One could avoid this seeming dilemma by claiming that private transactions that do not produce externalities are *Pareto* superior, while legislative logrolling invariably affects parties other than the members of the legislature, and thus they invariably produce externalities and cannot be assumed *Pareto* superior. The difficulty, however, is that ultimately this is an argument of definition. Consider the argument that market transactions (other than those with externalities) do not harm anyone and are thus *Pareto* superior. Economists making this argument are focusing solely on externalities among other private market actors, for example in the case of pollution. But by insistently honoring private market exchanges such as contracts below specified minimum wages, economists disregard potential harm to other actors, those in an altogether different institution, namely legislators who wish to enact minimum wage laws. Only by defining such actors as outside the scope of the model can one claim that private market transactions should be vindicated against contrary laws on the grounds that they uniquely satisfy the *Pareto* principle.

Of course the same is true with respect to those who seek to protect legislative compromise. It would also be a mistake to claim that such laws are invariably desirable because legislators have agreed to enact them. This calculus fails to consider the potential negative effects within the private market. Those who hold strong *laissez faire* views will be inclined to dismiss the significance of the concern about thwarting laws they deem socially detrimental, and those who are more skeptical of private markets and who are favorably inclined toward market regulation will hold a contrary view. The point here is not to demonstrate that either set of views is right or wrong. Rather it is to demonstrate that one cannot guarantee both sets of concerns simultaneously; there is a necessary choice, or at least the potential for a choice, that tests the outer limits of concerns for protecting the market and concerns for protecting democratic decision making. The history of the doctrine of economic substantive due process suggests that the Supreme Court has changed its mind over time with respect to this fundamental issue.

C. UNITED STATES v. CAROLENE PRODUCTS

Consider next the famous case *United States v. Carolene Products Co.*,[123] a case that was decided one year following *West Coast Hotel Co. v. Parrish*.[124] *Carolene Products* is notable not only because it provides a theoretical justification for low-level scrutiny of economic regulation, in this case a challenge to a prohibition against lower cost ''filled milk,'' but also because in its famous footnote 4, it offers an express and influential theory concerning those defects in political processes that might provide a normative justification for applying strict scrutiny to certain forms of legislation.

123. 304 U.S. 144 (1938).

124. 300 U.S. 379 (1937).

In *Carolene Products*, Justice Stone, writing for a majority, sustained the Filled Milk Act, a federal statute that ''prohibit[ed] the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream,''[125] as an adulterated product deemed injurious to the public health, against a challenge based upon the Fifth Amendment Due Process Clause and the Commerce Clause. The Court relied upon an earlier case, *Hebe Co. v. Shaw*,[126] for the proposition that ''a state law which forbids the manufacture and sale of a product assumed to be wholesome and nutritive, made of condensed skimmed milk, compounded with coconut oil, is not forbidden by the Fourteenth Amendment.''[127] The Court did not rest solely on precedent, however, asserting:

> [A]ffirmative evidence also sustains the statute. In twenty years evidence has steadily accumulated of the danger to the public health from the general consumption of foods which have been stripped of elements essential to the maintenance of health. The Filled Milk Act was adopted by Congress after committee hearings, in the course of which eminent scientists and health experts testified. An extensive investigation was made of the commerce in milk compounds in which vegetable oils have been substituted for natural milk fat, and of the effect upon the public health of the use of such compounds as a food substitute for milk. . . . [T]he House Committee on Agriculture . . . and the Senate Committee on Agriculture and Forestry . . . concluded . . . that the use of filled milk as a substitute for pure milk is generally injurious to health and facilitates fraud on the public.[128]

While the Court relied upon such legislative findings and the underlying testimony, it further noted that such findings were not necessary to sustain the Act. The Court continued:

> Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[129]

In the famous footnote 4 that followed this passage, Justice Stone, joined by a plurality of four, stated:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten

125. *Carolene Prods.*, 304 U.S. at 145–46.

126. 248 U.S. 297 (1919).

127. *Carolene Prods.*, 304 U.S. at 148.

