Public Choice in the Law

Saturday, 10:45 a.m. – 11:45 a.m.

Professor Todd Zywicki
Professor of Law & Senior Fellow of the James Buchanan Center, George Mason University School of Law

The session will introduce the ideas of Public Choice Economics, the application of the assumptions of economics to the study of politics. One implication of public choice theory is that it predicts the possibility of systematic market failures in the political marketplace, and in particular, the likelihood that well-organized special interest groups will have a predominant role in the shaping of government policy.

Selected Reading:

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

Auto Guide Report: 98 Percent of U.S. Commuters Favor Public Transportation for Others, The Onion, Nov. 29, 2000.

Amicus Brief for *St. Joseph Abbey v. Castille*

GEOFFREY P. MILLER

THE TRUE STORY OF CAROLENE PRODUCTS

United States v. Carolene Products Corporation,[1] as any second year law student knows, contains perhaps the most renowned footnote in constitutional history.[2] In famous footnote four Justice Stone, writing for himself and three others, suggested that the Court apply relatively strict scrutiny to legislation interfering with the political processes or affecting the rights of "discrete and insular minorities."[3] Because the Court had but recently abandoned strict scrutiny of economic regulation, the footnote is seen as paving the way for a two-tiered system of constitutional review in which individual rights are afforded greater protection than so-called economic liberties.

Geoffrey P. Miller is Professor of Law and Associate Dean, The University of Chicago Law School.

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

[2] *Cf.* Brown v. Board of Education, 343 U.S. 483, 494 n.11 (1954). See Mason, Harlan Fiske Stone: Pillar of Law 513–14 (1956); Hutchinson, Unanimity and Desegregation: Decision-Making in the Supreme Court 1948–1958, 68 Georgetown L. J. 1, 43 & n.349 (1979).

[3] 304 U.S. at 152 n.4. Justices Cardozo and Reed did not participate; Justice McReynolds dissented; Justice Butler concurred only in the result; and Justice Black did not concur in the part of the opinion containing the footnote.

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Today, a half-century later, the footnote is widely honored as a cornerstone of constitutional law,[4] a "great and modern charter for ordering the relations between judges and other agencies of government."[5] The footnote has spawned noteworthy scholarship;[6] and its seminal ideas have been expanded in works by John Hart Ely[7] and others.[8]

The plaudits accorded the footnote are matched by the disregard of the case itself. The facts were not the stuff of great decisions. At issue was the constitutionality of the 1923 federal "Filled Milk Act,"[9] a statute that prohibited the shipment in interstate commerce of skimmed milk laced with vegetable oil.[10] The case appeared to be a routine challenge to an unimportant economic regulation, with the outcome foreordained by recent opinions sustaining other forms of economic regulation.[11] Commentators have denigrated its significance, finding it "unremarkable,"[12] "straightforward,"[13] even "easy."[14]

The lack of attention to the case itself is unfortunate, because it is interesting in its own right, and because its facts shed light on the meaning of the footnote. The statute upheld in the case was an utterly unprincipled example of special interest legislation. The

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[4]See Lusky, Footnote Redux: A Carolene Products Reminiscence, 82 Colum. L. Rev. 1093 (1982); Lusky, Minority Rights and the Public Interest, 52 Yale L. J. 1 (1942); Gunther, Cases and Materials on Constitutional Law 542 (10th ed. 1980).

[5]Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 6 (1979).

[6]See Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713 (1985); Ball, Judicial Protection of Powerless Minorities, 59 Iowa L. Rev. 1059, 1060–64 (1974); Brilmayer, Carolene, Conflicts, and the Fate of the "Inside-Outsider," 134 U. Pa. L. Rev. 1291 (1986); Erler, Equal Protection and Personal Rights: The Regime of the "Discrete and Insular Minority," 16 Ga. L. Rev. 407 (1982); Powell, Carolene Products Revisited, 82 Colum. L. Rev. 1087 (1982).

[7]Ely, Democracy and Distrust (1980).

[8]*E.g.*, Cover, The Origins of Judicial Activism in the Protection of Minorities, 91 Yale L. J. 1287 (1982).

[9]21 U.S.C. § §61–63 (1982).

[10]The term "filled milk" was a dairy industry pejorative; manufacturers of the substance preferred "compound milk."

[11]*E.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[12]Brilmayer, note 6 *supra*, at 1294.

[13]Lusky, note 4 *supra*, at 1095.

[14]Powell, note 6 *supra*, at 1987.

purported "public interest" justifications so credulously reported by Justice Stone were patently bogus. If the preference embodied by this statute was not "naked,"[15] it was clothed only in gossamer rationalizations. The consequence of the decision was to expropriate the property of a lawful and beneficial industry; to deprive working and poor people of a healthful, nutritious, and low-cost food; and to impair the health of the nation's children by encouraging the use as baby food of a sweetened condensed milk product that was 42 percent sugar.

It is difficult to believe that members of the Court were unaware of the true motivation behind this legislation. That they should nonetheless vote to uphold the statute strongly suggested that all bets were off as far as economic regulation was concerned. Footnote four, in this light, can be seen as indicating that the Court intended to keep its hands off economic regulation, no matter how egregious the discrimination or patent the special interest motivation. Rational basis scrutiny of the sort suggested in *West Coast Hotel*[16] could not be taken seriously if it precluded judicial protection of individual liberties. By separating economic and personal liberties, Justice Stone suggested that the Court might really mean what it said about deference to the legislative will in economic cases. Two-tiered scrutiny did much more than facilitate the creation of preferred constitutional categories entitled to exacting judicial review. It also freed the forces of interest group politics from the stumbling block of the federal courts. *Carolene's* legacy is not only *Brown v. Board of Education;*[17] it is also the unrivaled primacy of interest groups in American politics of the last half-century.

Fortunately for the nation's consumers, the *Carolene Products* case itself is no longer the law. Go to any supermarket and you will find filled milk for sale under trade names such as "Milnot" or "Melloream." Some firms, including the aptly-named Defiance Milk Products Company of Defiance, Ohio, are boldly marketing the product under its original colors.[18] The Supreme Court's decision in *Carolene Products* has been overruled, and the statute declared to

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[15]Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689 (1984).

[16]*West Coast Hotel*, note 11 *supra*.

[17]Brown v. Board of Education, note 2 *supra*.

[18]This manufacturer describes its products as "Evaporated Filled Milk—Vitamin A & D Added," and states that the contents are "a substitute for, but not evaporated milk or cream."

violate substantive due process.[19] Yet while the injustice of the case itself has been remedied, the footnote remains.

I. Politics, Technology, Markets, and Law: The Filled Milk Act of 1923

The Filled Milk Act arose out of complex interactions among the politics, technology, and markets of the canned milk industry. Technological innovations shaped milk markets; those markets, in turn, stimulated research and development of new technology. Markets powerfully influenced dairy politics; politics shaped the development of legal regulations.[20] Legal changes, in turn, altered market dynamics and created new incentives for technological innovation. These complex actions and reactions were at all times subtle, pervasive, and deeply reciprocal.

A. TECHNOLOGY

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. In the nineteenth century, when refrigeration was in its infancy and transportation systems still relatively primitive, there was essentially no market for fluid milk outside of farming areas and major cities. Dairy products were consumed as butter or cheese, products less subject to spoilage than 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. It resisted spoilage for years, came in a convenient condensed form suitable for easy storage, and required virtually no preparation. The flavor was not particularly palatable

[19] See text accompanying notes 87–90 *infra*.

[20] See, *e.g.*, Peltzman, Towards a More General Theory of Regulation, 19 J. Law & Econ. 211 (1976); Becker, A Theory of Competition among Pressure Groups for Political Influence, 98 Q. J. Econ. 371 (1983).

for use as a beverage, but it was extremely serviceable in cooking and for use as a whitener in coffee or tea.

There were then, as now, two principal forms of canned milks. Condensed milk is produced by heating raw fresh milk almost to the boiling point to destroy bacteria, adding sugar as a preservative, then boiling in a vacuum at about 150° F until the volume is reduced by about half. The mixture, now 40 percent sugar, is then drawn off, cooled, and packed in cans for sale to the public. Borden's "Eagle," first sold in 1857, was in 1923 (and still is) the industry leader in condensed milk. Evaporated milk, the other principal canned milk product, is produced by boiling raw fresh milk at low temperature in a vacuum, homogenizing it, packing it in hermetically sealed cans, and then sterilizing it in the cans by heating above the boiling point. The principal difference between condensed and evaporated milk is that the former is preserved with sugar while the latter is preserved through heat sterilization.[21]

Filled milk is evaporated skimmed milk to which vegetable oils have been added in place of the butterfat. It is indistinguishable from ordinary evaporated whole milk in taste, odor, color, consistency, specific gravity, and cooking qualities. In 1923, at the time of the federal statute, filled milk was made almost exclusively with coconut oil, which was the only vegetable oil then available at reasonable price that had a sufficiently neutral taste. All the coconut oil in filled milk was imported, principally from the Philippine Islands. Some of this oil was refined in the Philippines and imported under a tariff exemption that the islands enjoyed due to their status as American possessions after the Spanish-American War. The remainder was imported in the form of copra—dried coconut meat—and refined in the United States. Copra was on the free list and could be imported duty-free from any country.

B. MARKETS

Canned milk was produced by commercial milk dealers and distributors. There were apparently significant economies of scale in the production and distribution of the product. By the late teens the canned milk industry had become relatively concentrated as a result of merger and internal expansion. The top four companies

[21]Federal Trade Commission, Report on Milk and Milk Products 1914–18 34 (1921).

in 1918 controlled 54.2 percent of the market and the top ten firms controlled 76.7 percent.[22] These figures actually underestimated the amount of concentration because the bigger firms purchased and marketed the output of the smaller ones and because the two top firms, Borden and Nestle, operated under an agreement to divide markets.[23] It is probable that Borden and Nestle together controlled about half the total U.S. market through their own output or via long-term contracts with other companies.

