesson in 1937 and

⁵³ I consider this tradition at length in Ackerman, *supra* note 12.

⁵⁴ For the complete text of the footnote's first paragraph, see note 1. For an authoritative account of the footnote's genesis, see Lusky, *supra* note 27, at 1096-1100.

would not use the Constitution's grand abstractions to revive the laissez-faire capitalism of the *Lochner* era. Nonetheless, by framing its pledge of judicial restraint in this way, *Carolene* added a distortion of its own. For it intimated that the judicial process of articulating the nature of our higher law values can be reduced to a mechanical effort to apply "specific" constitutional rules to predetermined facts. Such a position requires judges to repudiate the main line of modern American legal thought, which — from Pound to Dworkin⁵⁵ — is one long elaboration of the inadequacies of mechanical jurisprudence. Even more fundamentally, it trivializes the nature of the American people's higher-law achievement. Our Constitution does not even attempt to provide a detailed set of rules that might suggest the possibility of pseudomechanical application. Instead, our higher law tradition gains its distinctive character precisely by speaking in abstract and general terms about the nature of our basic rights. Hence, in endowing the Bill of Rights with a false "specificity," *Carolene* not only proffered a misleading and unattainable picture of responsible judicial decisionmaking. It also diverted us from the main question: having cleared away the laissez-faire debris of the *Lochner* era, can we still reconstruct, out of authoritative sources, a legally cogent set of higher-law principles that can continue to govern the pluralist process in the name of We the People?

The point of this essay is not to answer this question, but to convince you that it needs asking if we are to preserve the constitutional rights of discrete and insular minorities during the coming decades. I do not believe that the weaknesses in *Carolene's* defense of minority rights will long remain a professional secret locked in the pages of the *Harvard Law Review*. Instead, *Carolene's* errors will become increasingly apparent on the surface of American political life. Thanks largely to the achievements of the generation that looked to *Carolene* for inspiration, black Americans today are generally free to participate in democratic politics — and do so by the millions in every national election.⁵⁶ Moreover, the predicted consequences of the discreteness and insularity of black voters are beginning to be obvious at every level of American government. From City Hall to Capitol Hill, black politicians now aggressively represent their constituencies

⁵⁵ See Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22-32 (1967) (distinguishing legal principles from legal rules); Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

⁵⁶ In the congressional elections of 1982, voting participation among whites was 50%; among blacks, 43%. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1982, at vi (1983) (P-20, No. 383). Only 25% of the Spanish-speaking population voted. The Census Bureau concludes that this disparity was "primarily due to the large proportion of this population who reported that they were not citizens." *Id.* at v. If we restrict our attention to those who were registered, 72% of Hispanics voted, compared to 73% of blacks and 76% of whites. *Id.* at vi.

in the citadels of power.⁵⁷ Similarly, religious organizations are increasingly involved in pressure-group politics.⁵⁸

I am not suggesting that America is on the way to becoming a religious and racial utopia. Despite their political gains, blacks still suffer under the weight of grossly disproportionate economic, educational, and social disadvantage, as well as sheer racial prejudice.⁵⁹ In light of these facts, it is far too early to say that we have redeemed the promise of the thirteenth and fourteenth amendments. In contrast to black political mobilization, the heightened involvement of organized religion can readily undermine our substantive constitutional legacy — threatening the very values of religious toleration and free exercise to which our higher law is committed.

Yet as long as we use *Caroline* rhetoric to express our constitutional concerns with racial equality and religious freedom, we will find ourselves saying things that are increasingly belied by political reality. While constitutional lawyers decry the political powerlessness of discrete and insular groups, representatives of these interests will be wheeling and dealing in the ongoing pluralist exchange — winning some battles, losing others, but plainly numbering among the organized interests whose electoral power must be treated with respect by their bargaining partners and competitors. Gradually, this clash between constitutional rhetoric and political reality can have only one result. As time goes by, the constitutional center will not hold: the longer *Caroline* remains at the core of the constitutional case for judicial review, the harder lawyers will find it to convince themselves, let alone others, that judicial protection for the rights of “discrete and insular minorities” makes constitutional sense.

For those who are constitutional conservatives in the deepest sense, and who look upon our tradition of civil liberties as one of the greatest achievements of American law, the challenges are clear. On the one hand, if we are to remain faithful to *Caroline's* concern with the fairness of pluralist politics, we must repudiate the bad political science that allows us to ignore those citizens who have the most serious complaints: the anonymous and diffuse victims of poverty and sexual discrimination who find it most difficult to protect their fundamental interests through effective political organization. On the other hand,

⁵⁷ “Between 1965 and 1982, the number of black elected officials increased tenfold, from about 500 to more than 5,100 Blacks have now been elected to every major category of public office except the presidency, vice presidency, and governorship” T. CAVANAGH & D. STOCKTON, *supra* note 35, at 1. Blacks have made the most substantial gains at the local level: in 1982, there were 465 black county officials, 2,451 elected blacks at the municipal level, and 563 in the judiciary or in law enforcement. *Id.* at 2. For the data on black Representatives in Congress, see note 35.

⁵⁸ See THE NEW CHRISTIAN RIGHT (R. Liebman & R. Wuthnow eds. 1983).

⁵⁹ See Wilson, *The Urban Underclass, Social Dislocation, and Public Policy*, in AMERICAN MINORITIES AND CIVIL RIGHTS (L. Dunbar ed. forthcoming 1985).

we must explain to our fellow Americans that there are constitutional values in our scheme of government even more fundamental than perfected pluralism — most notably, those that bar prejudice against racial and religious minorities. If we persist in holding these rights hostage to pluralist theory, we shall only end up mocking the proud role that *Carolene* has played in the pursuit of constitutional values over the past half-century. By failing to adapt *Carolene's* constitutional theory to a changing political reality, we shall have passively allowed the Constitution's profound concern for racial equality and religious freedom to be trivialized into a transparent apologia for the status quo.