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CAROLENE, CONFLICTS, AND THE FATE OF THE "INSIDE-OUTSIDER"

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INTRODUCTION

*United States v. Carolene Products Co.*¹ is no longer only a case. It is a line of reasoning, and one so venerable as to have achieved almost axiomatic status in a world where virtually every other proposition of constitutional law is best considered controversial. It is, in Justice Powell's words, "the most celebrated footnote in constitutional law."² Yes, it has its critics,³ but even they would probably admit that *Carolene's* reasoning is more ensconced in our constitutional imaginations than any other line of reasoning not directly traceable to the text.

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¹ 304 U.S. 144 (1938). This paper is primarily concerned with the reasoning introduced in what is usually referred to as "the *Carolene* footnote." See *id.* at 152 n.4.

² Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982).

³ See, e.g., Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 716-18 (1985) (criticizing traditional application of *Carolene* as ill-suited for the issues that will be faced by the next generation); see also Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1067-79 (1980) (criticizing process-based theories, including Professor Ely's expansion of the *Carolene* reasoning). The view in the literature that is probably closest to the one expressed here is Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 116. Brest is not, however, primarily concerned with a critique of *Carolene*.

Carolene's appeal lies in its apparent ability to protect minority interests through a process-based analysis, without recourse to controversial substantive premises.⁴ Because its stated concern is process rather than substance, it is supposedly more consistent with democratic theory.⁵ Yet, at the same time, it purports to invalidate those majoritarian excesses that impinge unfairly on minorities who were historically subject to abuse. And because it more or less conforms to existing anti-discrimination doctrine,⁶ it also supposedly explains and legitimates the basic contours of equal protection law.

In short, *Carolene* is the perfect constitutional tool: modest, powerful, and descriptively accurate. Its genius lies in its ability to demonstrate that constitutional doctrine is exactly as it should be. It reassures us that the American system of judicial review really works and that it works without threatening our cherished notions of democracy. *Carolene* assures us that we can have our majoritarian cake and eat it too.

This appearance is completely illusory. *Carolene*, together with the cases and academic commentary interpreting it, is neither process-based nor particularly protective of minorities. Because a truly process-oriented theory would be more protective of minority interests than the *Carolene* reasoning as it has been applied, such a process theory would mandate radical revision of existing equal protection doctrine. In addition, and perhaps most strikingly, *Carolene* is not a judicially modest approach to constitutional adjudication. It does not merely police the democratic processes in a value-free way. Instead, it allows—indeed, requires—a judge to make controversial assumptions about what the proper process ought to be like. These assumptions are taken not from the actual political structure created by the United States constitution but instead from a controversial “natural law” of process. *Carolene's* pretensions to judicial modesty are simply that—pretensions.

⁴ Professor Tribe rejects such a view:

[T]he constitutional theme of perfecting the process of governmental decision is radically indeterminate and fundamentally incomplete. The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values—the very sort of theory the process-perfectors are at such pains to avoid.

Tribe, *supra* note 3, at 1064.

⁵ Professor Ely argues that a representation-reinforcing orientation, “unlike an approach geared to the judicial imposition of fundamental values, . . . is not inconsistent with, but on the contrary is entirely supportive of, the American system of representative democracy.” J. ELY, *DEMOCRACY AND DISTRUST* 101-02 (1980).

⁶ Professor Ely, for example, attempts to show that *Carolene* explains much existing case law. *See id.* at 148-51.

Surprisingly, the examples that demonstrate how a truly process-based theory would work are borrowed from the conflict of laws. This is surprising because *Caroline*-style analysis has usually been thought quite compatible with the existing law of interstate relations. The *Caroline* reasoning at first seems beautifully adapted to dealing with the theory of interstate problems. Nonresidents of a state, after all, seem paradigmatic examples of the "discrete and insular minorities" to which *Caroline* refers. This fertile ground for application of the *Caroline* reasoning has not escaped unnoticed. Numerous authors have made the *Caroline* argument in the interstate context, and the Supreme Court has alluded to the *Caroline* logic in its interstate decisions.⁷

Even in this context, however, *Caroline* is inadequate. There are two ways to apply arguments about political participation to interstate problems. One is to restrict the states' right to discriminate against persons who do not participate. The other is to deny states the right to regulate those nonparticipants at all. Both uses of democratic theory have found their way into the interstate case law. The coexistence of both approaches in interstate cases is extremely troubling when we return to the larger *Caroline* context. If *Caroline* is correct in equating discrete and insular minorities with political nonparticipants, by what right are these minorities governed at all?

Caroline mistakes what nonparticipation is about. Under *Caroline*, members of discrete and insular minorities are not complete outsiders, but rather "inside-outsiders." The inside-outsider is someone who is subject to the state's power and yet, at the same time, is excluded from the community to an extent that makes discriminatory treatment suspect. The inside-outsider is *inside* the scope of state power but *outside* the processes of political participation. That such persons exist seems very strange. Who are these second class citizens? What differentiates them from true outsiders? What differentiates them from true insiders? Can it be fair to require them to obey when they did not participate fully? And what does the whole thing tell us about the likely success of process-based theories of constitutional adjudication?

Part I of this Article sets out the basic *Caroline* reasoning and the basic problem associated with it. That problem is illustrated in the context of the application of *Caroline* reasoning to interstate cases. Part II

⁷ See, e.g., Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 384 (1979) (arguing that laws disadvantaging nonresidents "epitomize government without the consent of the governed") (citing L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-33, at 411 n.17 (1978)); see also *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) (noting, in a privileges and immunities context, that nonresidents are not represented in the local political process).

challenges the received wisdom about *Carolene's* process orientation. Part III denies that *Carolene* is adequately protective of the rights of discrete and insular minorities. It overprotects certain excluded groups, from a purely process-oriented point of view, and underprotects others. Part IV then explains why *Carolene* does not effectuate the goals of our American democratic system, but instead relies upon an unarticulated ideal of democratic theory substantially at odds with the United States Constitution.

I. *CAROLENE*: THE RATIONALE AND THE PROBLEM

The basic contours of the *Carolene*⁸ reasoning are eminently familiar. While engaged in a rather unremarkable discourse on the beauties of deference to legislative choice, Justice Stone, almost without warning, dropped the portentous footnote four:

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

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities, . . . ; . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.⁹

The footnote's first clause reflects a substantive and not a process orientation, recognizing that the Court need not defer to Congress when specific substantive constitutional rights are at stake. The second clause, in contrast, addresses process values, but in a more limited sense than the third clause does. It speaks only to the situation where the law in question itself restricts political participation. Thus, the first two clauses are of relatively determinate scope; they apply only with regard

⁸ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

⁹ *Id.* at 152 n.4.

to statutes impinging on certain sorts of protected interests.

Carolene's third clause—the focus of my discussion—has received the most attention. Because judicial application of the third clause is not limited to statutes distributing any particular sort of goods or rights, it represents a more freewheeling approach to process-based analysis. Its application is limited to some extent by its focus on situations in which certain groups of people receive less of the distributed goods—namely, groups whose discrete and insular status effectively excludes them from the political processes. The third clause, however, does not list the groups that qualify for this heightened concern but merely identifies their salient characteristics. As a result, the class protected by the third clause is in theory rather open-ended.

This theoretical open-endedness makes *Carolene* a potentially powerful tool for constitutional adjudication.¹⁰ Because of its textual indeterminacy, the footnote has become the darling of constitutional theorists, who pour into the footnote's phrasing their visions of political exclusion and powerlessness. The list of suspect groups¹¹ arguably includes not only groups defined in terms of race and national origin but also illegitimates,¹² the mentally ill,¹³ the poor,¹⁴ homosexuals,¹⁵ and children.¹⁶ The *Carolene* reasoning encourages such expansion. It cuts the equal protection clause loose from its specific moorings in history, but at the same time it remains arguably faithful to the clause's historical genesis. As others have argued, if the authors of the fourteenth

¹⁰ See *infra* notes 130-133 and accompanying text.

¹¹ The list of groups actually considered by the Court to be suspect is constantly under revision. The current list of suspect groups is not important to this Article; what is important is that some groups are considered suspect because of defects in the political process. I have chosen to use Greek-Americans in my hypotheticals rather than blacks because blacks have been subject to enough without having also to appear in cute law review hypotheticals.

¹² See *Matthews v. Lucas*, 427 U.S. 495, 504 (1976) (plaintiffs argued that illegitimate children were a suspect class and therefore classifications that disadvantaged them should be subject to strict scrutiny).

¹³ See *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3266-68 (1985) (Marshall, J., dissenting) (mentally retarded persons have been subjected to a "grotesque" history of discrimination and should be viewed as suspect).

¹⁴ See *James v. Valtierra*, 402 U.S. 137, 144-45 (1971) (Marshall, J., dissenting) (legislative classifications that discriminate on the basis of poverty are "suspect" and demand "exacting judicial scrutiny").

¹⁵ See *Roland v. Mad River School Dist.*, 105 S. Ct. 1373, 1376-77 (1985) (Brennan, J., dissenting from denial of cert.) (arguing that homosexuals constitute a significant and insular minority of this country's population, and that discrimination has in fact deprived this group of fundamental rights).

¹⁶ Cf. *Plyler v. Doe*, 457 U.S. 202, 218-24 (1982) (because children of illegal aliens are powerless to protect themselves from the adverse legal consequences of their parents' actions, legislation disadvantaging such children is not rational unless it furthers a "substantial state interest").

amendment had meant only to protect blacks from discrimination they surely would not have used the general language that they did.¹⁷

Despite its expansive potential as a theory of constitutional adjudication, *Carolene's* allure is in its modesty. How often have we been reminded that the primary problem with judicial review is "the counter-majoritarian difficulty"?¹⁸ How can it be possible in a democratic society for nine appointed judges to invalidate the wishes of an elected legislature? *Carolene* answers that constitutional adjudication is nothing more than policing the processes of democratic decisionmaking. Majorities can deprive unpopular minorities of the usual opportunities to wheel and deal and to achieve results to their advantage. Through *Carolene* analysis, constitutional adjudication merely ensures that the democratic processes embodied in our Constitution are working properly.

This view of the judiciary's examination of challenged statutes allegedly exemplifies a historical approach,¹⁹ to use Robert Nozick's language, for it focuses on the process of enactment rather than on the end result. Furthermore, it is a process-based analysis of a particular sort. Processes of decisionmaking may be challenged by one of two methods: either by direct attack or by collateral attack. A direct attack involves a frontal assault on defective processes. The remedy sought is the alteration of the decisionmaking processes that the challenger claims are unconstitutional. *Carolene's* second clause authorizes direct attacks on measures designed to restrict political participation. For example, a challenge to a literacy requirement for voting is a direct attack, as is a challenge to judicial jurisdiction raised in an appeal from the original proceeding.

Legislative and judicial decisions can also be challenged collaterally, after they have been made, by resisting enforcement of the decision. *Carolene's* third clause operates in this domain, providing for invalidation of an undesirable legislative outcome. As such, *Carolene*-based reasoning resembles a species of collateral attack on adjudicative proceedings, specifically the due process scrutiny of prior judicial deci-

¹⁷ See J. ELY, *supra* note 5, at 30 (arguing "that the decision to use general language, not tied to race, was a conscious one") (citing Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 44-45, 60 (1955)).

¹⁸ A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

¹⁹ See J. ELY, *supra* note 5, at 136 (citing R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 153-55 (1974)) ("The constitutionality of most decisions . . . cannot be determined simply by looking to see who ended up with what, but rather can be approached intelligibly only by attending to the process that brought about the distribution in question . . .").

sions. Before a judicial decision is enforced, a court may examine it to ensure that the unsuccessful litigant's procedural due process rights have been satisfied. The parties must have had adequate notice²⁰ and also an opportunity to appear and present their arguments.²¹ If either of these rights were denied to the litigants, the decision would be ineffective to alter their legal interests.²²

This species of attack and *Carolene*-based reasoning are obviously not identical. In constitutional adjudication under *Carolene*, the challenger need not have had a personal opportunity to participate in the legislative process. There is, however, a similar requirement that the challenger's voice must not have been excluded systematically from the electoral processes. One must have an opportunity to participate in the legislative sense. If this opportunity is denied, *Carolene* mandates the remedy of process-based invalidation.