Filled milk appeared on the scene in the early teens. It was produced by a few of the bigger milk dealers incident to their manufacture of condensed and evaporated milk. By 1923 there were seven or eight brands on the market, going under trade names such as "Enzo," "Nutro," "Nyko," "Silver Key," and "Carolene." The industry leader was "Hebe," produced by a subsidiary of the Carnation Company, one of the industry's top ten firms.

The great selling point of filled milk was price. Skimmed milk was virtually worthless at the time. Produced in the billions of pounds a year, its principal cash market was in the manufacture of paint. Mostly it was fed to hogs or calves on the farm. The only element of real value in milk was butterfat. Because the coconut oil in filled milk was much cheaper than butterfat, filled milk could be sold for considerably less than canned whole milk. The wholesale cost of a case of filled milk was about $3.50 for forty-eight cans, while the cost of a case of canned whole milk was $5.00.[24] At retail, filled milk typically sold for about 7½¢ a can, as compared with 10¢ for canned whole milk.[25]

The canned milk market was for many years a relatively unimportant part of the dairy industry. Beginning in 1915, however, European countries began demanding American dairy products as a result of the First World War. American exports of condensed and evaporated milk totaled only 16 million pounds in 1914; by 1917 they were 259 million pounds; and by 1919 they reached a peak of 729 million pounds.[26] The trade in filled milk expanded

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[22]*Id.* at 21.

[23]*Ibid.*

[24]Filled Milk, Hearings on H.R. 6215 before the House Committee on Agriculture, 67th Cong., 1st Sess. 12; 87; 127 (1921) (hereinafter "House Hearings").

[25]*Id.* at 12–16; 127–28.

[26]The Agricultural Crisis and Its Causes, Report of the Joint Commission on Agriculture Inquiry, H. Rep. No. 408, 64th Cong., 1st Sess. 149 (1921).

along with the demand for canned milk generally: it was estimated that in 1916 12,000 pounds of filled milk were produced; in 1917 19,000 pounds; in 1918 41 million pounds; in 1919 62 million pounds; and in 1920 84 million pounds.[27] The explosion in the demand for canned milk of all sorts was probably the most important single development in dairy markets during the period.

In 1920–21, following the conclusion of the First World War, the American economy suffered a serious decline. Farmers were particularly hard hit.[28] Prices for farm products plummeted in late 1920; and by 1921 the industry was in a depression that continued until 1923. Meanwhile, the prices of farm supplies and of commodities generally were either increasing or decreasing at a much slower rate than farm output prices.[29] Caught in a price squeeze, many farmers were forced into distress sales or even bankruptcy.[30] The "grim reality" of the agricultural economy in 1922, in the words of President Harding, was one of "crisis . . . depression and discouragements."[31]

The agricultural depression of 1920–23 was keenly felt in the dairy industry, even if the level of distress was somewhat less for this sector than for other agricultural products. Milk dropped from $3.22 per hundredweight in 1920 to $2.30 in 1921; butter suffered a similar loss from 54.3¢ a pound in 1920 to 37¢ in 1921.[32] Despite the price drop, consumption of dairy products remained nearly constant, reflecting the relatively inelastic demand for most farm products.[33] The situation did not improve until 1923 when milk and butter prices showed a small but significant increase.[34]

Conditions in the canned milk market were especially disrupted because of the collapse in European demand. Exports dropped from

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[27]Filled Milk, Hearings on H.R. 8086 before a Subcommittee of the Senate Committee on Agriculture and Forestry, 77th Cong., 2d Sess. 45 (1922) (hereinafter "Senate Hearings").

[28]Report of the Joint Commission on Agricultural Inquiry, Part I, H. Rep. No. 408, 67th Cong., 1st Sess. 35–36 (1921).

[29]U.S. Department of Justice, Milk Marketing, A Report to the Task Group on Antitrust Immunities 33–34 (1977).

[30] Report of the Joint Commission on Agricultural Inquiry, *supra*, Part II, pp. 86–89.

[31]Report of the National Agricultural Conference, H. Doc. No. 115, 67th Cong., 2d Sess. 6–7 (1922).

[32]The Statistical History of the United States 522 (1976).

[33]*Id.* at 329–31; 522–23.

[34]*Id.* at 522.

711 million pounds in 1920 to 267 million pounds in 1921.[35] Total production fell from 2.03 billion pounds in 1919 to 1.58 billion pounds in 1920, and to 1.46 billion pounds in 1921.[36] In October 1920, many condenseries were closed for the first time in history; by December production by all the larger companies had practically ceased.[37] Plants did not begin to reopen until February 1921, and the industry did not reopen all its plants until the following spring.[38] Borden's net income dropped from $4.28 million in 1919 to $2.81 million in 1920 and $2.92 million in 1921.[39]

The downturn was felt in the filled milk industry as well: filled milk production continued to increase through 1920, but in 1921 fell to about 65 million pounds, a loss of approximately 20 million pounds over the previous year.[40]

C. POLITICS

The politics of filled milk was a predictable expression of the self-interest of the various affected parties. The opponents of the product can appropriately be referred to as the "dairy industry," although the term is not completely accurate because limited segments of the industry were aligned on the other side. Pressing for prohibition were various farmer associations: breed groups; county, state, and national political organizations; dairy newspapers; agricultural colleges and universities; granges; and dairy promotional organizations. Farmers understood, correctly, that the imported coconut oil in filled milk undercut the domestic butterfat market. Although filled milk was mostly skimmed milk, a dairy product, the net impact on dairy farmers was negative. The demand for skimmed milk created by Hebe and similar products was largely a replacement for skimmed milk that would otherwise have been used in whole evaporated milk. Worse, filled milk displaced millions of pounds of butter into the market, driving down the price of that commodity. The loss in profits from the reduction in butter prices

[35]The Agricultural Crisis and Its Causes, note 26 *supra*, at 149.

[36]See 62 Cong. Rec. 7591 (1922) (remarks of Rep. Knutson).

[37]Annual Report, The Borden Company 8 (1920).

[38]*Id.* at 10.

[39]1920 and 1921 Annual Reports, The Borden Company.

[40]New York Produce Review and American Creamery, May 10, 1922, at 104.

outweighed any gain from an enhanced skimmed milk market.[41] In this respect the impact of filled milk was similar to that of margarine, dairying's longtime bugaboo.

In addition to farmers, the other important member of this coalition was the Borden Company. Borden enjoyed substantial brand-name capital in its various kinds of canned milk, especially its "Eagle" condensed milk. Perhaps because of its dominant position, Borden failed to introduce its own brand of filled milk. By 1920 the various other proprietary brand names had gained consumer acceptance; if Borden were to enter the market at this point it would have to struggle to do as well in filled milk as it was doing in other segments of the canned milk industry. Thus by 1920 Borden apparently calculated that it had more to gain by suppressing the trade in filled milk than by entering into competition with its rivals. Much of the opposition to filled milk appears to have been instigated and actively supported by Borden throughout.[42] Borden cooperated amicably with the producer groups in the filled milk battle even though their relations were keenly adversarial on other issues such as milk prices.

The principal supporters of filled milk were the small group of producers who wanted to protect a source of profits and their investments in brand names. Their interests were informally represented in the Carnation Company, which had the most to lose because its Hebe brand was the industry leader. Other opponents of the measure were importers and refiners of copra and retail and wholesale grocers. The cotton interests of the South also opposed the bill, out of hope that filled milk might someday be made with cottonseed oil; their interest, however, was discounted because the amount of cottonseed oil in filled milk was negligible, and future prospects depended on an uncertain technology of taste neutralization.[43]

Sitting ostentatiously on the sidelines were the big Chicago packing houses. As leading producers of margarine, they might have

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[41]Industry leaders recognized the threat posed by filled milk from the start. See, *e.g.*, "Hebe" Milk Likened to Oleo, Hoard's Dairyman, Jan. 10, 1919, at 846.

[42]House Hearings at 171; Senate Hearings at 81–83.

[43]While the bill was pending in Congress, filled milk manufacturers tried desperately to neutralize the taste of cottonseed and peanut oils. Their efforts met with mixed success at best, although opponents of the bill did display samples of milk filled with domestic oils during floor debate. See 62 Cong. Rec. 7583–84 (1922) (remarks of Rep. Aswell).

been expected to oppose discrimination against butterfat substitutes. The packinghouse interests, however, were interested principally in meat margarine, made from beef and hog fat, and secondarily in margarine made from cottonseed and other domestic oils, a business into which they had recently diversified. They had no interest in a product made from coconut oil. Indeed, they had reason to be antagonistic to coconut oil products because their margarine business was suffering competition from so-called "nut margarines" made from imported oils.[44] There is reason to suspect that the packing houses covertly supported the dairy industry in the filled milk battle, although their support could not be publicly expressed because of the longstanding hostility between the dairying and meatpacking industries over the margarine issue.[45]

D. THE 1923 STATUTE

Despite the threat posed by filled milk, the dairy industry made few efforts to combat the product prior to the onset of the farm depression in 1920. In part this was because there was no basis for challenging the product under existing law. The federal pure food and drug act required that the product not be adulterated or misbranded, but a proviso stated that an article would not be considered adulterated or misbranded if it was a compound of ingredients offered for sale under its own name and not an imitation of another article.[46] There was no question that filled milk, taken by itself, was a healthful product, since it was simply a compound of skimmed milk and vegetable oil, two substances universally recognized as healthful. Nor was there any basis to challenge the labeling of the various filled milks, under either state or federal law, since they correctly disclosed their ingredients and did not include "milk" in their names. Thus the executive branches of the state and federal

[44]In 1917, 145 million pounds of packing house fats were used in margarine as compared with only 19 million pounds of coconut oil; by 1921 packing house fats used in margarine had fallen to 86 million pounds and coconut oil had increased to 103 million pounds. Snodgrass, Margarine as a Butter Substitute 316 (1930).