128. *Id.* at 148–49 (citations omitted).

129. *Id.* at 152.

> amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> 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. [P]rejudice 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.[130]

The Court's argument in footnote 4 that the majoritarian political process generally protects individuals, but that ''discrete and insular'' minorities, such as racial or religious minorities, may be entitled to special protection by the judiciary, underlies John Hart Ely's well known book, *Democracy and Distrust*.[131] In this analysis, the true vice of factions is in failing to protect groups that systematically are disadvantaged, in part due to numbers and in part due to organizational abilities, within traditional political processes. As a result, Ely maintains, heightened scrutiny of laws that adversely affect specified racial minorities and women are normatively justified by perceived failures in political markets.

Consider the response by Professor Bruce Ackerman.[132] Following Mancur Olson, Ackerman contends that while the size of minority groups might be a weakness, their insularity might be a strength, at least when compared with other noninsular groups. Thus, Ackerman states:

> Other things being equal, ''discreteness and insularity'' will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics. Except for special cases, the concerns that underlie *Carolene* should lead judges to protect groups that possess the opposite characteristics from the ones *Carolene* emphasizes—groups that are ''anonymous and diffuse'' rather than ''discrete and insular.'' It is these groups that both political science and American history indicate are systematically disadvantaged in a pluralist democracy.[133]

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130. *Id.* at 152–53 n.4 (citations omitted).

131. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

132. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985).

133. *Id.* at 723–24.

Are there reasons to suspect that those groups that have traditionally benefited from the Court's treatment of *Carolene Products* footnote 4, namely African Americans, might lack some of the benefits that Ackerman ascribes to discrete and insular minorities? If so, what are those factors? Is it possible that Ackerman's analysis commits a category mistake, meaning that it equates as ''discrete and insular'' minorities two separate groups in the Wilson–Hayes framework:[134] those minorities who seek protections from laws benefiting majority groups at their expense (the lower left) and special interest groups seeking quasi-private legislation at the expense of a diffuse electorate (the upper right)? If so, which box is the target of Ackerman's analysis, and which box is the target of footnote 4?

Professor Geoffrey P. Miller has offered a critical account of the *Carolene Products* opinion, in which he claims that the result was to prevent access to a low cost product for those consumers most in need.[135]

> Filled milk was a technological innovation in the canned milk industry, an industry that was itself a response to the technological difficulties of bringing fluid milk to markets. The problem of dairy marketing has always been the perishability of fluid milk. . . . The early decades of the twentieth century saw rapid development of transportation, refrigeration, and pasteurization, facilitating the creation of home delivery systems of bottled milk. Even so, there remained a demand for fluid milk that resisted spoilage. Many homes, especially in poorer areas, did not have refrigerators; and it was useful for all households to have some extra fluid milk on hand for emergencies. Canned milk filled these needs.[136]

Given his conclusion that filled milk was a wholesome and economical milk product, Miller rejects the court's public interest justifications for the law as being ''patently bogus,'' instead attributing the law to the influence of the dairy industry. Filled milk, which was made with skim milk and vegetable oil, sold for a much lower price than whole milk, which was enriched with butterfat. Much of the profit for dairy farmers and large milk distributors (such as Borden) came from sales of fluid and condensed whole milk. Moreover, increased consumption of filled milk threatened to divert millions of pounds of butter into the market, thereby ''driving down the price of that commodity.''[137] Finally, in 1923 the federal Filled Milk Act was enacted, which prohibited the shipment in interstate commerce of filled milk, and by 1937, thirty-one states had also banned the manufac-

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134. *See supra* table 2:4 (The Four Box Static Model).

135. Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397.

136. *Id.* at 400.