The literature on *Carolene* indicates the existence of two types of dissatisfaction with the *Carolene*-style of constitutional analysis described above. The first denies that the sole, or even the primary, basis for invalidation is process defects.²³ This criticism of process-oriented approaches is premised on the fact that the Constitution also explicitly protects certain substantive values. Process theorists have moved beyond the boundaries of the Constitution's explicit text in their efforts to define the scope of judicial review. Why shouldn't theorists with a more substantive bent do the same? This line of reasoning brings one squarely into collision with the "countermajoritarian difficulty," but for those who see unrestrained democracy as something other than an un-

²⁰ See, e.g., *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950) ("[The] right to be heard has little reality or worth unless one is informed that the matter is pending and can choose . . . whether to appear or default, acquiesce or contest."); see also *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) ("[A]dequacy [of service] as far as due process is concerned is dependent on whether or not the form of substitute service provided for such cases and employed is reasonably calculated to give [the parties] actual notice of the proceedings and an opportunity to be heard.").

²¹ See *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("[T]he fundamental requisite of due process is the opportunity to be heard.").

²² See *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950) (holding that statutory notice by publication was not sufficient under the fourteenth amendment as a basis for adjudication because it deprived persons whose whereabouts were known of substantive property rights).

²³ See, e.g., *Baker, Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1030-31 (1980) (judicial review under the equal protection clause is concerned not with supposedly "value-free" policing of the political process, but with eliminating subordination from society); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, reprinted in *EQUALITY AND PREFERENTIAL TREATMENT* 84 (M. Cohen, T. Nagel, & T. Scanlon eds. 1977) (courts cannot decide which legislative outcomes are desirable without reference to substantive values); Tribe, *supra* note 3, at 1064 (arguing that process values tell us nothing unless they are supplemented by substantive values).

alloyed benefit, the clash with pure democracy is all for the better.

The second sort of dissatisfaction centers more on the details of *Carolene's* implementation. One may concede that the problem is the exclusion of certain groups from electoral give and take, but is the range of excluded groups necessarily limited to "discrete and insular minorities"?²⁴ What about amorphous majorities? For that matter, how is one to determine which groups qualify under the *Carolene* formulation? What do discreteness and insularity mean? Won't minority status depend upon how the classifications are drawn? Whites, for example, are usually thought of as the majority in equal protection challenges to racial classifications. A process theorist can defend affirmative action as a decision by the majority to disadvantage itself to benefit an otherwise excluded minority.²⁵ One might also argue, however, that no such majority exists because only impoverished or working-class whites rather than whites as a whole are disadvantaged by racial preference programs. Given the vagueness of the *Carolene* formulation, such disagreements about implementation seem inevitable.

Even the critics who question *Carolene's* current implementation, however, seem to agree on its central premise: process-based protection amounts to invalidating rules that discriminate against a minority that was effectively denied the right to vote. I will show here that *Carolene* is not even sound on this paradigmatic application. It does not explain adequately the reasons for invalidating discriminatory laws. Furthermore, *Carolene's* claim that it is historically "process-based" reasoning is false. The reason that *Carolene* is not really a process-based analysis can be demonstrated by a comparison to the possible uses of democratic theory in the interstate context.

²⁴ See Ackerman, *supra* note 3, at 718-31 (arguing that the terms "prejudice," "discrete," "insular," and "minority" do not fairly identify those groups who have been unconstitutionally deprived of their fair share of democratic influence); see also Tribe, *supra* note 3, at 1072-77 (criticizing the process-based approach to determining whether a law unjustly discriminates against a group). Professor Tribe states, "It all sounds pretty good—until we ask how we are supposed to distinguish . . . 'prejudice' from principled, if 'wrong,' disapproval. Which groups are to count as 'discrete and insular minorities'? Which are instead to be deemed appropriate losers in the ongoing struggle for political acceptance and ascendancy?" *Id.* at 1073.

²⁵ See generally Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974) (arguing that when a majority decides to advantage a minority and disadvantage itself through legislative classifications, there is little reason to be suspicious of its motives: "A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others. . . .").

A. *The Interstate Context*

Carolene's influence did not take long to reach the interstate context. Indeed, it had been foreshadowed in a commerce clause case, *South Carolina State Highway Department v. Barnwell Bros., Inc.*²⁶ Again in a footnote, Justice Stone wrote:

State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted. . . .

Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.²⁷

Justice Stone's later opinion in *Southern Pacific Co. v. Arizona ex rel. Sullivan* echoed this reasoning.²⁸

The commerce clause context is certainly not the only area of concern for the rights of out-of-staters. The privileges and immunities clause of article IV²⁹ also protects outsiders from discrimination,³⁰ and the Court has noted the applicability of *Carolene's* rationale to such problems.³¹ Another source of constitutional claims is the right to travel. Although the right to travel does not address discrimination against outsiders per se, it does protect those newly arrived in the state from differential treatment.³² This prohibition fits easily within the

²⁶ 303 U.S. 177 (1938).

²⁷ *Id.* at 184 n.2.

²⁸ 325 U.S. 761, 767 (1945).

²⁹ U.S. CONST. art. IV, § 2.

³⁰ See, e.g., *Toomer v. Witsell*, 334 U.S. 385, 396 (1948) (holding that the privileges and immunities clause was intended to outlaw classifications based on the fact of noncitizenship unless noncitizens constituted a peculiar source of evil at which the statute was aimed); *Shaffer v. Carter*, 252 U.S. 37, 53 (1920) (holding that the privileges and immunities clause protects nonresidents "against discriminatory taxation, but gives [them] no right to be favored by discrimination or exemption"); *Ward v. Maryland*, 79 U.S. 418, 430 (1870) (holding that "States may [not] impose discriminatory taxes against the citizens of other States").

³¹ See, e.g., *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) ("Since nonresidents are not represented in the taxing State's legislative halls . . . [courts cannot] acquiesce in taxation schemes that burden them particularly.").

³² See, e.g., *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (holding an Alaskan divi-

Carolene rubric, at least if one is willing to recognize newcomers as a particularly powerless class.

Even though *Carolene's* rationale has long been recognized as applicable in the interstate context, however, the fit between the Supreme Court's decisions in this area and *Carolene's* insider-outsider analytical framework has never been perfect. The lack of fit has three aspects. First, the difference in the clauses' substantive coverage may be more important than their shared insider-outsider analytical structure in determining the characteristics of the classes they protect. The commerce clause, for example, was designed to protect business enterprises and thus offers little help in noncommercial contexts. Conversely, the privileges and immunities clause has been held not to apply to corporations.³³ To add to this crazy quilt of coverage and exceptions, commerce clause protection itself depends upon whether Congress has decided to permit states to discriminate, as it has done with regard to the insurance industry.³⁴ Yet, even when Congress authorizes states to discriminate under the commerce clause, its permission does not extend to challenges made to the same legislation that are based upon the equal protection clause.³⁵ Thus, while these constitutional provisions share a common insider-outsider analytical structure, the precise contours of the protections they offer is not attributable to the *Carolene* reasoning itself.

A second way that *Carolene* is imperfectly reflected in the cases is illustrated by the varying degrees of scrutiny that interstate problems

dend distribution plan violative of the equal protection clause of the fourteenth amendment because of the condition that the amount of the dividend depended on the length of one's residence); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (holding that statutory provisions that deny welfare assistance to otherwise eligible residents who have not resided within the jurisdiction for more than a year preceding application for assistance violated the constitutional guaranty of the right to interstate travel).

³³ See *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656 (1981); see also *Hemphill v. Orloff*, 277 U.S. 537, 548-50 (1928) (holding that a legal entity with corporate attributes could not claim for itself rights guaranteed to the associates as individuals by the privileges and immunities clause); *Paul v. Virginia*, 75 U.S. 168, 177 (1868) (holding that corporations are not citizens within the meaning of the privileges and immunities clause).

³⁴ See, e.g., *Western & S. Life Ins. Co.*, 451 U.S. at 653 ("Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act."); see also *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 409 (1946) (holding that "[a] state tax or regulation discriminating against interstate commerce . . . may be validated only by the affirmative action of Congress consenting thereto"); 15 U.S.C. §§ 1011-1015 (1982) (McCarran-Ferguson Act).

³⁵ See, e.g., *Metropolitan Life Ins. Co. v. Ward*, 105 S. Ct. 1676, 1683 (1985) ("Although the McCarran-Ferguson Act exempts the insurance industry from Commerce Clause restrictions, it does not purport to limit in any way the applicability of the Equal Protection Clause.").

receive. Because outsiders are equally discrete and insular regardless of the source of the constitutional challenge, a process-based approach to each clause's coverage should result in similar levels of scrutiny for statutes that violate any one of the clauses by disadvantaging outsiders. Yet different levels of scrutiny are brought to bear. Commerce clause cases and privileges and immunities cases, for instance, employ a fairly high level of scrutiny when the difference in treatment is based upon the nonlocal nature of the party or enterprise.³⁶

In the equal protection context, however, the potential for a stricter level of scrutiny in interstate cases never materialized. One might expect equal protection to be the most fertile field for heightened scrutiny, because strict scrutiny is a child of equal protection doctrine and because the *Carolene* reasoning transplants into the interstate context so well. The Supreme Court has held, however, that discrimination against nonresidents is to be judged only under the rational basis test.³⁷ This same standard applies to equal protection analysis of some laws that disadvantage aliens.³⁸ To further confuse the picture, the Court, even while reaffirming the applicability of the rational basis test to such cases, has implicitly indicated that a different and higher standard of review may be appropriate. Last year, the Court applied the "toothless" rational basis standard in a novel way, holding that an otherwise legitimate state interest might cease to be legitimate when pursued by means of discrimination against outsiders.³⁹ The methodology is so

³⁶ See, e.g., *Supreme Court of N.H. v. Piper*, 105 S. Ct. 1272, 1279 (1985) (citation omitted) ("[The privileges and immunities clause] does not preclude discrimination against non-residents where: (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced . . . bears a substantial relationship to the State's objective."); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citation omitted) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."). For an excellent general discussion of the Supreme Court's approach to commerce clause and privilege and immunities clause cases, see Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1705-10 (1984).

³⁷ See *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 391 (1978) (The state has no duty to have its licensing structure "parallel or identical for both residents and nonresidents . . . in a purely recreational, noncommercial, nonlivelihood setting. Rationality is sufficient.").

³⁸ See *Ambach v. Norwick*, 441 U.S. 68, 72-75 (1978) (explicitly stating that the state has a "wider latitude in limiting the participation of noncitizens" when it exercises its governmental functions). *Ambach* reaffirmed *Foley v. Connelie*, 435 U.S. 291, 295-97 (1978). See also Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 56-87 (1985) (giving a history and critique of the Supreme Court's decision to apply the rational basis standard in cases involving aliens' participation in a state's "governmental functions").

³⁹ See *Metropolitan Life Ins. Co. v. Ward*, 105 S. Ct. 1676, 1682-83 (1985)

novel that it is hard to know exactly how far it will be taken.⁴⁰ Still, at a minimum these cases show that *Carolene's* lack of deference to discriminatory legislation has not been applied consistently whenever interstate concerns are implicated.

A third reason for the uncertainty of *Carolene's* impact on interstate cases is that there are some areas where the *Carolene* reasoning has not been tested. Modern choice of law theory raises numerous problems of discrimination against outsiders, and commentators have responded with a wide range of critiques.⁴¹ The basic problem arises when a forum attempts to determine whether to apply its or another forum's law to the case before it. Under modern approaches,⁴² courts are obliged to determine whether the forum state has an interest in the application of its law. Frequently, it is held that a state has such an interest if, but only if, a resident would benefit from the application of that law.⁴³ Furthermore, this finding of an interest often is limited to residents who were residents at the time of the transaction at issue and does not apply to newcomers who recently traveled into the state.⁴⁴

A resident-centered approach to conflict of law questions raises the specter of discrimination against non-residents. Moreover, a state that

("[The] promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose.").