[45]A decade later the packing houses and the dairy industry publicly made common cause in a successful effort to place legal restrictions on nut margarine. See President Hoover Signs the Cooking Compound Bill, Jersey Bulletin and Dairy World, July 30, 1930, at 1469.

[46]34 Stat. 768, 771 (1906).

governments, which might have been the first resort for the dairy industry, were not initially available in its campaign.

In Ohio, however, an existing statute prohibited the manufacture or sale of condensed skimmed milk. Ohio authorities threatened prosecution against the manufacturer of Hebe for violation of the statute. The case reached the Supreme Court of the United States in 1919, where, despite an argument for Hebe by Charles Evans Hughes, Justice Holmes upheld the statute. Holmes deferred to the legislature to a degree rarely matched even in the Court's pro-New Deal decisions after 1937. Even assuming that Hebe was wholesome, said Holmes, the legislative power "is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat."[47] Holmes had no difficulty concluding that the statute represented a valid exercise of the police power.[48]

The result in *Hebe Co.*, coupled with the weakening in dairy prices that began in 1919, galvanized the industry into action. Prominent dairy journals sounded the alarm. Hoard's Dairyman accused Hebe of being oleo wearing "a tin jacket . . . instead of annatto paint and oil paper."[49] The *Jersey Bulletin and Dairy World*, a national journal for the Jersey breed, disparaged the product as "milk business a la sausage grinder" and noted pointedly that the skimmed milk in Hebe was supplied by a Holstein herd.[50] The equation of filled milk with margarine was well-calculated to capture the attention of farmers long conditioned to consider oleo the worst of all possible evils (except when served at their own dinner tables).[51]

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[47]Hebe Co. v. Shaw, 248 U.S. 297, 303 (1919), quoting Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 204 (1912).

[48]The *Hebe* case illustrates that the *Lochner* era was anything but monolithic. See Currie, The Constitution in the Supreme Court: The Protection of Economic Interests 1889–1910, 52 U. Chi. L. Rev. 324 (1985); Currie, The Constitution in the Supreme Court 1910–1921, 1985 Duke L. J. 1111, 1129–31.

[49]"Hebe" Milk Likened to Oleo, Hoard's Dairyman, Jan. 10, 1919, at 846.

[50]Milk Business a la Sausage Grinder, Jersey Bulletin and Dairy World, May 11, 1921, at 1683.

[51]Dairy industry journals of the period frequently condemn the habit of dairy farmers to use margarine for their own cooking needs.

Industry leaders charged that filled milk was unhealthy because it lacked vitamins, and that it induced fraud because it could so easily be confused with evaporated milk. These arguments formed the basis for a sustained campaign by the industry against filled milk at both the state and federal levels.[52]

Around 1920 bills to outlaw or severely restrict filled milk were introduced in various state legislatures. California and Washington passed the first such laws in 1919, followed by seventeen more states within the next four years.[53] The campaign for state legislation received a boost in 1922 when the Wisconsin Supreme Court upheld that state's filled milk statute against a challenge brought by the Hebe Company.[54]

Beneficial as these statutes were for the opponents of filled milk, they did not provide complete protection. The product could still be manufactured where it was not prohibited, and could, under the original package doctrine, be freely transported into states that had enacted prohibitory legislation.[55] As long as filled milk undersold canned whole milk by a significant amount, merchants, grocers, and peddlers could be found willing to risk prosecution for selling the product. To enforce the statute effectively prosecutors would have to go after these small-time operators, a strategy certain to prove both time-consuming and ineffective. Even if retailers could be apprehended, their defense costs would be paid by the filled milk manufacturers; and sympathy for defendants would often result in jury nullification or unfavorable judicial interpretations. Prosecutors were unlikely to enforce these statutes enthusiastically given the many other demands on their resources. The dairy industry had experienced all this and more in its frustrating campaign against margarine, and it was well aware of the difficulties it would face in a similar attack on filled milk.

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[52]As shown below, the arguments were bogus. See text accompanying notes 92–112 *infra*.

[53]The states were Colorado (1921), Utah (1921), Oregon (1921), Wisconsin (1921), New Jersey (1922), New York (1922), New Hampshire (1923), Missouri (1923), Minnesota (1923), Michigan (1923), Massachusetts (1923), Iowa (1923), Illinois (1923), Connecticut (1923), Tennessee (1923), South Dakota (1923), and Pennsylvania (1923). See Brief for the United States in United States v. Carolene Products Co., Oct. Term 1937, at 60–68 (hereinafter cited as "United States Brief"). The early adoption of filled milk statutes by western states was probably due to the fact that Carnation, the manufacturer of Hebe, was a West Coast distributor.

[54]State v. Emery, 178 Wisc. 147, 189 N.W. 564 (1922).

[55]*E.g.*, Leisy v. Hardin, 135 U.S. 100 (1890).

This is not to say that the state prohibitions on filled milk were useless. By increasing the cost of the product, the statutes raised the price and reduced the quantity sold. Further, and perhaps equally important, the statutes provided a model for federal legislation. In the state legislative contests the dairy industry was able to hone and refine its arguments while at the same time organizing effective state- wide lobbies that could be unified in the subsequent national campaign.

Federal legislation therefore remained an attractive goal for the dairy industry despite its success in obtaining prohibitory legislation in many states. The question was what form the legislation should take. The choice was between taxing and regulating, with the decision turning on practical and legal considerations.

Existing federal legislation provided the model of a prohibitive tax. Yellow margarine had been subject to a prohibitive federal tax since 1902[56] and "filled cheese" (skimmed milk cheese with non-dairy fat) had been taxed out of existence since 1896.[57] There was reason to hope that a prohibitory tax would be sustained in court.[58] Moreover, a federal tax could reach the product at the point of manufacture. Because there were relatively few producers in the canned milk business, enforcement of a tax on manufacturers would be simple and effective.

State prohibitory statutes provided the other model. Such legislation would prohibit the transport of filled milk in interstate commerce; if effectively enforced it would balkanize the filled milk market along state lines and restrict the product to states where it was not prohibited. The disadvantage of legislation under the commerce power was that under existing jurisprudence it could not reach within a state to regulate manufacture.[59] In addition, commerce power regulation was subject to potential attack under the Due Process Clause. While the hands-off attitude of the *Hebe Co.* case suggested that a federal prohibition would be upheld, the Supreme Court had not always been deferential to economic reg-

[56]32 Stat. 197 (1902).

[57]29 Stat. 253 (1896).

[58]See McCray v. United States, 195 U.S. 27 (1904) (upholding federal margarine tax). See also Veazie Bank v. Fenno, 8 Wall. 533 (1869) (sustaining prohibitive tax on state bank notes).

[59]United States v. E.C. Knight Co., 156 U.S. 1 (1895).

ulation.[60] Accordingly, some sort of police power justification was necessary to guard against judicial invalidation. Under existing jurisprudence a prohibition of interstate commerce was likely to survive constitutional scrutiny if the product in question were shown to be dangerous to health, safety, or morals,[61] or if it worked some sort of fraud on the public.[62]

By 1921 the dairy industry as a whole had determined to support a direct federal prohibition of filled milk rather than a punitive tax, although segments of the industry worried about the constitutional difficulties.[63] The leading congressional supporters of the bill were congressmen from dairy states such as Wisconsin, Minnesota, New York, and Iowa. The opponents were largely from the South, especially cotton states such as Arkansas, Mississippi, and Louisiana. The bill passed the House 250 to 40,[64] passed the Senate by a voice vote,[65] and was signed into law on March 4, 1923.

The federal statute removed some of the pressure for prohibitory legislation in states that had not yet acted, but state legislation was still needed to prevent intrastate manufacture and sale of the product. Filled milk was banned or stringently regulated in Arkansas (1925), Indiana (1925), North Dakota (1925), Vermont (1925), Alabama (1927), New Mexico (1927), Montana (1929), Georgia (1929), Connecticut (1930), Arizona (1931), Delaware (1935), Texas (1935), and Kentucky (1940).[66] By 1937 thirty-one states had enacted laws prohibiting the manufacture or sale of filled milk; three had prescribed standards for condensed milk that effectively outlawed filled milk, and three had imposed conditions and regulations on the manufacture and sale of filled milk.[67]

The effect of the federal statute, coupled with prohibitory state legislation, was to drive most producers out of business. A small

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[60]*E.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918).

[61]*E.g.*, Champion v. Ames, 188 U.S. 321 (1903).

[62]*E.g.*, McDermott v. Wisconsin, 288 U.S. 115 (1913).

[63]See Senate Hearings at 87; Why Filled Milk Should Be Taxed, The Milk Dealer, Oct. 1921, at 93.

[64]62 Cong. Rec. 7669–70 (1922).

[65]64 Cong. Rec. 4986 (1923).

[66]United States Brief at 60–68; Carolene Products Co. v. Hanrahan, 291 Ky. 597, 164 S.W.2d 597, 598 (1942).

[67]United States Brief at 60–68.

trade in the product did continue, however, where permitted by law or where a producer was willing to risk prosecution in order to test a statute in court. The leading (perhaps the only) manufacturer of filled milk after 1923 was the Carolene Products Corporation. This firm continued to manufacture and sell the substance in a number of states, including several that had enacted prohibitory legislation.