137. *Id.* at 404.

ture or sale of filled milk, three states had enacted effectively similar legislation, and three states had imposed conditions and regulations on the manufacture and sale of filled milk. ''The effect of the federal statute, coupled with prohibitory state legislation,'' Miller observes, ''was to drive most producers out of business.''[138] Miller concludes:

> The battle over filled milk seems well-described by interest group theory. The most plausible inference is that the statute was enacted at the behest of a coalition of groups intent on advancing their own economic welfare at the expense of less powerful groups. An impressionistic view of the events surrounding the statute's enactment supports this inference: the sponsors were from big dairy states, while the chief opponents were from cotton states.[139]

Miller also conducted an empirical analysis that generally supported his conclusions. He observes:

> In the *Carolene Products* footnote, Justice Stone suggested that special protections were needed for ''discrete and insular minorities'' because such groups would not be adequately served by the political process. The statement, if meant as a general observation about American politics, is obviously misplaced. Public choice theory demonstrates that, in general, ''discrete and insular minorities'' are exactly the groups that are likely to obtain disproportionately large benefits from the political process.
>
> The insights of public choice theory are amply demonstrated by the battle over filled milk, where one discrete minority—the nation's dairy farmers and their allies—obtained legislation harmful to consumers and the public at large. To be sure, the legislation discriminated against another discrete minority—the filled milk industry—but this fact simply reflects the complexity of the dairy industry. Filled milk producers, if they had not been trumped by a politically more powerful group, might themselves have been able to obtain special legislative favors to the detriment of the public interest.[140]

Does this analysis affect your thinking about the deferential approach that the *Carolene Products* Court took to the statute under review? About its less deferential approach in cases involving discrete and insular minorities? Miller posits:

> The political theory underlying the *Carolene Products* footnote, now a half-century old, needs to be updated. The results of that process may call in question the Supreme Court's policy of blind deference to

138. *Id.* at 410.

139. *Id.* at 423.

140. *Id.* at 428 (footnote omitted).

legislation favoring special industrial interests. Is it time to re-examine the wisdom of ''see-no-evil, hear-no-evil'' as the prevailing philosophy in economic regulation cases?[141]

To what extent is the Supreme Court's deferential standard of review in *Carolene* based on its embedded assumptions about how the legislative process operates? Does the Court provide any justification for its assumptions? Is the filled milk industry the sort of ''discrete and insular'' minority that the Supreme Court had in mind in *Carolene Products* footnote 4? Is it possible that Professor Miller has also committed a category mistake that the Wilson–Hayes analysis helps to identify?[142] Should the Court carefully scrutinize both economic regulation and legislation affecting discrete and insular minorities? What might the costs of such a regime be? To what extent if any are your answers informed by public choice?

V. NORMATIVE CRITIQUES OF INTEREST GROUP THEORY AND INTEREST GROUP THEORY BASED LEGAL SCHOLARSHIP

In this section, we consider two normative critics of interest group theory and of legal scholarship relying upon interest group theory. We begin with Professor Einer Elhauge's article, *Does Interest Group Theory Justify More Intrusive Judicial Review?*[143] The author answers the title question in the negative. The article presents two central arguments, the first of which is of particular importance to this chapter. We then consider the critique by Professors Donald Green and Ian Shapiro, set out in their book, *Pathologies of Rational Choice Theory.*[144]

A. THE PROBLEM OF BASELINES[145]

Elhauge's analysis responds to claims by an impressive cadre of legal scholars who have relied upon public choice to identify claimed defects in political processes and to rely upon those identified defects to advocate less judicial deference to legislative outcomes.[146] Elhauge advances two arguments that together represent a broadside attack on the literature relying on interest-group theory to advocate changes in judicial interpretation of statutes:

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141. *Id.*

142. *See supra* note 134, and accompanying text.

143. Elhauge, *supra* note 100, at 31.

144. DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE (1994).

145. Portions of the discussions that follow are adapted from STEARNS, *supra* note 22, at 246–53.

146. Elhauge includes the following, and reviews many of their articles in his analysis: Erwin Chemerinsky, Frank Easterbrook, Richard Epstein, William Eskridge, Jonathan Macey, Jerry Mashaw, Gary Minda, William Page, Martin Shapiro, Bernard Siegan, Cass Sunstein, and John Wiley. Elhauge, *supra* note 100, at 33.