⁴⁰ The novelty of the analysis was pointed out in the dissent. *Id.* at 1685 (O'Connor, J., dissenting) (The Court "meld[ed] the . . . two-step inquiry regarding the State's purpose and the classification's relationship to that purpose into a single unarticulated judgment."). For further discussion of the majority's reasoning, see *infra* text accompanying notes 118-21.

⁴¹ See, e.g., B. CURRIE, *SELECTED ESSAYS IN THE CONFLICT OF LAWS* 445-583 (1963) (discussing the equal protection and privileges and immunities clauses in the conflicts of laws setting); Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 416-17 (1980) (arguing that a conflicts of law methodology should not be based on favoritism for local residents that would seem contrary to the spirit of the privileges and immunities and equal protection clauses); Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 WM. & MARY L. REV. 173, 180-92 (1981) (also suggesting that modern choice-of-law analysis raises discrimination concerns in both the equal protection clause and privilege and immunities clause settings).

⁴² For a survey of modern approaches to choice of law, see L. BRILMAYER, J. CORRE, E. ESTY, J. FISCH, J. FIRESTONE, S. GORDON, J. HUTTENHOWER, N. KUCKES, M. MARR, K. PAISLEY, & A. SPENCER, *AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM* 215-48 (1986); J. MARTIN, *CONFLICT OF LAWS* 174-328 (2d ed. 1984).

⁴³ Some have explained conflict of laws cases by arguing that state protective and compensating policies are intended to benefit only residents of the jurisdiction. See Brilmayer, *supra* note 41, at 393-98.

⁴⁴ See, e.g., Reich v. Purcell, 67 Cal. 2d 551, 555, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34 (1967) (Although the plaintiff resided in California when the suit was commenced, the relevant residence and domicile was held to be Ohio, where the plaintiff resided at the time of the accident.).

denies newcomers the beneficial effects of its rules arguably infringes on the right to travel. Thus, *Carolene* is clearly analytically relevant to the discrimination problems inherent in such a definition of interests. Sooner or later, the Court will have to address the privileges and immunities clause, the commerce clause, and the equal protection issues that lurk within the modern view on choice of law. When it does this, it will have to confront the *Carolene* objections awaiting it.

B. *An Unrecognized Analogue*

The above discussion is already evident to close observers of the modern choice of law scene. What has often gone unnoticed, however, is another type of interstate analysis wherein similar reasoning is also pertinent. This analysis involves not discriminatory underreaching, or the denial of the benefits of local law (as in the problems outlined above), but *overreaching* through applying local law despite due process clause objections. The case of *Blackmer v. United States*⁴⁵ is illustrative. In *Blackmer*, the defendant sought to resist a subpoena compelling him to give testimony before an American congressional investigation. The defendant was an American citizen, but he resided in France at the time he was subpoenaed. The issue presented was similar to the constitutional question of jurisdiction over forum residents temporarily absent, although technically the two situations are different because the defendant in *Blackmer* was not required as a party but rather as a witness. In *Blackmer* the Court, as it has in other cases raising traditional problems of adjudicative jurisdiction, held that domicile within the state is an adequate basis for assertion of state power.⁴⁶

An identical problem arises in the choice of law context. In *Skiriotes v. Florida*,⁴⁷ the defendant had been convicted of sponge fishing with scuba gear off the coast of Florida. He challenged the application of Florida law, arguing that such an application would extend Florida law to situations beyond that state's territorial waters. The defendant's conviction was upheld on the ground that Skiriotes was himself a Florida resident. According to the Court, the obligation to obey the laws of one's own state justified the application of Florida law.⁴⁸

⁴⁵ 284 U.S. 421 (1931).

⁴⁶ See *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (citing *Blackmer*, 284 U.S. at 254-55) ("[T]he authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties.").

⁴⁷ 313 U.S. 69 (1940).

⁴⁸ *Id.* at 78.

Blackmer and *Skiriotes* fit comfortably within liberal democratic theory.⁴⁹ In both cases, the complaining party was a resident of the state that was exercising its authority. As such, each party had an available legislative remedy, which would have been the appropriate avenue to pursue. Had the complaining parties in *Blackmer* and *Skiriotes* been nonresidents, however, no such legislative remedy would have existed because nonresidents are not entitled to vote. Under such circumstances, the complaining parties most likely would have been immune to the exercise of state power.⁵⁰ These cases therefore seem to fit neatly into the *Carolene* paradigm: insiders are bound in situations where outsiders would not be.

There is one problem, however, in fitting these cases into the *Carolene* paradigm. The legislation in *Blackmer* and *Skiriotes* was not discriminatory. Whereas a nonresident in *Skiriotes*' position might have prevailed in a challenge to the application of Florida sponge fishing law, such a holding would not have been based on discrimination because Florida did not apply a different standard to insiders relative to outsiders. Rather, such a holding would have been based on the right of an outsider to avoid the impact even of neutral rules. If an outsider to the political processes has a right to resist state coercion, then this right is not limited to resisting discriminatory rules. It is, in fact, a right to resist the application of any state rules at all.

Why does this present problems for traditional *Carolene* analysis? A variation on the *Skiriotes* theme provides the answer. Imagine that two scuba divers are apprehended while taking sponges near the coast of Florida but outside its territorial waters. One diver, like *Skiriotes*, is an American of Greek extraction, and the other is a Greek tourist. The tourist objects to the application of Florida law on the grounds that she was not a part of the political process that adopted the law. Under *Blackmer* and *Skiriotes* she would probably be released.⁵¹ The American of Greek extraction then recalls having read somewhere that national origin is a suspect classification because persons of foreign ex-

⁴⁹ The political theory actually mentioned in *Skiriotes* and *Blackmer* merely cites the obligation owed by a citizen to her own government, without emphasizing whether this obligation rests on the right of political participation or on some other basis. In a democracy, however, it seems most reasonable to base the obligation to obey one's own government on one's right to participate.

⁵⁰ The only other possible basis for the exercise of jurisdiction by the state would be the fact that fishing outside the state's territorial waters would harm the aquatic environment within the state. See *infra* notes 79-80 and accompanying text (discussing "impact territoriality").

⁵¹ But cf. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §402 (Tent. Draft No. 6, 1985) (adopting impact territoriality notions as a basis for state exercise of jurisdiction).

traction are members of a discrete and insular minority that is not represented in the political process. The American can make the same argument that the Greek tourist did, but he would lose because the law was not discriminatory.

The tension between *Carolene* and *Skiriotos* is thus clear. Both deal with the consequences of being an outsider to the political process, and both suggest that insiders have special obligations to follow. The protections that *Carolene* and *Skiriotos* provide for political outsiders, however, are different. According to *Carolene*, outsiders to the political processes may protest laws that discriminate. *Skiriotos*, in contrast, suggests that outsiders are, at least in certain circumstances,⁵² free from the application of all of the state's laws. In other words, *Carolene* requires states to treat outsiders to the political processes *the same* as it treats insiders. This is because it is thought to be a protection—an advantage—to be treated like an insider. *Skiriotos* suggests that outsiders to the political community should be treated *differently* from insiders. Being treated like an insider is of no particular protection at all; it is precisely the sort of overreaching sought to be resisted.

This line of reasoning suggests a difficulty with the *Carolene* rationale itself. *Carolene* specifies that there are certain groups that are excluded from the political processes, and that this exclusion requires rules that discriminate against such groups to be strictly scrutinized. *Carolene*'s adherents claim that this sort of process-based reasoning accounts for much constitutional doctrine. But why not also strictly scrutinize neutral rules, once it is determined that such rules are the result of a process that excluded various groups? In both cases, the issue is whether a rule should be applied to a nonparticipating person or group. Is the process any more or less defective because the result of the process was discriminatory in one case and facially neutral in the other? The existing case law, which *Carolene* enthusiasts claim to be accurately describing, rarely calls for strict scrutiny of facially neutral rules.⁵³

The *Carolene* reasoning, as it has been applied in the literature and in the cases, thus presents two related questions. First, if *Carolene* is truly a process-based theory shouldn't it impose a high level of scrutiny on all laws that are the result of a defective process, regardless of

⁵² This is the case, unless some other basis for applying local law exists. *See, e.g., id.* at § 42.

⁵³ A neutral rule might be strictly scrutinized if there was proof of discriminatory motivation. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (requiring proof of intent to discriminate before invalidating neutral rules).

whether the rules are neutral or discriminatory? The second question is the converse: if the *Carolene* reasoning invalidates only discriminatory rules, is it adequately protective of minority rights? Shouldn't a court invalidate the application even of neutral rules to groups who concededly were excluded from political participation?

II. IS *CAROLENE* REALLY PROCESS-BASED?

If *Carolene*⁵⁴ were purely process-oriented, the validity of a challenged rule would not depend on whether it could be considered "neutral" or "discriminatory." The fact that only some rules are strictly scrutinized suggests that more than mere process concerns are involved. Why, then, has it been assumed that *Carolene* is process-oriented? There are at least three reasons: a causal explanation, an evidentiary explanation, and a virtual representation explanation.

A. *Causal Explanation*

The fact that *Carolene* has been thought to be process-oriented is probably due, first, to the likely causal connection between discrimination against unpopular minorities and their exclusion from the political process. Admittedly, the exclusion of certain disfavored groups from the political process makes discrimination against them more likely. Democracy does not adequately protect disfavored or politically powerless groups from being treated worse than the groups who dominate the political processes. Certain values are not likely to be adequately protected by majority rule, because they are values to which the majority is likely to be hostile. When a value popular to only a few is impinged upon by a legislature, one might then argue that there has been a defect in the democratic processes—a value that went unprotected solely because of its unpopularity. *Carolene* suggests that such defects should be remedied by strictly scrutinizing the law that ignored the values of the minority.

When "process analysis" is construed so broadly, however, any invalidation of a statute could be seen as process-oriented because some minority's interest always goes unprotected. The problem with this view of "process analysis" lies in its definition of a "process defect." The Framers probably were concerned that the democratic process would not always adequately protect certain values, and they therefore protected these processes in the text of the Constitution. When these values are imposed upon by a legislative result, the process has argua-

⁵⁴ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

bly failed because it does not respect values extrinsic to majoritarian processes. For instance, if Congress establishes a state religion, the democratic process can be viewed as having failed to respect the value of disestablishment.

Such a legislative result, however, does not mean that the democratic process has failed in its own terms, but rather that it has failed in terms of the extrinsic values protected by the first amendment. *In terms of its own values*, the democratic process worked—majority will was implemented. The only reason that one thinks the process has failed is that there is some substantive value that should have been protected but was not. Since there is no reason to believe, however, that democracy will respect unpopular values, and since it was not set up to respect unpopular values, there is no process objection to the law. There is only a substantive objection, grounded in the fact that an important substantive value was violated.⁵⁵

To put it another way, democratic processes produce diverse results, of which some are desirable and others are not. For example, one might expect to find laws against theft and murder since theft and murder are politically unpopular. One is unlikely to consider it a defect in the democratic processes, however, that a particular democracy takes this common position and penalizes criminals. Thus only some of the things that one might expect a democracy to do are substantively bad. Similarly, the mere fact that there is a causal connection between democracy and unfair treatment of minority interests is not in and of itself a sufficient process-based reason for invalidating rules that fail to consider those minority interests. After all, in a democracy one expects the majority to control. It is, instead, the substantive prohibition against discriminatory rules that makes such outcomes "defective."

B. *Evidentiary Explanation*

To show a process defect, one should focus on the process itself, as opposed to inferring a process defect from the fact that a substantively undesirable result was reached. To borrow Nozick's terminology once again, one should be concerned with the "historical" processes of enactment and not with the pattern of end results.⁵⁶ *Carolene*, however, arguably makes the discriminatory nature of the rule relevant to a process-based analysis because its discriminatory nature permits an

⁵⁵ This is somewhat akin to the observation that in a democracy minorities are *supposed* to lose. Tribe, *supra* note 3, at 1073; see also *id.* at 1075 (Burglars are not protected as a suspect class because of society's substantive disapproval of burglary.).