Despite what appeared to be the unfavorable precedent in *Hebe Co.*, Carolene Products had some remarkable successes in its lonely legal odyssey. In 1931 the Supreme Court of Illinois—Carolene's home state—invalidated its filled milk statute on due process grounds.[68] When an organization of evaporated milk producers caused the legislature to enact a new statute complete with suitable recitations of "fact," the Illinois Supreme Court again struck it down, holding that the purported fact finding intruded on the judicial function and denied due process and equal protection of the laws.[69] These decisions established a safe harbor in which the company could operate its manufacturing plant and serve the large intrastate market, including the Chicago metropolitan area.

In 1934 the company won an even bigger victory when a judge in the Southern District of Illinois, in a sweeping if confused opinion, invalidated the federal statute.[70] The act, said the court, "strikes down a well-known lawful industry, one which theretofore was entitled to and had the protection of the Constitution and laws of the United States. It amounts to a taking of private property ostensibly for the public good without compensation, and deprives the defendant and others similarly situated of liberty and property, without due process of law."[71]

Carolene Products' situation improved still more in 1936 with decisions by the Supreme Courts of Michigan and Nebraska striking down their respective filled milk statutes.[72] Although prohibitory legislation was still being enacted in a number of states, it began

[68]People v. Carolene Products Co., 345 Ill. 166, 177 N.E. 698 (1931).

[69]Carolene Products Co. v. McLaughlin, 365 Ill. 62, 5 N.E.2d 447, 451 (1936).

[70]United States v. Carolene Products Co., 7 F.Supp. 500 (S.D. Ill. 1934).

[71]*Id.* at 507.

[72]Carolene Products Company v. Thompson, 276 Mich. 172, 267 N.W. 608 (1936) (state and federal constitutions); Carolene Products Company v. Banning, 131 Neb. 429, 268 N.W. 313 (1936) (state and federal constitutions).

to appear as if the dairy industry's campaign of 1920–23 would founder completely upon the rocks of the Due Process Clause.

In fact, however, it was Carolene Products that was on a headlong course for disaster. In 1937 it attempted to eliminate interference from its archenemy, the Evaporated Milk Association, by bringing a bill of complaint alleging that the Association's activities violated the antitrust law. The strategy backfired when the Seventh Circuit upheld the federal statute, overruling the prior decision by the Southern District of Illinois.[73]

The following year catastrophe struck. The Supreme Courts of Missouri and Pennsylvania upheld their states' prohibitory statutes.[74] Worse, the United States Supreme Court upheld the federal statute in *United States v. Carolene Products Co.*[75] Justice Stone's opinion for the Court deferred totally to congressional committee "findings" that filled milk threatened the public health (because it lacked vitamins) and encouraged consumer fraud (because it could be confused with evaporated milk).

Despite the Court's apparent renunciation of any meaningful role in economic cases, Carolene Products refused to abandon the fight. It added a little cod liver oil and marketed the product as "New Vitamin A Carolene."[76] The scheme failed. State supreme courts in Kentucky[77] and Kansas[78] sustained filled milk statutes as applied to the new formula. A renewed federal prosecution came to the United States Supreme Court in 1944.[79] The Court rejected the company's arguments out of hand, holding that congressional concerns about consumer fraud were sufficient to sustain the statute even if the product were assumed to be completely wholesome and nutritionally equivalent to milk. In a companion case, *Sage Stores*

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[73]Carolene Products Co. v. Evaporated Milk Association, 93 F.2d 202 (7th Cir. 1938).

[74]Carolene Products Co. v. Harter, 329 Pa. 49, 197 A.627 (1938); Poole & C. Market Co. v. Breshears, 343 Mo. 1133, 125 S.W.2d 23 (1938) (prosecution of retailer for distributing Carolene).

[75]304 U.S. 144 (1938).

[76]See Carolene Products Co. v. Hanrahan, 291 Ky. 417, 164 S.W. 2d 597, 699 (Ky. 1942).

[77]*Ibid.*

[78]Carolene Products Co. v. Mohler, 152 Kan. 2, 102 P.2d 1044 (1940); State v. Sage Stores Co., 157 Kan. 622, 143 P.2d 652 (1943), aff'd, 323 U.S. 32 (1944) (proceeding against retailer for distributing Carolene).

[79]Carolene Products Co. v. United States, 323 U.S. 18 (1944).

v. Kansas,[80] the Court sustained the Kansas filled milk statute as applied to the new product.

By the end of 1944 Carolene Products appeared to have run out of options. The Supreme Court had made it abundantly clear that it was not about to overturn filled milk statutes no matter what proof the company might offer. Filled milk had been banned in more than thirty states and heavily regulated in others. Carolene was relegated to a marginal legal existence, able to survive by serving a few intrastate markets but without serious prospects for expansion. At this point the record falls almost silent on the fate of an organization known as the Carolene Products Corporation.

The controversy over butterfat substitutes, however, continued to simmer on the back burner of constitutional law. After the Second World War, markets, politics, and technology combined to create a more favorable environment for filled dairy products. The technology of taste neutralization advanced to the point where soybean, peanut, and cottonseed oils could be used in substitute milk products. This development, coupled with the imposition of tariff duties on copra and coconut oils incident to Philippine independence, meant that filled milks would be formulated from domestic oils if the product were legalized. Meanwhile the relative importance of canned milk ebbed as improvements in transportation, refrigeration, and pasteurization made fresh milk available nationwide. Increasing knowledge of nutrition established that fortified filled milk contained the same vitamins as canned whole milk; and scientific awareness of linkages between food cholesterol and heart disease impeached the healthfulness of butterfat. Consumer groups appeared and began to press for elimination of legal restrictions on margarine. With the repeal of the federal tax on colored margarine in 1950 the argument for prohibiting filled milk appeared increasingly preposterous. Meanwhile diversified food products companies began to experiment with new forms of imitation dairy products that promised big profits if the legal barriers against filled milk could be surmounted.

Filled milk litigation surfaced again in 1959, with a decision by the Arizona Supreme Court invalidating a prohibitory statute as

[80] 323 U.S. 32 (1944).

applied to imitation ice cream made with vegetable oil.[81] The Massachusetts Supreme Judicial Court held in 1965 that its food and drug statute could not constitutionally prohibit the sale of a frozen non-dairy creamer.[82] The Colorado Supreme Court followed suit in 1971 by invalidating a filled milk statute as applied to sour cream substitutes made with vegetable oil.[83] Although the trend toward striking down filled milk statutes was not unwavering,[84] it was unmistakable. Moreover, the paucity of decisions almost certainly indicates that state statutes had fallen into desuetude. Some states repealed their statutes.[85]

The federal statute remained. By the 1950s, however, it was evident that the federal government had lost all enthusiasm for prosecuting violations. The Agriculture Department determined that many new filled dairy products were not made "in imitation or semblance of milk," hence not within the statute.[86] Interpretation had its limits, however. No amount of bureaucratic legerdemain could twist the statute so as not to apply to its original intended victim, evaporated skimmed milk with vegetable oil. At some point the issue that had apparently been conclusively settled in the *Carolene Products* cases was bound to arise again.

It did so in 1972 in a suit brought by the Milnot Company, a manufacturer of filled milk. A federal district court struck the statute down as a violation of substantive due process, thus overruling the Supreme Court's decisions in *Carolene Products*.[87] The statute was arbitrary and capricious, according to the court, because prod-

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[81]State v. A.J. Bayless Markets, Inc., 86 Ariz. 193, 342 P.2d 1088 (1959) (state and federal Due Process Clauses). Three years earlier the New York Court of Appeals had struck down a statute prohibiting the sale of evaporated or condensed skimmed milk in containers of less than ten pounds. Defiance Milk Products Co. v. Du Mond, 309 N.Y. 537, 132 N.E.2d 829 (1956).

[82]Coffee-Rich, Inc. v. Commissioner of Public Health, 348 Mass. 414, 204 N.E.2d 281 (1965) (state constitution).

[83]People ex rel. Orcutt v. Instantwhip Denver, Inc., 176 Colo. 396, 490 P.2d 940 (1971) (en banc) (state constitution).

[84]A fresh filled milk product called "Farmer's Daughter" fell victim to several state statutes. See Reesman v. State, 74 Wash. 2d 646, 445 P.2d 1004 (1968)(en banc); Martin v. Wholesome Dairy, Inc., 437 S.W.2d 586 (Tex. Civ. App. 1969).

[85]See Milnot Co. v. Richardson, 350 F.Supp. 221, 224 n.1 (S.D. Ill. 1972).

[86]See *id.* at 224.

[87]*Ibid.* A district court obviously cannot "overrule" a Supreme Court opinion in the technical sense. The term "overrule," however, accurately describes the practical consequences of the *Milnot* decision, at least within the Southern District of Illinois.

ucts virtually identical to Milnot were circulating in interstate commerce free of statutory infirmity. Moreover, the market conditions and dangers of confusion that led to the passage and judicial upholding of the statute "have long since ceased."[88] Accordingly, Milnot had the right to market its product in interstate and foreign commerce free from federal interference under the Filled Milk Act.[89]

The *Milnot* decision has once again re-opened the channels of national commerce to trade in filled milk. Today, as noted, filled milk can be found on the canned milk shelves of any supermarket. Borden's "Eagle," meanwhile, is often ignominiously relegated to the bakery department, it having been recognized that a product comprised 42 percent of sugar is not a particularly appropriate beverage, especially for infants. And in one sense filled milk has gained the sweetest revenge of all: concerns about dietary cholesterol have made filled milk appear the more healthful product, since the vegetable oils (principally soybean oil) now contained in filled milk are cholesterol free, a virtue notoriously lacking in butterfat.

A final footnote is in order. The Milnot Company, which managed to overturn the Supreme Court's opinions in *Carolene Products*, was not always known by that title. Years ago it had a different, more familiar name—the Carolene Products Corporation.[90]

II. Constitutionality of the Federal Statute

The campaign against filled milk was grounded on three arguments: (1) filled milk is a threat to the public health because it does not contain the vitamins that exist in butterfat; (2) filled milk is a threat to the public welfare because it can be confused with evaporated milk; (3) filled milk is a threat to the public interest because it undermines the dairy industry, an essential national institution.[91] The first two arguments were designed to bring the

[88] *Ibid.*

[89] In 1983 a federal district court held the Kansas filled milk statute unconstitutional under the federal Due Process and Equal Protection Clauses, overruling the Supreme Court's decision in *Sage Stores*. General Foods Corp. v. Priddle, 569 F.Supp. 1378 (D.Kan. 1983).

[90] See Milnot v. Richardson, 350 F.Supp. at 222.

[91] See Filled Milk Legislation, The Milk Dealer, Oct. 1921, at 68; Brief on Voigt Bill, New York Produce Review and American Creamery, July 5, 1922, at 575; Oiled Milk is a Blow to Dairying, The Milk Dealer, August, 1922, at 72; About Filled Milk, The Milk Dealer, January, 1923, at 219; Filled Milk Catechism, The Milk Dealer, April, 1922, at 28; Why Filled Milk Should be Taxed, The Milk Dealer, Oct., 1921, at 93.

proposed statute within the police power. They were credulously accepted by the Supreme Court in *Carolene Products*. Yet even on the legislative record compiled in 1923 they were a tissue of insubstantial rationalizations covering the real motivation of the statute, namely, the desire to suppress trade in one article of commerce in order to eliminate competition with another.

A. VITAMINS

The dairy industry's campaign against filled milk was based on one indisputable proposition: butterfat was a rich source of vitamin A while coconut oil was almost devoid of the vitamin. This proposition did not, however, justify legislative prohibition of filled milk.

The history of vitamin research demonstrates that subtle but significant positive effects can often accompany the unambiguously wealth-reducing consequences of economic regulation. In the early years of the struggle against margarine the dairy industry had high hopes that butter's superiority could be demonstrated by chemical analysis. To the industry's chagrin, however, the two substances proved chemically indistinguishable. By the turn of the century the industry had given up on chemists and begun to focus on dietary studies. At the Wisconsin Agricultural Experiment Station a young research scientist, E.V. McCollum, began giving simplified diets to animals.[92] By 1913 McCollum and a colleague had demonstrated that young rats on restricted diets would grow when butterfat was added but did not grow when olive oil or lard was added. They interpreted these results to mean that butterfat contained a previously unrecognized dietary essential.[93] This mysterious substance, verified by Osborne and Mendel the same year,[94] was quickly iden-

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[92]McCollum's mentor was S. A. Babcock, the titan of dairy scientists, whose butterfat test revolutionized the industry in the late nineteenth century. McCollum, The Newer Knowledge of Nutrition 6 (2d ed. 1922).

[93]McCollum & Davis, The Necessity of Certain Lipids in the Diet During Growth, 15 J. Bio. Chem. 167 (1913). McCollum's work was presaged in Hopkins, Feeding Experiments Illustrating the Importance of Accessory Factors in Normal Dietaries, 44 J. Physiology 485 (1912).

[94]Osborne & Mendel, The Influence of Butter Fat on Growth, 16 J. Bio. Chem. 423 (1913).

tified as one of the "vitamines" postulated by an earlier researcher, C. Funk, as necessary to prevent certain dietary deficiency diseases.[95]

McCollum's work, needless to say, was music to the dairy industry's ears, for it confirmed the dogma of butter's superiority to margarine.[96] The industry was even more delighted when McCollum became a charismatic milk apostle, proclaiming the gospel "a quart a day" as the key to the kingdom of health.[97] The industry considered him its "best friend . . . in the world."[98]

The case against filled milk had the appearance of scientific rigor. McCollum, a researcher of undoubted stature, was ready at a moment's notice to testify to the many virtues of milk and to inadequacies of vegetable oils. He came equipped with gruesome photographs of young animals fed on vegetable oil, showing them to be scraggly, undernourished, and afflicted by eye disorders.[99] Young animals fed on butterfat, on the other hand, were shown with glossy coats, bright eyes, and healthy constitutions.

In spite of appearances, the case for prohibiting filled milk was utterly unproved. Filled milk was undoubtedly a wholesome food. No one would be harmed by drinking it. The entire argument against the product was based on the proposition that it would somehow crowd out consumption of other foods necessary to a well-balanced diet.

In the case of adult nutrition, this argument was patently preposterous. McCollum's studies had failed to document adverse consequences for adult animals fed on butterfat-poor diets. Although adults needed some vitamin A, the amount was obviously not large.

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[95]Funk & Cooper, Experiments on the Causation of Beri-Beri, 11 Lancet 1266 (1911). See generally Pike & Brown, Nutrition: An Integrated Approach (3d ed. 1984) 11–13; McCollum, A History of Nutrition (1957).

[96]See Is Oleomargarine Healthful?, Hoard's Dairyman, April 2, 1915, at 396 ("The oleomargarine manufacturer and his chemist can no longer tell us that 'fat is fat.' We know differently and know that oleomargarine cannot ever be properly called a substitute for butter."); Nutritious Oleo (?), Hoard's Dairyman, May 21, 1915, at 648; Butter and Cottonseed Oil, Hoard's Dairyman, March 15, 1918, at 333; The Truth Goes Marching On, Hoard's Dairyman, June 7, 1918, at 848; Concerning Butterfat Substitutes, Jersey Bulletin and Dairy World, March 6, 1918, at 343; Some Butter History, Jersey Bulletin and Dairy World, Dec. 14, 1918, at 2056.

[97]*E.g.*, House Hearings at 26; Senate Hearings at 21.

[98]The Milk Dealer, Sept., 1921, at 2.

[99]See House Hearings at 21–23; Senate Hearings at 23–24.

McCollum's own research had suggested that skimmed milk, the principal ingredient in filled milk, contained some vitamin A.[100] Moreover, the proposition that filled milk in an adult diet would crowd out other sources of vitamin A was absurd. The American diet was rich in many foods containing vitamin A, including butterfat products (whole milk, cheese, and butter), fish, eggs, greens, and yellow vegetables.[101] There was no evidence that any adult would ever drink so much filled milk as to cause vitamin A deficiency. The argument for banning filled milk, in the case of adults, was no more substantial than that for banning the use of rice or flour because these substances were deficient in vitamin A.

If the argument had any merit, it was in the case of infant nutrition. Everyone agreed that infants needed a certain amount of vitamin A for growth. Although occasional or even frequent use of filled milk in infant diet was harmless, it was possible that if filled milk were used as formula and fed to infants exclusively of other foods for an extended period, the babies would experience the sort of vitamin A deficiency McCollum had induced in baby rats. But there was no evidence in the legislative record that filled milk was fed to children at all, much less on an exclusive basis. The labels clearly warned against use as an infant food,[102] a statement that was probably unnecessary because mothers were not inclined to give filled milk to their babies in any event. Most filled milk consumers were working-class and immigrant families in which the mothers breast-fed their babies.[103] Even mothers who did not breast feed were unlikely to use filled milk as infant formula. The proponents of the bill commissioned the Visiting Nurses' Associations of several large cities to survey homes they visited in order to document instances of filled milk being fed to babies. Of 1,000 homes surveyed in Philadelphia and 1,500 surveyed in Milwaukee not a single instance was discovered of filled milk being fed to babies.[104] Inquiries of nineteen child care field nurses from the Boston Health De-

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[100]See House Hearings at 54.

[101]See *ibid;* McCollum, The Newer Knowledge of Nutrition 123–56 (2d ed. 1922).

[102]House Hearings at 58; State v. Emery, 178 Wisc. 147, 189 N.W. 564, 566 (1922).

[103]House Hearings at 84.

[104]*Id.* at 103–04.

partment were equally unavailing.[105] No instance of filled milk being fed to babies was documented in the entire legislative record.

The fact was that filled milk undoubtedly improved the national health. Its lower price increased consumption of skimmed milk and vegetable fats, both wholesome and nutritious foods. And to the extent that it displaced other dairy products, the result was far from undesirable. The sugar content of condensed milk (including Borden's "Eagle") was high enough to raise questions about its desirability as a baby food.[106] Fresh whole milk was often positively dangerous. Milk was known to transmit typhoid fever, diphtheria, diarrhea, septic sore throat, and scarlet fever.[107] It was suspected in the transmission of poliomyelitis.[108] Most tragically, it was a leading cause of tuberculosis, a disease that carried away thousands of adults and tens of thousands of children annually.[109] These dangers were largely absent in the case of filled milk, which was manufactured in modern plants under hygenic conditions and sterilized at high temperature.

In the words of Lafayette Mendel, co-discoverer of vitamins with McCollum:[110]

> The opponents of "filled" milks (representing a special industry) have tried to exclude them on the plea of "menace to public health". No public health question is involved. The claim is a specious one. The House bill represents a fight between industrial "interests," and I am confident that the medical profession would not admit that any wholesome food is a menace. Life and health are not endangered: on the contrary, . . . our national nutrition would be benefited if, instead of discarding the milk separated from cream in the butter industry—instead of converting a unique food into roof paint, etc.—we encouraged

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[105] *Id.* at 104.

[106] See Senate Hearings at 106. Eagle's label, unlike the labels of filled milks, expressly encouraged its use as baby food.

[107] Haslam, Recent Advances in Preventive Medicine 142 (1930).

[108] *Ibid.*

[109] See *id.* at 166–71. Dairy farmers contributed to the spread of the disease by resisting efforts to cull their herds or to pasteurize milk. *E.g.*, Some Problems in Our Milk Supply, Jersey Bulletin and Dairy World, June 24, 1914, at 950; Tuberculosis Must be Eradicated, Jersey Bulletin and Dairy World, May 14, 1919, at 858; Bovine Tuberculosis—Pasteurization, Jersey Bulletin and Dairy World, May 21, 1913, at 809.