⁵⁶ See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 153-55 (1974).

inference about the process that gave rise to it: the interests of the minority against whom the discrimination is directed were, for whatever reason, not protected.⁵⁷ When coupled with a general awareness that a group is politically powerless, the discriminatory nature of a specific rule can be viewed as evidence of a procedural failure. For example, the discriminatory rule might indicate that the legislators were influenced by prejudice, rather than by empirical facts. This evidentiary explanation is the second reason why *Carolene* appears process-oriented.

This explanation is inadequate because it fails to recognize that neutral rules, as well as discriminatory rules, might result from defective processes. If *Carolene* is to maintain its stature as a process-based theory, its proponents must be willing to engage in actual inquiry about the process underlying neutral as well as discriminatory rules. It will not do simply to *presume* that neutral rules are the product of an acceptable process whereas discriminatory ones are not. To the extent that one permits the discriminatory content of the rule to found an irrebuttable inference of a defective process, one is not really engaged in a process-based analysis at all. One is simply disguising a dislike for discriminatory rules by asserting, without proof, that such rules result from defective processes.

The evidentiary inferences that lead *Carolene's* proponents to advocate heightened scrutiny of discriminatory rules should also engender suspicion about the political processes that produce neutral rules. In particular, two of *Carolene's* grounds for strictly scrutinizing discriminatory laws provide a rationale for questioning whether even facially neutral rules should be considered fair. First, the *Carolene* reasoning relies upon a general categorization of certain groups as "suspect," a characterization that is necessarily based upon a determination of discreteness, insularity, and political exclusion. Second, the very existence in the past of some discriminatory rules buttresses the inference that this suspect group actually has been the subject of prejudice and hostility. These reasons also require that neutral rules be strictly scrutinized, contrary to the *Carolene* reasoning.

Assume, for example, that Greek-Americans have been recognized as a suspect class for purposes of equal protection law. Because Greeks constitute a suspect class, laws that discriminate against them are subject to heightened scrutiny. Skiriotes, therefore, wishes to protest the

⁵⁷ See *supra* text preceding note 55 (Causal explanation permits inference that a discriminatory rule was passed because the interests of the disadvantaged group were not adequately represented; this neglect of the interests of the disadvantaged group might well be due to prejudice, using the term in the conventional sense, of the majority against the minority.).

application to him of the Florida law prohibiting the use of scuba equipment to fish for sponges. Although this law is facially neutral, Skiriotes has two pieces of evidence that suggest a process defect in the enactment of the statute. First, Greek-Americans are a suspect group under the *Carolene* reasoning precisely because they are discrete and insular and, as such, historically have been excluded from the political processes. Second, prior legislation that discriminated against Greeks as a class demonstrates that this general political exclusion previously resulted in actual distortion of the legislative process. The fact that the present law is neutral does not answer the question of whether prejudice against Greeks continues to pollute Florida's legislative process.

The more that *Carolene's* enthusiasts extol its virtues as a process-based analysis, the less explicable the reasoning's failure to apply heightened scrutiny to neutral rules becomes. Ely states:

No matter how open the process, those with most of the votes are in a position to vote themselves advantages at the expense of the others, or otherwise to refuse to take their interests into account. "‘One person, one vote,’ under these circumstances, makes a travesty of the equality principle." . . . Of course, the pluralist model does work sometimes, and minorities *can* protect themselves by striking deals and stressing the ties that bind the interests of other groups to their own. But sometimes it doesn't, as the single example of how our society has treated its black minority (even after that minority had gained every official attribute of access to the process) is more than sufficient to prove.⁵⁸

Note that, although Ely does not recognize it, this reasoning has nothing to do with discrimination. If the interests of blacks are effectively ignored, either before they were granted access to the process or afterward, then their concerns were equally ignored when neutral laws were passed.

The point can be illustrated by returning once again to the hypothetical problem of the Greek scuba divers. Assume that the Florida legislature is composed entirely of WASPs and that it never has had a member of Greek extraction. Assume further that, because of this homogeneity and because of the overt ethnic intolerance of some of the members, the legislature never solicits information or testimony from

⁵⁸ J. ELY, *supra* note 5, at 135 (quoting J. PENCOCK, *DEMOCRATIC POLITICAL THEORY* 8-9 (1979)).

persons of Greek descent and makes no effort to canvass their opinions. The legislature now considers the protection of sponges off the coast of Florida and drafts two possible formulations of the bill:

1. No individual shall take sponges with scuba equipment within fifteen miles of the coast of Florida.

2. Persons of Greek extraction shall not be permitted to take sponges with scuba equipment within fifteen miles of the coast of Florida.

Under the *Carolene* reasoning, there is a process defect if the second version of the bill is passed but not if the first version is passed. Such a distinction ignores the systemic nature of prejudice and exclusion. It seems exceedingly unlikely that the legislators would put their prejudices aside to pursue minority interests when they vote on the facially neutral legislation.

Carolene's subjection of discriminatory rules to heightened scrutiny seems process-oriented because it turns on the tendencies of majorities to disregard minority interests because of stereotyping or hostility. But while one might agree that hostility or bias creates a process defect, there seems to be little reason to suppose that the effect of hostility or stereotyping is limited to discriminatory rules. Hostility or bias can also cause majorities to disregard minority preferences as to which neutral rules ought to be adopted. The same motivations⁵⁹ that underlie discriminatory rules probably underlie neutral ones. Ignoring the interests of certain groups who cannot muster the political pressure necessary to effect change through the legislative process is as much of a process defect as explicitly treating those groups differently from the majority.

C. *Virtual Representation*

The process theorists' most likely response to the suggestion that defective processes can generate both neutral and discriminatory rules is

⁵⁹ A variation on the evidentiary explanation is the thesis that *Carolene* reasoning concerns itself with whether there were impermissible motivations at work in the enactment processes. The discriminatory nature of the rule supposedly shows that there were. Motivation analysis, however, cannot turn *Carolene* into process-based reasoning. If motivation is read broadly, it would include the motive of disregarding minority interests and, as the text illustrates, this motive can be equally present in the enactment of neutral rules. If, in the alternative, motivation analysis responds only to a motive to discriminate, then this would explain the different treatment of neutral and discriminatory rules. Such a definition of impermissible motivation, however, smuggles substantive values into process theory through the back door. If such an approach is process-based, then so is one based upon impermissible motivations to infringe first amendment or substantive due process rights. The motivation approach explains equal protection law only if it goes beyond process-based reasoning and recognizes a substantive prohibition against discrimination.

that, with regard to neutral rules, virtual representation cures the process defects stemming from political exclusion. For example, even if no Greeks had ever been elected to the legislature and even if no opinions had ever been solicited from Greek constituents, a process theorist would argue that the facially neutral version of Florida's hypothetical sponge fishing statute is not defective. Based on the assumption that there is no conflict of interest between the WASP legislators and the Greek population with regard to the first version of the bill, the theorists would argue that the WASPs had adequately represented the Greek community's interests. Thus, the process that was used was politically fair enough to legitimate the first bill, but not adequate to legitimate the second.

This theory of virtual representation has received prominent attention in the *Caroline* literature,⁶⁰ but there are two important objections to it. First, one should question the assumption that there are no conflict of interest problems if the all-WASP legislature enacts the first version of the bill. Why should one assume simply because the bill does not discriminate on its face that the needs of Greeks are adequately accommodated? Perhaps there are more Greek commercial sponge fishermen than WASP commercial sponge fishermen. WASPs would then have more of an interest in recreationally valuable environmental protection than in efficient fishing measures. In short, it is entirely possible that even a neutral version of the law might have a disparate impact on persons of Greek extraction. Political exclusion is not a harmless error simply because a neutral rule was adopted.

The *Caroline* reasoning has confronted this possibility in at least one area, namely commerce clause jurisprudence. The commerce clause cases cited above,⁶¹ which relied upon *Caroline* reasoning, did not involve legislation that *discriminated*.⁶² The laws involved in those cases were facially neutral, but they had an extremely disparate impact in practice on interstate commerce. These challenges to facially neutral laws thus provide some precedent for extending *Caroline* to its logical conclusion, namely the invalidation of all laws resulting from a polluted political process. Yet the courts have never utilized the *Caroline* reasoning to its full potential; in equal protection jurisprudence the impact of this reasoning on facially neutral rules has been *de minimis*.⁶³ Ex-

⁶⁰ The most prominent treatment is, of course, J. ELY, *supra* note 5, at 82-87, 100-01.

⁶¹ See *supra* notes 26-28 and accompanying text.

⁶² See *Bacchus Imports Ltd. v. Diaz*, 468 U.S. 263 (1984) (focusing on disparate impact but not on discrimination per se in a commerce clause setting).

⁶³ See *supra* note 55 and accompanying text; see also *Washington v. Davis*, 426 U.S. 229, 238-42 (1976) (requiring discriminatory intent). See generally Perry, *The*

tending the reach of the *Carolene* reasoning to neutral rules having a disparate impact would place the process theorists in the posture of radical critics of existing doctrine, when instead they seem to want to rely on precedent for affirmative support.⁶⁴

Even if disparate impact analysis were extended to its logical conclusion, however, *Carolene* could not overcome its limitations as a process theory. A difference of opinion between two groups on policy preferences may be reflected in a properly functioning political process, and yet it might not be revealed through adjudication based on proof of disparate impact. It is possible, for instance, that women are more likely to prefer increased spending on social services (even services that they themselves do not use) and decreased spending on nuclear weapons. Yet this probably would not amount to a case of disparate impact in the usual sense, since women receive their share of social services and nuclear protection.

The legislative process is designed specifically to accommodate interests to which the judicial process does not respond. It would be perfectly appropriate for a legislature to consider the desires of certain constituents to have social services supplied to others. Indeed, social service programs typically are enacted for such reasons. Unless the coalition of groups supporting welfare programs was broader than the group of actual welfare recipients, welfare legislation probably never would get passed. The judicial system, in contrast, focuses only on personal harm suffered by a particular injured plaintiff.⁶⁵ Therefore, the set of disparate impact claims that courts might consider themselves competent to recognize is too narrow to remedy all of the process defects that *Carolene* reasoning might identify. To remedy this sort of problem, a truly process-based analysis would require a blanket invalidation of all rules, neutral or not, regardless of whether disparate impact can be shown.

The second reason why virtual representation does not cure the process defects inherent in neutral rules is, quite simply, that virtual representation is not a convincing version of democratic political theory. That virtual representation does not cure possible process defects is

Disproportionate Impact Theory of Racial Discrimination, 125 U. PA. L. REV. 540, 541-48 (1977) (arguing that the *Washington v. Davis* court dismissed disproportionate impact theory without serious consideration).

⁶⁴ Ely, for instance, clearly attempts to fit his theory within the basic contours of existing doctrine. J. ELY, *supra* note 5, at 148-51.

⁶⁵ This is a requirement of the article III "case or controversy" doctrine. U.S. CONST. art. III, § 2. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 99-100 ("case or controversy" requirement behooves courts to focus only on personal harm suffered by the particular injured plaintiff).

clear from the fact that it would not be an adequate defense to direct challenges to political exclusion. Assume, for example, that Florida prohibits Greek-Americans from voting and that Skiriotes brings suit to challenge that law. Surely Florida cannot argue in response that it is permissible to exclude Greek-Americans from voting so long as the WASPs who control the legislature represent the Greek community's needs. In other words, political exclusion is not excused either by the lack of an identifiable conflict of interest or by refraining from adopting discriminatory rules.