[110] House Hearings at 54.

> the greater use of the nonfat part of the milk in the preparation of food. . . . Are you ready to sanction economic waste of food by a new form of prohibition on the invalid plea of harmfulness to children, who do not make use of the product?

The scientific case against filled milk, in short, was entirely bogus from the start.

B. FRAUD

Whatever the merits of the vitamin argument, it is clear that these contentions had no force as against filled milks to which vitamins had been added. The second *Carolene Products* case presented that fact situation. The filled milk in that case had been fortified with cod liver oil, a rich source of vitamins A and D. Although the new ingredient could not have enhanced the taste of the product, it did supply at least as many vitamins as were in evaporated whole milk. Accordingly, the second *Carolene Products* case isolated the fraud argument for separate analysis and consideration.

This argument was even more whimsical than the health contentions. To begin with, there was a certain irony in the idea that consumers would object to a product indistinguishable from evaporated whole milk in every practical way including vitamin content. Ironies aside, it was evident that filled milk simply did not present any dangers of fraud, or even serious dangers of confusion. It was sold in cans clearly marked with proprietary brand names and unequivocally stating that the products were not milk. The ingredients were listed for anyone to read. The product was in full compliance with the labeling requirements of the federal food and drug act and with virtually all state legislation. Filled milk producers were willing to accept any further labeling requirements that Congress might impose.[111]

The forces pressing for prohibition fell back on the contention that labeling would be ineffective at preventing confusion or fraud in the case of non-English speaking consumers. Yet they failed to produce a single documented instance of fraud or confusion. Those who knew this market best testified that immigrants were more, not less, aware of the food content of their diet because they needed to stretch a dollar.[112] It was evident, moreover, that the confusion

[111] *Id.* at 70.

[112] *Id.* at 72.

argument would apply to all sorts of products in addition to filled milk, including, notoriously, evaporated skimmed milk, which contained the word "milk" in its label and was marketed by all the major producers, including Borden and Nestle, but which was not prohibited by the proposed statute.

As with the health argument, the argument from consumer welfare cut in exactly the wrong direction. The interests of consumers would have been much better served by permitting and encouraging trade in filled milk than by outlawing a healthful, nutritious, and low-cost item of food.

C. THE "NATIONAL INTEREST"

The final argument for the statute was the contention that filled milk posed a threat to the dairy industry, a vital institution essential to the national welfare. At bottom the argument was a thinly disguised expression of self-interest. So interpreted, it was no doubt valid: filled milk did threaten the dairy industry. Yet the argument at least purported to consider the broader public interest as well.

One oft-repeated assertion was that dairying preserved the "fertility of American soil."[113] The connection between dairying and the fertility of the soil was never spelled out, but it was obvious to anyone who had ever walked across a cow pasture. So understood, the argument is easily seen to be made of the same substance that gave such fertility to the soil. While the by-product of the dairy cow was undoubtedly good fertilizer, it was no better, and considerably less convenient, than other commercially available fertilizers. There was no evidence that the fertility of the soil would suffer a whit by a marginal decrease in the number of dairy cows due to competition from the "coconut cow" of the South Seas.

The "national interest" argument also incorporated disquieting ideas about the alleged superiority of milk-consuming cultures. McCollum, who was an odd blend of hard scientist, dairy huckster, and muddleheaded racist, epitomized these attitudes. His grand scheme divided humanity into milk-drinking and vegetable-eating peoples. With breathtaking disregard of history he asserted that milk drinkers had always enjoyed cultural and physical superiority over their leaf-chewing cousins. Not a single plant-eating culture,

[113] *E.g.*, *id.* at 32–33.

he claimed, "has ever come to the front in a matter of human achievement in any field of activity."[114] Take the Japanese. "These people . . . are the subjects or vassals; they are the peoples who multiply in considerable numbers, but whose life is short, who are inefficient, of low mentality, warped by peculiar religious prejudices which ruined them . . . They are a failure from the standpoint of living a normal human life." Milk-drinking peoples, on the other hand, "become large, strong, vigorous people, who . . . have the best trades in the world, who have an appreciation for art and literature and music, who are progressive in science and in every activity of the human intellect."[115] Unpleasant as it may now seem, this racial stereotype had considerable currency in the dairy districts of the country and in the Congress.[116] Farmers of the "coconut cow" were portrayed as lazy, ignorant, dark-skinned natives who had nothing to do all day but run up a tree and shake down a few nuts. A milk industry cartoon showed Congress, as a large white American, booting filled milk, personified as a small dark-skinned savage, back to the South Sea islands from which he came, while an American dairy cow watched with evident satisfaction.[117]

Aside from its crass appeal to self-interest, the various appeals to the "national interest" had even less to recommend them than the vitamin or fraud contentions. The arguments in support of the statute, in short, were entirely implausible under any reasonable view of the evidence.

III. The Statute as an Interest Group Measure

The history recounted above suggests several thoughts about the dynamics of American politics as expressed in the filled milk controversy. The analysis is based on the interest group theory of regulation developed by (among others) Stigler,[118] Peltzman,[119] Pos-

[114]McCollum, Milk, The Necessity of Life, Jersey Bulletin and Dairy World, June 19, 1918, at 973.

[115]*Ibid.*

[116]*E.g.*, 62 Cong. Rec. 7583 (remarks of Rep. Voigt: "[T]he superiority of the white race is due at least to some extent to the fact that it is a milk-consuming race. Natives of tropical countries who use the products of the coconut are stunted in body and mind.").

[117]The Milk Dealer, May, 1922.

[118]Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Man. Sci. 3 (1971).

[119]Peltzman, Toward a More General Theory of Regulation, 19 J. Law & Econ. 211 (1976); Peltzman, Constituent Interest and Congressional Voting, 27 J. Law & Econ. 181 (1984).

ner,[120] and Becker.[121] The familiar claim of this theory is that regulations are principally determined by the influence of political pressure groups rather than by ideology or rational debate. As currently constructed, the theory posits the existence of a political equilibrium in which interest groups "maximize their incomes by spending their optimal amount on political pressure, given the productivity of their expenditures and the behavior of other groups."[122] The theory recognizes that the outcome of the political struggle is rarely an absolute victory or defeat for any group, but rather reflects a balancing of interests in which each of the affected groups exerts equal pressure at the margin.

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.

To test this hypothesis, I performed an OLS regression of the form:

$V = A + aM + bC + cH + u$, where
V = House vote, a dummy variable equaling 1 if the vote was for the bill and 0 if the vote was against
A = the constant term
M = gallons of milk produced in the state divided by population of the state[123]
C = acres planted in cotton in the state divided by population of the state[124]
H = population of congressman's home town[125]
u = residual error

For a response, see Goldberg, Peltzman on Regulation and Politics, 39 Public Choice 291 (1982).

[120]Posner, Theories of Economic Regulation, 5 Bell J. Econ. & Man. Sci. 335 (1974).

[121]Becker, A Theory of Competition among Pressure Groups for Political Influence, 98 Q. J. Econ. 371 (1983); Becker, Public Policies, Pressure Groups, and Dead Weight Costs, 28 J. Pol. Econ. 329 (1985).

[122]Becker, 98 Q. J. Econ., at 372.

[123]Sources: U.S. Census of Agriculture 1925 at 28–39; U.S. Census, 1920.

[124]Sources: U.S. Census of Agriculture 1925, at 38–47; U.S. Census 1920.

[125]Sources: Congressional Directory 1923; U.S. Census 1920.

The regression equation (t-statistics in parentheses) was:

$$V = .828 + .000825M - .000101C + .0000H$$
$$(23.32)\ (3.04) \qquad (-4.52)\ (.73)$$
$$R^2 = .126, \qquad N = 290$$

In this equation the effect of milk and cotton production is significant at well above the 99 percent confidence level, a strong result for voting studies of this type. The results suggest that a member was much more likely to vote for the bill if dairying was a major factor in the state's economy, and much more likely to vote against the bill if cotton was an important crop in the state.

The filled milk controversy also substantiates the proposition of interest group theory that regulations will be determined by an equilibrium of political forces. It is noteworthy that many of the arguments advanced against filled milk applied with even greater force to margarine. Margarine, like filled milk, lacked vitamin A, while butter was exceedingly rich in the substance. Margarine formed a much greater part of the American diet than did filled milk. And the "dangers" of consumer confusion and fraud were equally great in the case of margarine. Although federal law at the time effectively required that margarine be colored white,[126] there was plentiful evidence that margarine was being illegally colored and sold in yellow form.[127] Yet the dairy industry did not attempt to prohibit margarine.

The natural explanation is that the equilibrium of political forces was different for margarine than for filled milk. Most importantly, the beef and hog industries, including meat packers, western cattle ranchers, and midwestern hog farmers, would have vigorously contested any attempt to outlaw margarine, since animal fats were still among its principal ingredients. In addition, margarine had a much better base of public support, having been a staple in many family diets for nearly a half-century. Although disorganized masses of consumers are not usually viewed as exercising significant influence in interest group theory, the possibility that they will become organized probably should be included as one of the factors that

[126]The statute allowed the sale of yellow margarine, but imposed a prohibitive tax of 10 cents per pound.

[127]*E.g.*, Oleo Dealers Sentenced, Jersey Bulletin and Dairy World, Oct. 27, 1915, at 1525.

influence political outcomes, just as potential competition exercises a restraining influence on anticompetitive behavior in classical economic markets. In the case of margarine, there is little doubt that an attempt to prohibit the substance would have aroused popular resentment and might well have stimulated the creation of consumer groups. Because margarine supporters were stronger politically than filled milk supporters, margarine was allowed to exist, albeit subject to legal discrimination, while interstate commerce in filled milk was prohibited altogether at the federal level.