At most, virtual representation addresses the remedial issue of whether a collateral attack⁶⁶ on a particular legislative outcome should be allowed. Even if one admits that there were a process defect, one might still argue that such a defect should be remedied only by a direct attack⁶⁷ on the political exclusion. This, however, would create an uncomfortable complication for *Caroline* theorists. If one admits that collateral attack is only occasionally a remedy for process defects and that, in certain circumstances, the only available remedy should be direct attack, how does one decide which process defects may be attacked collaterally? *Caroline* theorists might answer that collateral attack should be permitted where rules are discriminatory. But why should collateral attack be limited to discriminatory rules, considering that neutral rules may have a disparate impact or otherwise violate the political preferences of the excluded groups? Again, the differential treatment of neutral and discriminatory rules seems unjustifiable.

If process were *Caroline's* true focus, then it would not matter whether a particular legislative outcome is good or bad. From a process viewpoint, an individual or a group should be allowed to participate in political decisionmaking regardless of whether it will make any difference to the result. Thus, if collateral attack is an appropriate remedy for process defects (as *Caroline* suggests),⁶⁸ the excluded individuals should not have to show that the result would have been different if they had been included.

In the somewhat analogous context of judicial process, no proof of conflict of interest is needed when a litigant seeks to avoid the collateral estoppel effect of a judgment in which she was not a participant.⁶⁹ Nor

⁶⁶ See *supra* notes 19-22 and accompanying text.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ Virtual representation might be analogized to class action representation. There are, however, important differences. Many class actions, for example, offer the absent plaintiff a right to opt out. Even without a right to opt out, absent plaintiffs have rights to intervene or to participate personally in some other way. Furthermore, class representatives must demonstrate that they do, in fact, represent an identifiable class. Repre-

must the challenger show that the result would have been different had she been included. Instead, due process requires that the coercive effect of a judicial decision be limited to the persons actually involved—the non-represented parties simply are not bound by the court's action.⁷⁰

Similarly, there can be no automatic assumption of homogeneity of interests or fairness of process simply because the statutory result happens not to discriminate.⁷¹ Democratic theory requires one to assume that persons and identifiable groups are different in unexpected and often unmeasurable ways. For this reason persons are allowed to vote and are entitled to express what they actually desire, rather than what others think they should want. Thus, appointing some supposedly representative individual to act on an unrepresented group's behalf simply because there is no overt conflict of interest is an inadequate response to the concerns raised by democratic theory.

Ironically, Ely's development of *Carolene* reasoning into a comprehensive theory of constitutional adjudication starts with an acknowledgment of the unsavory historical character of the theory of virtual representation.⁷² Virtual representation was England's response to the colonists' claim that it was unfair to tax them when they were not represented in Parliament. Ely takes this theory from its original context and attempts a less malodorous application to current problems.

Ely's attempt to adapt virtual representation theory to present problems, however, fails. What his historical example really demonstrates is that discrimination is not the only issue. The colonists were entitled to complain about nondiscriminatory *and* discriminatory taxes and regulations. "No taxation without representation" is not the same battle cry as "No discriminatory taxation without representation." Admittedly, many of the taxes they protested were discriminatory because they applied only to the thirteen colonies.⁷³ Yet, the colonists' political slogan reflects a more ambitious and theoretically satisfying view of the political equities, as well as a more sonorous one. The disenfranchised colonists could claim that England was not entitled to act as their government because Parliament's laws were not their laws. And they were

sentatives in the virtual representation context need offer no such proof. FED. R. CIV. P. 23. Thus, a lack of conflict of interest is not the only protection.

⁷⁰ See *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *Blonder-Tongue Labs, Inc. v. University of Ill. Found.*, 402 U.S. 313, 329 (1971); see also J. FRIEDENTHAL, M. KANE, & A. MILLER, *CIVIL PROCEDURE* § 14.13 (1985).

⁷¹ See *supra* notes 60-64 and accompanying text.

⁷² J. ELY, *supra* note 5, at 84.

⁷³ For a particularly entertaining discussion of Britain's attempts to tax the colonies, see B. TUCHMAN, *THE MARCH OF FOLLY: FROM TROY TO VIETNAM* 127-231 (1984).

not, therefore, obligated to obey.

The theory of virtual representation, without more, supplies neither an adequate solution to process defects nor an obligation to obey the law. If it did constitute a source of political obligation, then it would have made as much sense for the British to tax the French as to tax the colonists. The British Parliament could claim that when it voted on taxes, criminal laws, and other regulations it was adequately taking into account the interests of the French whenever there was no conflict of interest. Notwithstanding the absence of any conflict of interest between the two countries, however, Britain simply lacked the power to tax or to regulate the French. The British claim to power over the colonies was more plausible only if it could be assumed that Britain possessed some right to regulate the colonists as British subjects. The virtual representation argument leads inexorably, therefore, to the question of the ultimate right to coerce individuals who have not been included in the political processes.⁷⁴

Before leaving the subject of process theories, it is appropriate to note that *Carolene's* shortcomings are shared by process theories generally. To what extent can *any* process-based theories explain our current methods of constitutional adjudication? Concededly, process-based analysis can explain why it is that we invalidate laws that themselves address process issues. Direct attacks on restrictive voting regulations can be explained in process terms. But collateral attack on substantive rules that are merely products of defective processes cannot be explained without extending the heightened scrutiny to neutral as well as discriminatory rules. Unless the Court is willing to take that step, no purely process-based analysis will provide an accurate account of its doctrine.

III. THE RIGHTS OF INSIDE-OUTSIDERS

The failure of *Carolene*⁷⁵ to require strict scrutiny of neutral rules is not the end of its problems. The reasoning also causes one to wonder whether persons who are excluded from the political processes can be governed at all. This motivates an inquiry into what other types of justification for government coercion might exist.

This section examines two different bases for holding nonparticipants to the results of the political processes: territoriality (authority over visitors) and membership. At least one of these theories of govern-

⁷⁴ See *infra* notes 75-129 and accompanying text (discussing the right of the federal or state government to regulate groups who are excluded from the political process).

⁷⁵ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

mental power, membership, is a problematic justification for state coercion. Moreover, even if we accept both categories as bases for coercion, neither rehabilitates the *Carolene* reasoning. First, although each rationale for the exercise of government power has very different philosophical characteristics, *Carolene* incorrectly treats them as indistinguishable by lumping both visitors and members together for purposes of democratic theory. Second, even if one finds both theories persuasive, neither territoriality nor membership explains the different treatment of neutral and discriminatory rules. Third, it is not clear that the existence of any other arguably sufficient basis for the exercise of government authority obviates the problem of binding nonparticipants. *Carolene* seems to take the form of an affirmative defense to an otherwise valid exercise of power. If so, the fact that an individual is excluded may give a right to resist even when another basis for official coercion can be found.

A. *Who are the Inside-Outsiders?*

The individual who does not participate in political processes, but who is nevertheless subject to the results of those processes, is the "inside-outsider." Such persons are inside from the perspective of who can be bound but outside from the perspective of who can participate. The *Carolene* reasoning supposedly protects these persons from the adverse effects of discriminatory rules, but it requires them to abide by neutral ones. Inside-outsiders fall between inside-insiders (who can be subject to any rules) and outside-outsiders (who cannot be subject even to neutral rules).

The first justification for subjecting inside-outsiders to the state's regulations is suggested by the facts of *Skiriotes v. Florida*.⁷⁶ In *Skiriotes*, a Florida court attempted to apply its state law to an event outside Florida's territorial borders. The extra-territorial nature of the event prompted the Court's discussion of whether Florida could exert its authority over *Skiriotes*, because it was this aspect of the case that made the application of Florida law problematic. In contrast, if *Skiriotes'* activities had occurred within Florida's territorial reach, the jurisdiction of Florida's courts would not have been questioned. This theory—that being within a state's territory creates an obligation to obey the state's

⁷⁶ 313 U.S. 69, 76-77 (1941) (Although the *Skiriotes* Court resolved the question on the ground that *Skiriotes* was a Florida resident, what is important here is that if *Skiriotes* had been a nonresident—an outsider—there would have been a real question as to whether the state could exercise authority over him).

rules—is historically associated with Locke.⁷⁷ A related basis for government coercion is suggested by the situation where one's activities have foreseeable consequences within a territory. In such a case, even nonparticipants may be bound.⁷⁸ This added complication of impact territoriality need not, however, be dealt with separately.⁷⁹

Presence in the territory alone is not an adequate explanation for all state coercion. Recall our two scuba divers.⁸⁰ Assuming again that Greeks are a suspect class, could a Florida court apply its laws to a diver of Greek ancestry apprehended off Florida's coast? My belief is that *Skiriotēs* would not have been decided differently had Skiriotēs argued that he was a member of a suspect group. Whether or not Skiriotēs was a member of a discrete and insular minority, he was a Florida resident and thus could be bound. Recall also the above discussion of personal jurisdiction: Would *Blackmer v. United States* have been decided any differently had Blackmer been black?⁸¹ Again, in reviewing the thousands of cases analyzing due process limits on adjudicative jurisdiction, there seems to be no suggestion that membership in a suspect group would immunize absent domiciliaries from the obligation to respond.

To explain this phenomenon, a second justification for binding nonparticipants must be posited. This second basis is membership in the political community, as opposed to participation. The state treats some individuals as full members even though they find themselves ex-

⁷⁷ See J. LOCKE, TWO TREATISES OF GOVERNMENT § 119 (P. Laslett ed. 1960) (3d ed. 1698) (Tacit consent to be bound by the laws of a government "reaches as far as the very being of any one within the Territories of that Government.").

⁷⁸ Impact territoriality has had a checkered career in international law, particularly in antitrust law. For a compilation of representative commentary in the area, see Hood, *The Extraterritorial Application of United States Antitrust Laws: A Selected Bibliography*, 15 VAND. J. TRANSP. L. 765 (1982). In interstate relations, however, causing a foreseeable consequence in another state might provide an adequate basis for the exercise of judicial jurisdiction. See, e.g., *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980) (citations omitted) (For a state to exercise jurisdiction over an outside defendant, "the defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there.").

⁷⁹ Impact territoriality is a form of territoriality because both define the limits of permissible state coercion with reference to a state's territorial borders. They are distinct in their focus. Territoriality focuses on the people and events within a state's territorial borders and allows a state to exercise authority over those people. Impact territoriality focuses on the occurrence of events within the territory when the persons in question remain outside the state. For those who recognize impact territoriality as a basis for a state's assertion of authority the same observations will apply as those made in the text below with regard to visitors. For a discussion of impact territoriality in the international law context, see RESTATEMENT (SECOND) OF U.S. FOREIGN RELATIONS LAW § 18 reporters' notes 1-2 (1965).

⁸⁰ See *supra* note 51 and accompanying text.

⁸¹ 284 U.S. 421 (1931); see also *supra* notes 45-46 and accompanying text.

cluded from the political process.

What membership consists of is not entirely clear, but it is evident that membership and the ability to participate are different components of an individual's political identity. Assume, for example, that the state of New York informs all residents of Fairfield County, Connecticut that henceforth they will be allowed to vote in New York state elections. Connecticut's citizens would not be obligated to obey New York law on the basis of such an offer.⁸² New York has no authority to force non-New Yorkers to exchange the chance to participate for the promise to obey. The opportunity to participate only validates the state's authority over members. Although participation is usually restricted to members, it need not be; participation and membership are distinct characteristics. Aliens, for example, were at one time given the right to vote in many states' elections. As such, they were participants but not members.⁸³

But what about the converse? Are all members participants? Leaving aside, for the moment, the normative question of whether all members *ought* to be allowed to participate, it is at least clear that the right to participate does not inevitably follow from the status of membership. Certainly, there are disenfranchised members in society, such as children and convicted felons. Furthermore, in earlier historical periods, large segments of the population, such as women and those without property, were denied the right to vote.⁸⁴ Yet it was taken for granted that women and those without property were still citizens of the United States, with all of the attendant obligations.⁸⁵

Particularly at the perimeter, these concepts of membership and territoriality are very mysterious. When is a person sufficiently connected to the state so that she may be treated as a member?⁸⁶ Under

⁸² The right to vote does not, of itself, place the Connecticut residents within the territorial boundaries of New York. Thus, the tacit consent arising from presence within the territories of a particular government does not exist here. See J. LOCKE, *supra* note 77, at § 119.