The filled milk controversy suggests some possible extensions of interest group analysis. First, the basic structural elements of the American constitutional system—federalism and separation of powers—mediated the process of interest group rivalry in quite different ways. A repeated phenomenon of dairy industry politics is that the interest groups would go first to the states before attempting federal legislation. This pattern held true in the case of filled milk, where the interest groups obtained discriminatory legislation in a number of states before presenting their case to Congress. The states acted as "laboratories," not in Brandeis's sense of experimental arenas for socially beneficial legislation,[128] but in the sense that they provided an ideal testing ground for special interest measures. State legislation gave the dairy industry an opportunity to develop its case against filled milk, to assess the feasibility, enforceability, and constitutionality of different legislative approaches, and to organize coalitions at the state level before attempting to develop a national campaign.

Although the existence of overlapping state and federal sovereigns provided opportunities for the dairy industry, it also posed problems. Under the limited interpretation of the Commerce Clause then in effect, Congress was powerless to prohibit the manufacture or intrastate sale of the substance. And the dairy industry was never able to obtain prohibitory legislation in all states. Thus federalism prevented the industry from achieving its goal of an absolute ban on filled milk. Filled milk continued to be produced and sold in states that had not banned the product. In a unitary system the dairy industry might have administered the coup de grace.[129]

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[128]New State Ice Co. v. Liebmann, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting).

[129]The advantages to interest groups of obtaining overlapping state and federal legislation are significantly greater today under the Court's expansive interpretation of the Commerce Clause, although care must be taken to avoid loss of the overlap through federal preemption.

Separation of powers also played a powerful mediating role in the politics of filled milk. It was not enough for the dairy industry to obtain legislation; the legislation had to be enforced by the executive branches of the state or federal governments and upheld by the judicial branches. Although the campaign against filled milk was more successful in this regard than the industry's battles against margarine, it nevertheless ran into difficulties outside the legislative arenas. After a period of relatively vigorous enforcement the executive branches of the state and federal governments grew lax about prosecuting violations of the filled milk statutes. The Department of Agriculture eviscerated the federal statute through interpretation, and it is likely that state attorneys general were similarly disinclined to enforce their statutes. The judicial branches also proved nettlesome, at least at the state level where a substantial number of filled milk statutes were struck down. At the federal level, the *Carolene Products* cases suggested that the judiciary would no longer block economic regulation. That prophecy has apparently been disproved in the case of filled milk, but it remains generally true for economic legislation. There is, however, the possibility that the Court may someday tighten up its scrutiny in economic matters.[130]

On the other hand, separation of powers was not necessarily an unambiguous evil for the dairy industry. The system of divided powers allowed it to go first to the branch of government where it had the most influence—the legislature, where the votes of 5 million dairy farmers spoke loudly indeed. The industry was able to obtain some relief, even if the legislation was progressively weakened as it passed through the executive and judicial levels of the enforcement process. Moreover, it is not always the case that special interests will receive their most favorable reception in the legislature. Many groups find executive agencies to be the preferred forum from which to obtain protection. Others go first to the courts. In a unitary system, interest groups might have less, not more ability to obtain favorable action because they would have to present their petitions to the government as a whole.

Another noteworthy feature of filled milk legislation is that it was passed during a severe economic downturn. There was no

[130]For calls for a return to strict scrutiny of the *Lochner* variety, see Epstein, Takings: Private Property and the Power of Eminent Domain (1985); Siegen, Economic Liberties and the Constitution (1980). The Court would not have to go nearly as far as these authors recommend in order to strike down statutes like the Filled Milk Act.

significant effort to stamp out filled milk between 1917 and 1920, when production of the substance increased at an explosive rate. The battle over filled milk occurred between 1920 and 1923, years when filled milk production actually began to decrease. The likely cause of the increased political activity is the agricultural depression during those years.[131] The same pattern can be seen in the case of margarine, in which the dairy industry's major campaigns coincided with periods of low butter prices and low margarine production. The increased incidence of interest group activity may be due to the fact that there is no need to fear entry in times of depression when firms are leaving the industry. Gains from interest group activity will not be eroded by new entry in bad times as they will in good.[132] The heightened level of interest group activity may also be partially explained by the hypothesis that people will pay more to avoid losing an entitlement than they will pay to obtain one.

A final observation is that the dairy industry's campaign against filled milk may actually have benefited Carolene Products, the one surviving producer. In driving other firms from the business, these statutes eliminated competition for the firm that remained. Further, they probably created barriers to entry by making it impossible for a filled milk producer to survive unless it could assure retailers of protection in the event of prosecution. In addition, free rider effects in the disfavored industry were reduced or eliminated as firms were driven out. It is no accident that the initial challenges to filled milk legislation were all brought by the Carnation Company, which as the dominant firm had the most to gain from expenditures on litigation and lobbying. When Carnation abdicated as a result of the federal statute, the cause was taken up by Carolene Products, which was willing to litigate case after case because as the only remaining producer it could capture all the benefits of its litigation expenditures (in the short run). Thus, while the filled milk statutes increased Carolene Products' costs and limited its markets, they also eliminated its competition.

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[131]This period was one of vigorous interest-group activity throughout the agricultural sector. The Farm Bloc was established within Congress as a de facto voting trust on agricultural issues in 1921, see McCune, The Farm Bloc (1943); and the Capper-Volstead Act (exempting agricultural cooperatives from the antitrust laws) was enacted in 1922, Act. of Feb. 18, 1922, 42 Stat. 388, codified at 7 U.S.C. § §291–92 (1983).

[132]This interesting thesis is suggested in Haddock, Basing Point Pricing: Competitive v. Collusive Theories, 72 Am. Econ. Rev. 289, 300–301 (1982).

These observations appear as if they may capture some general characteristics of American politics: (1) the contours of regulation reflect an equilibrium of political forces; (2) federalism and separation of powers mediate the expression of interest group forces in important ways; (3) pressure by industrial interests to obtain protection from competition is likely to be more intense in bad times than in good; and (4) protective measures may actually confer a benefit on those firms that are able to remain in the disfavored market. It is, however, dangerous to speculate beyond the evidence, and this study has examined only a narrow controversy within a single industry. Further study would be necessary in order to assess whether these hypotheses hold in other industrial and political contexts as well.

IV. Conclusion

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.[133] 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.

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 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?

[133]United States v. Carolene Products Co., 304 U.S. at 152 n.4.

The Onion

Auto Guide

Report: 98 Percent of U.S. Commuters Favor Public Transportation for Others

Volume 36, Issue 43
November 29, 2000

WASHINGTON, DC—A study released Monday by the American Public Transportation Association reveals that 98 percent of Americans support the use of mass transit by others.

"With traffic congestion, pollution, and oil shortages all getting worse, now is the time to shift to affordable, efficient public transportation," APTA director Howard Collier said. "Fortunately, as this report shows, Americans have finally recognized the need for everyone else to do exactly that."

Of the study's 5,200 participants, 44 percent cited faster commutes as the primary reason to expand public transportation, followed closely by shorter lines at the gas station. Environmental and energy concerns ranked a distant third and fourth, respectively.

Anaheim, CA, resident Lance Holland, who drives 80 miles a day to his job in downtown Los Angeles, was among the proponents of public transit.

"Expanding mass transit isn't just a good idea, it's a necessity," Holland said. "My drive to work is unbelievable. I spend more than two hours stuck in 12 lanes of traffic. It's about time somebody did something to get some of these other cars off the road."

Public support for mass transit will naturally lead to its expansion and improvement, Los Angeles County Metropolitan Transportation Authority officials said.

"With everyone behind it, we'll be able to expand bus routes, create park-and-ride programs, and build entire new Metrolink commuter-rail lines," LACMTA president Howard Sager said. "It's almost a shame I don't know anyone who will be using these new services."

Sager said he expects wide-scale expansion of safe, efficient, and economical mass-transit systems to reduce traffic congestion in all major metropolitan areas in the coming decades.

"Improving public transportation will do a great deal of good, creating jobs, revitalizing downtown areas, and reducing pollution," Sager said. "It also means a lot to me personally, as it should cut 20 to 25 minutes off my morning drive."

The APTA study also noted that of the 98 percent of Americans who drive to work, 94 percent are the sole occupant of their automobile.

"When public transportation is not practical, commuters should at least be carpooling," Collier said. "Most people, unlike me, probably work near someone they know and don't need to be driving alone."

Collier said he hopes the study serves as a wake-up call to Americans. In conjunction with its release, the APTA is kicking off a campaign to promote mass transit with the slogan, "Take The Bus... I'll Be Glad You Did."

The campaign is intended to de-emphasize the inconvenience and social stigma associated with using public transportation, focusing instead on the positives. Among these positives: the health benefits of getting fresh air while waiting at the bus stop, the chance to meet interesting people from a diverse array of low-paying service-sector jobs, and the opportunity to learn new languages by reading subway ads written in Spanish.

"People need to realize that public transportation isn't just for some poor sucker to take to work," Collier said. "He should also be taking it to the shopping mall, the supermarket, and the laundromat."

No. 11-30756

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

ST. JOSEPH ABBEY, ET AL.

Plaintiffs-Appellees,

v.

PAUL CASTILLE, ET AL.

Defendants-Appellants.