⁸³ See Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1093-1100 (1977) (outlining the history of alien suffrage in the United States). Although early in this country's history aliens could vote in several states, late in the nineteenth century the states began reserving the right to vote for citizens alone. By 1928, there was no state in the union where aliens could vote. See *id.* at 1099-1100.

⁸⁴ These examples are chosen (as opposed to other disenfranchised groups) because it is clear that they were citizens at a time when the status of blacks was unclear.

⁸⁵ See Rosberg, *supra* note 83, at 1094 ("Women were completely excluded [from voting] even though their capacity to hold citizenship was not questioned.").

⁸⁶ For instance, is domicile, residence, or citizenship the relevant characteristic? With regard to businesses, is it incorporation, principal place of business, or something else?

what circumstances is an outsider "in" the territory such that we should treat her like a visitor?⁸⁷ Although such bases for assertion of state power are well recognized,⁸⁸ how far they reach is a subject of great controversy.⁸⁹ Furthermore, some assertion of government power seems to be based upon a hybrid of the two groups. For example, non-resident aliens have some of the characteristics of visitors (because they hale from another country) but also have some of the characteristics of members (because they have settled more or less permanently in the United States). Is the justification for regulating them based upon their status as visitors or as members? One's beliefs about the rights that resident aliens ought to have will, as we shall shortly see,⁹⁰ turn on this question.

The *Carolene* reasoning raises far more serious concerns than merely those related to distinguishing between territoriality and membership as jurisdictional bases. Even if one can accept these two concepts as bases for the assertion of state authority and can delineate their precise contours, neither theory rehabilitates the *Carolene* reasoning. *Carolene's* primary difficulty is that it treats both kinds of inside-outsidiers alike. Because the *Carolene* reasoning is concerned solely with the question of exclusion from the political processes, it makes no attempt to differentiate between groups that stand in different justificatory relationships to the government. It ignores the fact that members and visitors are in very different positions with regard to the assertion of governmental power.

B. *Members and Visitors Contrasted*

The different positions of members and visitors have several aspects. The first difference is that it is not philosophically troublesome that the visitor is not allowed to participate in the elections of every country in which she travels. Visiting establishes a relatively casual relationship between the visitor and the visited state that does not seem to confer the right to become politically involved. This is, in part, because—unlike the member—the visitor has a home state. The definition

⁸⁷ What about, for instance, an outsider who has an agent in the state? What about an outsider who engages in actions with foreseeable consequences within the state?

⁸⁸ See, e.g., RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW, *supra* note 50, at § 402 (adopting territoriality and impact territoriality principles as bases for a state's assertion of jurisdiction).

⁸⁹ This is particularly so with regard to impact territoriality. See, e.g., Hood, *supra* note 78, at 765-67 (discussing wide variety of views on the scope of impact territoriality in an international law context).

⁹⁰ See *infra* notes 113-115, 127 and accompanying text.

of domicile, for instance, ensures that every person has a domicile.⁹¹ Similarly, international law attempts to guaranty that no person will be rendered stateless.⁹² The visitor's rights of political participation extend to participation in the home state's process, not the process of the state that is visited. With regard to the laws of the visited country, visitors have the option to "vote with their feet."

Perhaps it will be argued that some visitors, because of their status at home and abroad, may not be full participants in any state. For instance, a member who is politically excluded in her home state might travel abroad and be denied participatory rights both on that visit and at home. Nevertheless, it seems undeniable that, in such situations, the visitor's greater complaint is against the home state, rather than against the state in which she is transiently present. The home state has the greater obligation to provide full participation rights, and the visited state cannot and probably should not have to try to remedy the home state's failings, except, perhaps, by providing the nonparticipant a new home if she wishes to emigrate.

A second difference between members and visitors also relates to the fact that the visitor has another focus of allegiance. Even though the visitor is not a participant in the political processes of the visited state, she is not entirely without political clout. The home state may have some bargaining power, and comity toward that state may motivate the visited state to treat the visitor fairly.⁹³ The member's sole protection is whatever influence she can bring to bear on sympathetic participants, who might or might not take up her cause.⁹⁴

A third difference between members and visitors is the scope of the state's authority. To use the jargon of judicial jurisdiction, there is only "specific" jurisdiction over visitors but "general" jurisdiction over members.⁹⁵ Specific jurisdiction, as the term is used here, is the power to resolve controversies arising out of the visitor's activities in the state.

⁹¹ See RESTATEMENT (SECOND) OF CONFLICTS § 11(2), comment m (1969) (stating that each person has exactly one domicile: "Since the law of a person's domicile determines many of his important interests, it is essential that everyone have a domicile.")

⁹² The protection against statelessness is discussed in 1 M. McDUGAL & W. REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 921 (1981).

⁹³ See M. WALZER, *OBLIGATIONS* 104 (1970) (argument refers specifically to the status of resident aliens, whose home state protection may be confirmed explicitly by bilateral treaties with the visited state).

⁹⁴ It has been argued that the access to sympathetic participants puts members in a less vulnerable position than visitors. See Simson, *supra* note 7, at 385. Where majorities are prejudiced against minorities, however, propinquity may simply exacerbate the hostility.

⁹⁵ See Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

For example, a visitor who becomes involved in an automobile accident in a state while traveling through that state may be required to return to take part in the resulting litigation.⁹⁶ Similarly, a visitor who earns money while in the state may be required to pay taxes on those earnings. The visited state's courts cannot compel visitors to respond to litigation arising out of activities elsewhere, however, nor can they force visitors to pay taxes on income earned in other states.⁹⁷

Members, in contrast, are subject to litigation concerning any cause of action arising either in or out of state because the state has general jurisdiction over them.⁹⁸ Similarly, the member may be required to pay taxes on her entire income, wherever earned.⁹⁹ We have already discussed one example of general jurisdiction to impose state regulatory law: *Skiriotes* involved a Florida resident apprehended while sponge fishing outside the state's territorial waters.¹⁰⁰ Visitors, therefore, have no continuing obligation to obey local law once they leave the visited state; however, members have a continuing obligation.

What these three differences between members and visitors suggest is that the member is in a far more difficult position vis-à-vis the visitor with regard to state control. First, unlike visitors who cannot expect to be allowed to participate, members are wronged when they are denied participatory rights. Second, members are more vulnerable than visitors because they do not enjoy the protective benefit of a sovereign outside the state who can act on their behalf. Thus, states have no outside pressure to treat members fairly, and members have no guaranteed source of political support if they challenge the state's exertion of authority. At the same time, however, the member has a more expansive obligation to

⁹⁶ See, e.g., *Hess v. Palowski*, 274 U.S. 352 (1927); *Hendrick v. Maryland*, 235 U.S. 610 (1915); cf. *McGee v. International Life Ins.*, 355 U.S. 220 (1957) (where seller is nonresident, a single contract may give rise to specific jurisdiction over resident buyer in action arising out of the contract).

⁹⁷ Some courts have held that visitors can be subjected to adjudicative jurisdiction. See, e.g., *Humphrey v. Langford*, 246 Ga. 732, 273 S.E.2d 22 (1980) (visitors sued by resident on a breach of contract executed and consummated outside the host state). The issue of whether mere presence can suffice to allow a state to exercise general jurisdiction has not yet been addressed by the Supreme Court. For opposing views on this subject, compare *Bernstine, Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38, 60-62 (1979) (transient presence is not sufficient for exercise of jurisdiction) with *Glen, An Analysis of "Mere Presence" and Other Traditional Bases of Jurisdiction*, 45 BROOKLYN L. REV. 607, 613-14 (1979) (suggesting that transient presence should be sufficient if purposeful).

⁹⁸ See *Brilmayer, How Contacts Count: Due Process Limitations on Court Jurisdiction*, 1980 SUP. CT. REV. 77, 81.

⁹⁹ See *Cook v. Tait*, 265 U.S. 47, 56 (1924) (holding that the federal government's power to tax citizens is based on their United States citizenship and is not dependent on the location of the citizen's domicile or the situs of the taxable property).

¹⁰⁰ See *supra* notes 47-48 and accompanying text.

obey the outcome of political processes than the visitor does, and this is true even when they are wrongfully excluded from the decisionmaking process.

A fourth difference cuts the other way, although it also is related to the fact that the visitor has another focus of allegiance. If a visitor participates at home, the state has good information about the visitor's political preferences. As participants, visitors are part of a distinct political process—that of their home state. Thus there exists some set of legal norms to which they appropriately may be held. In contrast, corresponding information about the member's preferences is unavailable. Members can participate only in their home state's political processes. Once they are excluded from that process, there is no set of norms to which they are unproblematically subject.

The significance of this fact lies in its implications for any effort to devise a remedy for nonparticipation. If it were decided that individuals cannot be subjected to decisions in which they did not participate, to what legal standards should they be bound? For visitors, the answer is home state law. But should member nonparticipants have no legal obligations at all? Even though it may be more unfair to subject members to state authority than it is to subject visitors to that authority, it may also be more necessary.¹⁰¹

C. *Fairness to Visitors*

Once *Carolene's* insensitivity to the differences between members and visitors is made clear, the reasoning's inadequacies as an analysis of interstate relations are evident. First, *Carolene* focuses on differences in treatment as the evil to be avoided, when at times similar treatment is more objectionable. Second, invalidation of differential treatment cannot be explained as a remedy for a process defect because visitors have no process rights to be involved in democratic decisionmaking. In both of these respects, the *Carolene* approach is an oversimplification of the rights of visitors.

Differential treatment is not necessarily objectionable because at times differential treatment actually amounts to deference to the visitor's home state law. As noted earlier,¹⁰² in the interstate context protection of outsiders sometimes requires treating them differently from insiders rather than treating them the same. *Carolene* seems to assume, however, that outsiders are better off only if treated the same as insiders. This is why the virtual representation argument is crucial to

¹⁰¹ See *infra* notes 123-29 and accompanying text.

¹⁰² See *supra* notes 49-50 and accompanying text.

Carolene's viability. Virtual representation suggests that as long as the rule is neutral the interests of insiders and outsiders are the same.¹⁰³

This argument fails to note that, if the state has no legitimate basis for exercising its power, a political process defect can also result from treating outsiders the same as insiders. For instance, the usual choice of law rule is that, on matters of internal governance, the applicable law is the law of the business enterprise's place of incorporation.¹⁰⁴ Certainly, this approach results in a differential treatment of local and out-of-state businesses, but it seems unlikely that this practice runs afoul of either the commerce clause or the equal protection clause. First, despite the differential treatment, there is no process defect because both the local and the out-of-state corporations are subjected to the results of political processes in which they had a say.¹⁰⁵ This difference in treatment, therefore, is not a product of the discrimination that *Carolene* was meant to eliminate.

Second, the state's motivation for treating each corporation differently is deference to the corporation's home state. That this rationale can justify a difference in treatment is shown by *Sosna v. Iowa*.¹⁰⁶ In *Sosna*, the Supreme Court upheld a durational residency requirement for divorce against a challenge based on the right to travel. Previous precedents had invalidated other durational residency requirements,¹⁰⁷ but part of the basis for upholding the divorce law was that Iowa had a legitimate state interest in not becoming a divorce mill.¹⁰⁸ Iowa's purpose was to avoid undercutting other states by allowing other states' residents to come to Iowa to get divorced under Iowa laws. *Sosna*, thus, shows that deference to other states can justify differential treatment, at least under the equal protection clause. The same rationale would explain why states may refuse, as a matter of choice of law, to apply their laws to plaintiffs who acquire a domicile after the relevant events leading up to the litigation have transpired.¹⁰⁹

This is not to say that all differential treatment can be explained

¹⁰³ See *supra* notes 59-74 and accompanying text.

¹⁰⁴ See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 296, 293-99, 303-13 (1971).

¹⁰⁵ Cf. B. CURRIE, *Conflict, Crisis, and Confusion*, in SELECTED ESSAYS IN THE CONFLICT OF LAWS 720 (1963) ("[C]lassification according to domicile is not only permissible, but mandatory . . . to avoid unjustified encroachment on [the visitor's home state's] interests."). But see *infra* text accompanying note 111 (subjecting the visitor to the less advantageous of the two standards may be discriminatory).

¹⁰⁶ 419 U.S. 393 (1975).

¹⁰⁷ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (rejecting one-year residence requirement for receipt of welfare benefits).

¹⁰⁸ See *Sosna*, 419 U.S. at 407-08.

¹⁰⁹ See *supra* note 44 and accompanying text.

on such grounds. For one thing, most discrimination takes the form not of applying another state's laws but of applying local law while maintaining a different local law standard for foreigners than for insiders. This factor distinguishes the typical privileges and immunities, equal protection, and commerce clause cases from the typical conflict of laws cases. The former types of cases deal with an admitted application of local law that treats foreigners and insiders differently without any pretense of a deferential rationale. Conflict of laws cases deal, on the other hand, with the choice between local and home state law.

Furthermore, not even all applications of another state's laws can be explained in terms of deference. A state could decide to use its choice of law rules to disadvantage out-of-staters. For example, a state might have a choice of law rule that said, "Apply whichever law is less advantageous to the outsider." Even when this resulted in an application of home state law, it could not be justified on deference grounds because the home state law is deferred to only when that law hurts the home state resident, a result that the home state surely would not have countenanced.¹¹⁰ The point is not that all differential treatment is justified, but rather that differential treatment is not necessarily bad and neutral treatment is not necessarily good. *Carolene* is a gross oversimplification.

The second problem with *Carolene*'s treatment of interstate relations is that it focuses on remedying process defects that do not exist. Visitors simply *do not have* process rights to participate. Contrary to *Carolene*'s suggestion, political legitimacy does not turn on participation, but rather it turns on whether there are territorial occurrences that give the state the right to regulate.¹¹¹ Since the visitor who commits acts within the state has no legitimate expectation of political participation, the visitor's political exclusion does not insulate her from the state's exercise of authority.

Again, the problem is that *Carolene* oversimplifies. It assumes that every person who is affected by a rule has a right to participate in its enactment. Visitors, however, are in a rather peculiar position in democratic theory. Their anomalous posture has been noted by several commentators in the context of the voting rights of resident aliens.¹¹² If

¹¹⁰ Cf. Brilmayer, *supra* note 41, at 415-16 (arguing that host state's interpretation of restrictive home state legislation under interest analysis principles often ends in application of home state legislation only when it advantages the home state's residents).

¹¹¹ See *supra* notes 77-80 and accompanying text.

¹¹² See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-22, at 1053 & n.10 (1978) (noting the circularity of relying on the fact of alien disenfranchisement to justify strict scrutiny of the practice); see also Note, *A Dual Standard for State Dis-*

resident aliens are viewed as visitors (rather than as members),¹¹³ then denying them the franchise is not problematic. It seems fairly clear, at any rate, that the Supreme Court is not likely to use its strict scrutiny reasoning to require that aliens be allowed to vote.¹¹⁴

According to *Carolene*, however, the very exclusion of resident aliens is the basis for an argument that they must be allowed to vote. *Carolene* reasoning suggests that excluded groups may not be discriminated against—they may not be denied even minor advantages that are available to locals. Following this logic, resident aliens could be characterized as an excluded group that should not be denied an important right¹¹⁵ such as the franchise. This argument is curious, however, because it seems to justify inclusion on the basis of exclusion. Furthermore, the argument could be made with regard to any group, such as transient visitors, who is presently denied the right to vote. The flaw in the reasoning that leads to such paradoxical results is the premise that political exclusion is always a process defect. Because the exclusion of visitors is not a process defect,¹¹⁶ a true process-based theory would not call for the invalidation of rules disadvantaging such persons.

The point goes beyond the fact that visitors need not be included in the political processes. The broader point is that legislators need only take into account the wishes of their constituents in lawmaking, and they may deliberately ignore the interests of visitors who would be subject to their laws if they entered the state. For example, visitors to Boston are often annoyed at the dearth of street signs, making it hard to

crimination Against Aliens, 92 HARV. L. REV. 1516, 1528 (1979) (making a similar point and citing L. TRIBE, *supra*).

¹¹³ The opposite result would follow if they were members. See *infra* text accompanying note 127. Thus, the key to analyzing the right of resident aliens to vote depends on this characterization.

¹¹⁴ See *Skaft v. Rorex*, 430 U.S. 961 (1977), *dismissing appeal from* 191 Colo. 399, 553 P.2d 830 (1976) (basing finding of no substantial federal question on Justice Blackmun's assertion in *Sugarman v. Dougall*, 413 U.S. 634, 648-49 (1973) (citations omitted), that "citizenship is a permissible criterion for limiting [voting] rights").

¹¹⁵ The Supreme Court emphasized the importance of the franchise when it stated: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Westbury v. Sanders*, 376 U.S. 1, 17 (1964). More recently, however, the Court has clarified its opposition to the application of strict scrutiny when denying political participation to aliens, reasoning that applying strict scrutiny in this context would "depreciate the historic value of citizenship." *Foley v. Connelie*, 435 U.S. 291, 295 (1978) (citations omitted); see also *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973) (describing a community's power to exclude aliens from the domestic political process as "historical").

¹¹⁶ Cf. *Toll v. Moreno*, 458 U.S. 1, 41 (1982) (Rehnquist, J., dissenting) (citing *Cabell v. Chavez-Salido*, 454 U.S. 432, 439-40 (1982)) ("Judicial incursions into [the definition of the scope of the political community] may interfere with those aspects of democratic self-government that are most essential to it.").

navigate by use of road maps. Many visitors also wish that there were more municipal parking lots. But since the locals know all of the roads, they do not care that most intersections are unmarked and confusing. And since they are familiar with public transportation and more likely than visitors to be pedestrians, they do not care as much about increasing the amount of downtown parking.

Certainly, when Boston decides not to spend money on street signs and parking lots, it is disregarding the preferences of visitors. One might suggest that Boston is foolish to pay so little attention to the wishes of tourists. But as a matter of pure political process theory, the city is entitled to do these things. Boston has no theoretical obligation to take into account the visitors' conception of what Boston ought to be like. Boston is entitled to be quaint and cranky if that is the sort of city in which Bostonians want to live. Indeed, the right of Boston to maintain its own unique character can be used to justify even certain sorts of discriminatory rules, such as the limitation of policy-making public employment to local residents.¹¹⁷

Even so, although there is no process problem with either excluding visitors from participation or deliberately ignoring their wishes, the fact that a state may refuse to take the interests of visitors into account does not automatically mean that the state may discriminate against them. Although there may be no process problems with disregarding their wishes, there are substantive prohibitions against discrimination such as the commerce clause, the equal protection clause, and the privileges and immunities clause.¹¹⁸ While the state is entitled to dismiss the preferences of outsiders utterly and to cater exclusively to the preferences of the insiders, if it tailors a statute to confer benefits on the insiders alone, the statute may very well be unconstitutional. This point is illustrated by *Metropolitan Insurance Co. v. Ward*,¹¹⁹ which invalidated an Alabama insurance premium tax that taxed foreign insurance companies more heavily than local insurance companies.

The confusing aspect of the majority opinion in *Metropolitan Insurance* is its treatment of earlier cases that had indicated that it is an

¹¹⁷ See, e.g., *Supreme Court of New Hampshire v. Piper*, 105 S.Ct. 1272, 1279 (1985); *Sugarman*, 413 U.S. at 641-43 (conflict of interest between an alien's home state and the visited state held to constitute a substantial state interest justifying statute that excluded aliens from holding public positions involving the formulation and execution of public policy; the statute was, however, struck down as being overly broad); Koh, *supra* note 38, at 61 (discussing doctrine permitting discrimination against aliens); see also *Foley*, 435 U.S. at 291 (permitting the exclusion of aliens from the local police force).

¹¹⁸ See *supra* notes 35-36 and accompanying text.

¹¹⁹ 105 S. Ct. 1676 (1985).

appropriate state objective to promote local business.¹²⁰ While acknowledging the validity of this objective, the Court stated that the state could not pursue its end through discriminatory means. The dissent charged that the majority had collapsed the two separate inquiries of goal and method into one by incorrectly redefining the goal of "promoting local interests" as "promoting local interests through discriminatory means."¹²¹ This was illegitimate since the only valid test of the method was supposed to be whether it rationally furthered the state goal, and the goal of furthering local interests had been conceded valid.

The source of the confusion lies in the misinterpretation of the earlier cases holding that furthering local interests is a valid state goal. It is true that a state need only to consult locals and to consider their well-being in determining what interests to further. To say, however, that the purpose behind a statute is the promotion of purely local interests is not to say that the scope of that statute may be limited to those local interests. It might seem that the most precise statute would be the one whose scope was tailored to the precise conditions motivating the statute. This would suggest that since local needs prompted the enactment, the statute's benefits might be limited to locals. But because rules must be given general application, the benefits of rules passed by self-interested legislators must extend, to some degree, beyond the group of persons who supported the bill in the first place.¹²² The antidiscrimination provisions of the Constitution mandate this sort of overbreadth.

In sum, *Carolene* is far too simplistic an approach to the rights of visitors. It suggests that the reason visitors cannot be discriminated against is that they were unfairly excluded from the political processes. But sometimes they *can* be treated differently, and sometimes, they *must* be treated differently. And, even when they *cannot* be treated differently, the explanation is not process defects but the substantive law that regulates interstate relations. *Carolene* reasoning is simply irrele-

¹²⁰ See, e.g., *Bacchus Imports Ltd. v. Dias*, 104 S. Ct. 3049 (1984) (state's interest in aiding local industry justified exempting certain locally-produced alcoholic beverages from excise tax); *Pike v. Bruce Church*, 397 U.S. 137, 143 (1970) (protection of local farmers' reputations held a legitimate state interest); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526 (1959) (discussing generally the right of states to "ensure revenue and foster their local interests"); *Parker v. Brown*, 17 U.S. 341 (1943) (state agricultural act, while possibly adversely affecting out-of-state interests, held not violative of commerce clause because it did not discriminate between those and local interests).

¹²¹ 105 S. Ct. at 1685 (O'Connor, J., dissenting).

¹²² This explains why the interest analysis school of conflict of laws is mistaken in its assertion that a state may limit the benefits of its laws to local residents. Cf. *Brilmayer*, *supra* note 41, at 408 & n.66 (choosing laws to compile the most advantageous package for resident parties is "implausible" given protective statutes); *Ely*, *supra* note 41, at 192-93 (arguing that a choice of law rule that directs courts to prefer residents as residents is unconstitutional).

vant in the interstate context.

D. *Fairness to Members*

With regard to members, *Carolene's* problem is not that it is irrelevant but that it opens a Pandora's box. The reasoning casts grave doubts upon a state's authority to govern nonparticipants because political theory really does seem to require that members be given a chance to participate if they are expected to obey. For example, Michael Walzer cites traditional liberal democratic theory to the effect that "oppressed minorities have no obligations at all within the political system."¹²³ While it is not difficult to justify exclusion of visitors from the political processes, the exclusion of members seems *prima facie* unfair.

This intuition that members have a *prima facie* right to participate is demonstrated in the literature regarding the voting rights of resident aliens.¹²⁴ As noted earlier, it is not clear whether resident aliens should be treated as visitors or as members.¹²⁵ If they are visitors, they have no right to participate. If, however, they are analogized to members, then serious questions arise about whether they ought to have the right to vote. Thus, for instance, one author who favors extending the franchise to resident aliens has argued that resident aliens are not transients. They are, instead, similar to United States citizens, with fairly stable commitments to the country.¹²⁶ In order to establish a right to participate, it seems crucial to emphasize those traits that resident aliens share with acknowledged *members* of society.

This *prima facie* right to participate arguably affords a member nonparticipant an affirmative defense to the imposition of local law even when another basis for imposition of local law exists. This is significant because, in many situations, an alternative basis for coercion arguably does exist. For instance, it might be argued that because members are usually present within the state they can be regulated as visitors. Alternatively, the obligation to obey the law might be argued to arise from the receipt of benefits from the state.¹²⁷

Such explanations do not go far enough to justify the full range of state coercion. First, members are ordinarily subject to state authority

¹²³ M. WALZER, *supra* note 93, at 49.

¹²⁴ See, e.g., Rosberg, *supra* note 83, at 1111 (suggesting that resident aliens are more similar to citizens than to transients and should therefore have the right to vote).

¹²⁵ See *supra* text accompanying notes 83-90.

¹²⁶ See Rosberg, *supra* note 83, at 1114, 1118-19, 1129 (resident aliens must pay taxes, have a familiarity with the law, and must generally feel a sense of commitment).

¹²⁷ For a comprehensive discussion of theories of obligation and of benefit theory in particular, see A. SIMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 157-90 (1979).

even when they are absent from the state. They must obey its laws, respond to judicial summons, and pay taxes.¹²⁸ Second, although suspect group members often are denied some of the benefits that participant members receive, they are still required to obey.

Perhaps more importantly, however, it is clear as a matter of democratic theory that neither physical presence within the state nor receipt of government benefits is an adequate substitute for the right of political participation. Member nonparticipants are entitled to challenge directly their exclusion from the political processes. It would not be an adequate response to a direct challenge of disenfranchisement to point out that the challenger receives benefits from the state or is physically present in the state. For this reason, democratic theory seems to do more than merely provide one sufficient basis for official coercion; it seems to purport to state a necessary condition for governing members. Exclusion from political processes therefore creates an affirmative defense.

Accordingly, in those areas in which the *Caroline* reasoning has been used—namely, in the invalidation of discriminatory rules—it would not be an adequate response that the suspect group member is within the state's territory or that some other justification for coercion can be found. This is no more adequate a response in the context of *Caroline*'s third clause than it would be in the context of a second clause direct attack on formal legal disenfranchisement. The existence of an alternative basis for official power, therefore, does not remedy the violation of the right to participate either in direct challenges to disenfranchisement or in *Caroline*-based challenges to discriminatory rules.

The fact that we, nonetheless, require suspect group members to comply with neutral rules demonstrates one of two things. First, it may show that we really do not believe the *Caroline* hypothesis that such groups are excluded from the political processes. After all, it might be argued, most suspect groups are no longer formally disenfranchised. This argument undercuts the *Caroline* analysis, of course. It destroys the articulated rationale for invalidating discriminatory legislation by suggesting that earlier reliance on *Caroline* was less than completely honest in its glib assertions about who was excluded from the political processes.

The second possible conclusion that might be drawn from the failure to justify the regulation of member nonparticipants is that such regulation is grounded on purely pragmatic considerations. This, I

¹²⁸ See *supra* notes 96-99 and accompanying text (discussing general jurisdiction over members).

think, is the real answer. Because the member has no other set of norms in whose formulation she participated, the consequence of exemption from local law is a complete absence of regulation. It is to avoid this result that local law is imposed. The best explanation is that of expediency. While this is, ultimately, a rather depressing view of American democracy, it rings true in a way that *Carolene* itself does not.

For those persons who have been excluded, this country's neutral laws are not their laws.¹²⁹ The pragmatic resignation to the status quo that requires the retention of those laws does not yield fair results for those who suffer exclusion. Nor is it fair that excluded groups should bear the entire responsibility of altering every neutral rule that does not represent their interests. There simply is no other choice.

IV. A NATURAL LAW OF PROCESS

A. *Carolene's Second and Third Clauses*

This Article noted at the outset a number of claims that have contributed to the appeal of *Carolene*¹³⁰ as a theory of constitutional adjudication. It is supposedly process-oriented, protective of minorities, and not judicially intrusive upon an essentially American majoritarian system of government. Having challenged the first two of these claims, this article next turns to the last claim—a claim that is, perhaps, the *Carolene* enthusiasts' proudest boast. It, too, proves unfounded. Contrary to the claims that *Carolene* is essentially compatible with the American democratic system, its reasoning is in fact based upon a controversial natural law of process that is substantially at odds with the system established by our Constitution.

We have already shown two different ways in which the typical application of *Carolene* analysis diverges from our constitutional law of political process. First, *Carolene* characterizes as process defects certain types of political exclusions that the Constitution does not treat as process defects at all (such as the exclusion of visitors).¹³¹ Second, *Carolene* exonerates certain sorts of political exclusions that the Constitution does treat as process defects (namely, those where virtual representation can be shown).¹³² To put the problem another way, there is

¹²⁹ That is why resident aliens could at one point have been treated as a suspect group, *Graham v. Richardson*, 403 U.S. 365 (1971), although the Court has never suggested their entitlement to vote.

¹³⁰ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

¹³¹ See *supra* notes 112-15 and accompanying text.

¹³² See *supra* text accompanying notes 60-67 (discussing virtual representation).

an unexplained divergence between the second and third clauses of the *Carolene* footnote. The second clause deals with direct challenges to exclusionary political rules. It recognizes that such rules are suspect and counsels that they ought to be strictly scrutinized. The third clause, however, is not limited in its impact to situations in which challenges under the second clause would succeed. It applies, for instance, to exclusion of visitors from the political process. Inexplicably, then, there are two different definitions of process defects. One, based on the second clause, identifies the situations in which a direct challenge to an exclusion will succeed. The other, grounded in the third clause, explains when collateral attack on a particular substantive result will succeed. As this section will show, this latter definition is both broader and narrower than the former definition.

Further, *Carolene's* third clause constitutes an idealized theory of democratic government whose contours cannot be located in the American Constitution. The second clause strives to define directly who should be included in the democratic processes and who need not be included. It directly addresses the question of which persons have a right to vote in our constitutional system. By disregarding the results of that analysis, the third clause sets judges loose upon uncharted seas, to formulate for themselves some utopian version of democratic political theory. Perhaps it is a good thing that they do so. But even if it is a good thing, it certainly is not judicial modesty.¹³³

B. *The Necessity of Natural Law in Process-Based Theories*

Carolene must contain within it a natural law of democratic processes, because process theories cannot amount to very much unless they contain an ideal of process that differs from the positive law of process in effect within a jurisdiction. In other words, if the definition of a process defect in *Carolene's* third clause was congruent to the definition of a process defect in the second clause, then *Carolene* would not be a particularly powerful tool in constitutional adjudication.

This can be shown by imagining a world in which the footnote's two clauses were equated. What would a process theory look like if process defects were defined strictly in terms of the positive law of pro-

Under the fifteenth amendment, for example, it is entirely clear that blacks may not be denied the right to vote. If, however, the arguments about virtual representation were to be believed, exclusion of blacks from the political processes would pose no process defects so long as no discriminatory rules were passed.

¹³³ Cf. J. ELY, *supra* note 5, at 102 (arguing that a representation-reinforcing approach, unlike a fundamental-values approach, "assigns judges a role they are conspicuously well situated to fill").

cess rights? A process theory of this sort would link direct and collateral attack so that collateral challenge to a rule would be possible if and only if a direct attack would have been possible. Due process analysis of judicial decisions is of this sort. In the context of challenges to legislation, however, few statutes would be invalidated.

A prime example of a statute that could not be invalidated under such a positivist process theory would be a rule discriminating against blacks that was enacted at a time when blacks had no constitutional right to vote. As a matter of positive law, blacks at that time had no process rights. Since their process rights stemmed from natural law—not positive law—a direct challenge to their political exclusion would have been unsuccessful.

A purely positive law approach to process analysis would require the judge to ask whether any positive process rights were violated during the actual process of enactment and to answer that question in terms of the law of process in effect at that point in time. Such a reading of *Carolene* would narrow and consequently undercut the scope of its third clause. It is quite obvious that this is not *Carolene's* approach, nor would anyone establishing any other variation of process-oriented theory find such an approach very attractive. Not only does it insulate many obnoxious statutes from challenge, but it also severely restricts the utility of process-based theories as a general matter.

The restricted utility of such a process-based theory arises out of the fact that the possibility of direct challenge limits the time period that any exclusionary rule contrary to positive law will remain in force. For instance, assume that Florida denies Greek-Americans the right to vote, and that a number of laws are enacted during the period when Greek-Americans are excluded from the political process. Sooner or later, of course, the exclusion itself will be directly challenged. If the exclusion is upheld, then a positivist process analyst ought to conclude that the statutes enacted in the interim are all valid. If the exclusion is invalidated, then those statutes that were enacted in the interim ought to be invalidated. But statutes enacted after the invalidation may very well be constitutional. The reason is that Greek-Americans now possess the right to vote. If their positive law rights are no longer being violated, it seems that they have no right of collateral attack. Thus, if the third clause definition of process defect tracks that of the second clause, there will be only a small window in time in which procedurally defective laws can be enacted.

Positivist process theories only work with regard to time periods in which the positive legal rights and actual statutory rights are not synchronized—time periods, that is, when positive law rights are being

violated. The vehicle of direct challenges, however, continuously brings the actual statutory rights up to date. In other words, such unsynchronized periods do not last indefinitely. Natural law process theories, in contrast, do not contain such a self-limiting feature. Positive law can be out of touch with natural law for indefinitely long periods of time because there is no vehicle for ensuring congruence. Under a natural law approach, then, process defects need not be confined to such relatively short historical periods. Since many more statutes therefore can be invalidated, the result is a far more powerful constitutional tool.

Powerful? Yes. Modest? No. *Carolene* is wrong in its suggestion that you can have your majoritarian cake and eat it too. The natural law that *Carolene* relies upon is carefully concealed as mere implementation of democratic processes. For this reason, it appears possible to be judicially modest and judicially activist at the same time. This is an illusion. Whether one is activist with regard to procedural rights or with regard to substantive rights, invalidation of statutes requires contradicting majoritarian preferences. It is puzzling that anyone could have ever thought otherwise.

CONCLUSION

The *Carolene*¹³⁴ ideal is not without its attractions. It appears to be based upon some vague notion that everyone who is affected by a political decision ought to have a right to participate in making that decision. It is not clear upon closer examination, however, that, if one must fuel a process-based approach with *some* natural law of process, one should opt for that implicitly relied on by the proponents of *Carolene*.

Even as natural law theories of process go, I do not find the *Carolene* approach to be particularly attractive. The virtual representation argument strikes me as unconvincing in a time of near-universal suffrage, whatever its appeal might have been at the time of the American Revolution. The failure to differentiate between the moral claims of visitors and members is inexcusable. Perhaps most telling, however, is the fact that, once one admits that process theories require reliance on natural law, there is no reason to grant process rights any special jurisprudential status. To be consistent, one then must either be willing to recognize natural rights of substance (if one is inclined toward activism) or refuse to recognize any natural rights of process (if one is inclined toward positivism and interpretivism).

¹³⁴ United States v. Carolene Products Co., 304 U.S. 144 (1938).

Returning to the starting point, no version of the *Carolene* analysis explains the differential treatment of discriminatory and neutral rules. *Carolene's* cruelest hoax is its suggestion that, once the discriminatory rules are invalidated, our political process problems are over. But, as any excluded person surely realizes after putting the illusion of *Carolene* to one side, discriminatory rules are only a small part of a very large problem. They are only the first hurdle in a long road to political participation and equality.

Carolene's approach has led us seriously astray. It suggests that only discriminatory rules have process defects. It suggests that all outsiders are in the same boat, when in fact outside-outsiders are not subject to local rules at all. It suggests that all inside-outsiders are comparably situated, when in fact members are much more seriously wronged than visitors. Its remedy for visitors is more generous than its process analysis can explain, whereas its remedy for excluded members is clearly insufficient according to its own supposedly process-based analysis.

If we were to take process values seriously, we would probably be more protective of minority interests than *Carolene* allows us to be. Its promises of judicial modesty and substantive neutrality are misconceived, and its promise of protection of minority interests is an illusion. It is better to recognize the *Carolene* non sequitur for what it is and then to get on with a task more difficult than *Carolene* has ever recognized.