On Appeal from the United States District Court
For The Eastern District of Louisiana,
USDC No. 2:10-cv-02717
The Honorable Stanwood R. Duval, Jr. Presiding

AMICUS CURIAE BRIEF ON BEHALF OF PROFESSOR TODD J. ZYWICKI IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMING THE DECISION BELOW

ATTORNEYS FOR PROFESSOR TODD J. ZYWICKI

Robert W. Loewen
Mary G. H. Lang
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, California 92612
Telephone: (949) 451-3800
Facsimile: (949) 451-4220

CONSENT TO AMICUS CURIAE BRIEF

Counsel for all parties have been contacted and they have consented to Professor Todd J. Zywicki filing an amicus curiae brief in this proceeding.

RULE OF APPELLATE PROCEDURE 29(c)(5) STATEMENT

This Brief was not authored by counsel for any of the parties in whole or in part, nor has any party or a party's counsel contributed money that was intended to fund the preparation or submission of this Brief. No person other than the amicus curiae contributed money that was intended to fund preparing or submitting this brief.

IDENTITY AND INTEREST OF AMICUS CURIAE

A critical issue in this case is ascertaining the basis for casket-retailing regulations in Louisiana and determining how to interpret the record from the district court. As an expert in public choice theory, Professor Zywicki is uniquely situated to analyze the causes and effects of this anticompetitive regulation.

Professor Zywicki is a professor of law at George Mason University School of Law and a leading scholar in the areas of public choice theory as well as law and economics. Professor Zywicki also serves as a Senior Scholar at George Mason University's Mercatus Center, a Senior Fellow of George Mason University's James Buchanan Center for Political Economy Program on Philosophy, Politics, and Economics, a Senior Fellow of the Goldwater Institute, and a Fellow of the International Centre for Economic Research in Turin, Italy. Since 2006, he has served as co-editor of the Supreme Court Economic Review. From 2003–2004, Professor Zywicki worked as the Director of the Office of Policy Planning at the Federal Trade Commission.

In addition to several articles on public choice published in various law reviews and peer-reviewed economic journals, Professor Zywicki has co-authored a book on public choice theory: Maxwell Stearns & Todd J. Zywicki, *Public Choice Concepts and Applications in Law* (2009).

Professor Zywicki has authorized the filing of this Brief.

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SUMMARY OF THE ARGUMENT

Among economists, there would be virtually no dispute about the proper interpretation of the record in this case: The sole purpose and effect of Louisiana Revised Statutes sections §37:831(37), 37:831(41), and 37:842(A)–(C) is to benefit the economic interests of Louisiana funeral directors. Under public choice economics, these statutes are paradigmatic examples of "rent-seeking" legislation—legislation designed to transfer wealth from consumers to a particular interest group. Predictably, funeral directors supported the legislation, opposed its amendment, and are now before this Court defending their profitable privileges as the only authorized casket sellers in Louisiana. Public choice economics also predicts that an industry's defense of its privileges will entail self-serving justifications about consumer protection and other public-spirited reasons, just as the State Board and its amicus lobbying group, the Louisiana Funeral Directors Association, have done in their briefing.

Professor Zywicki advances no opinion on whether pure rent-seeking laws are unconstitutional, but he does respectfully advise the Court to be extremely skeptical of the arguments advanced by the State Board and its amicus. Additionally, because the challenged statutes in this case represent the result of the funeral-director cartel's rent seeking, the Court should not have any illusions about the Abbey's predicament being rectified through the democratic process.

ARGUMENT

A. Public Choice Economics

1. Regulations Of Industries Governed By Professional Licensing Frequently Reflect The Interests Of Those Industries

Public choice economics is "the economic study of nonmarket decision making, or simply the application of economics to political science." Dennis C. Mueller, *Public Choice III* at 1 (2003). Among other things, public choice economists have studied causes and effects of governmental regulation. These studies have led to the following conclusion: *governmental regulation frequently fails to reflect the preferences of the majority of voters and instead reflects the dominant influence of politically powerful interest groups*.

People typically assume that governmental regulations are "unbiased and conscientious" efforts to advance the "public interest." *See* John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 Antitrust L. J. 1075 (2005). But among economists, that assumption is largely regarded as false. Public choice theory has been "almost universally accepted" since the mid-1980s as explaining much economic regulation. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 224 n.6 (1986) (citing Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74A Econ. Rev. 279 (1984)). Three of the major

figures in the field of public choice have been awarded the Nobel Prize in Economic Science: Kenneth Arrow, James Buchanan, and Amrtya Sen. *All Prizes in Economic Sciences*, Nobelprize.org —The Official Website of the Nobel Prize, http://www.nobelprize.org/nobel_prizes/ economics/laureates/.

Occupational licensing, such as the casket-selling statutes challenged here, and other anticompetitive regulations often serve primarily to protect members of the regulated industry with no discernable benefit to consumers or the public, and are not justified under the purported rationale of consumer protection. By raising prices and reducing the options available to consumers, the net public effect of many regulations is actually negative. *See* Morris M. Kleiner, *Occupational Licensing*, 14 J. Econ. Perspectives 189 (2000) (summarizing studies).

For several reasons, special interest influence is often especially pronounced in industries governed by professional licensing. First, members of professional networks are often already organized by trade associations or otherwise, thereby reducing the transaction costs of organizing for lobbying efforts. Second, such professional organizations also often have an internal communications infrastructure. Through newsletters, email lists, regular meetings, and the like, members can be educated about relevant issues and proposed legislation with relative ease. The time and money that would need to be spent for any individual to remain informed and motivated to act is greatly reduced, overcoming problems

of rational ignorance within the profession. Third, licensed professions are usually largely self-governing, which gives members an opportunity to enact anticompetitive regulations to benefit their members at the expense of the public with little public or legislative oversight. The danger of enacting economically self-interested anticompetitive regulations is especially acute where the licensing board is dominated by members of the licensed profession itself. *See* Einer R. Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 690–91 (1991). Once given the power of self-regulation and the power to control entry into a profession, licensed professionals have every incentive to expand the scope of their governmental monopoly to further protect their economic interests.

Consumer interests are also less effective when goods or services subject to the anticompetitive regulation are purchased infrequently. In such situations, consumers may not have any benchmark by which to judge the price of those goods or services, and also rarely will feel the economic effect of the regulation. As a result, they lack the incentive to overcome rational ignorance to effectively participate in the political process in opposition to producer interests.

2. Consumer Interests Are Often Subservient To Industry Interests Within The Regulatory Process

Public choice theory rests on the fundamental assumption that politicians and constituents are rational economic actors; that is, constituents compete with one another to demand political favors from the government, and politicians use

the coercive powers of the state to provide wealth transfers in return for political support. "The interest group most able to translate its demand for a policy preference into political pressure is the one most likely to achieve its desired outcome." James C. Cooper, Paul A. Pautler, and Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 Antitrust L. J. 1091, 1100 (2005). Outcomes of the political and regulatory process will therefore not always reflect the preferences of a majority of the voting public, but instead will reflect the comparative advantage of special interests to organize and exert political influence relative to the public. *See* Richard A. Posner, *Economic Analysis of Law* § 19.3, pp. 534–36 (6th ed. 2003).

Powers v. Harris, which the State Board urges this Court to follow, was both honest and correct when it recognized that "the favored pastime of state and local governments" is enacting rent-seeking legislation at the behest of industry that has little to no public benefit and exists simply to transfer wealth to insiders by hamstringing competitors. 379 F.3d 1208, 1221 (10th Cir. 2004). Producers or service providers in a particular industry often form interest groups to seek enactment of regulations because those regulations give them an advantage in the marketplace. It is widely accepted that government regulation can restrict competition and entry into a particular industry, thereby causing (1) prices to increase above the competitive market price and (2) industry participants to reap

long-term economic profits. Such regulations are thus actively sought by particular industries, and are "designed and operated primarily for [the industry's] benefit." George J. Stigler, *The Theory of Economic Regulation*, 2 Bell. J. Econ. & Mgmt. Sci. 3 (1971); Milton Friedman, *Capitalism & Freedom* 140 (1962) ("[t]he pressure for [occupational licensing] invariably comes from members of the occupation itself" and not consumers or the public).

An industry's ability, through an anticompetitive regulation, to raise prices above the price that would be charged in an otherwise open market, is referred to by economists as "economic rents." James Buchanan has defined "rent" as "that part of the payment to an owner of resources over and above that which those resources could command in any alternative use," or "receipt in excess of opportunity cost." James M. Buchanan, *Rent Seeking and Profit Seeking*, in *Toward a Theory of the Rent-Seeking Society* 1 (1980). The process of special interests lobbying governments to impose anticompetitive regulations is known as "rent seeking."

In many situations, smaller, homogenous interest groups will have a comparative advantage in the political process relative to larger, more heterogeneous and diffuse groups such as consumers and the public at large. *See* Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1971). Each member of a small interest group stands to make a

substantial economic gain from securing favorable legislation. Members therefore have an incentive to inform themselves regarding such laws and regulations and to organize to secure enactment of favorable legislation and block legislation adverse to their interests. John O. McGinnis, *Our Supermajoritarian Constitution*, 80 Tex. L. Rev. 703, 735 n.137 (2002) (the "intense common concerns" of special interest groups "help them overcome organizational difficulties and give them more influence than their numbers warrant"). By contrast, the costs of an anticompetitive regulation are spread thinly across consumers in the form of marginally higher prices, giving each individual consumer little incentive to learn about and organize to oppose every anticompetitive or protectionist regulation. Each member of the public is thus "rationally ignorant" about many anticompetitive regulations. Because industries have a "superior ability to organize in the political process relative to consumers, consumer interests are often subservient to industry interests in the regulatory process." Cooper, *supra*, at 1100; Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & Econ. 211, 212 (1976) ("A common[,] though not universal, conclusion has become that as between the two main contending interests in regulatory processes, the producer interest tends to prevail over the consumer interest.").

B. Application Of Public Choice Theory To Louisiana Revised Statutes Sections 37:831(37), 37:831(41), And 37:842(A)–(C)

With principles of public choice theory in mind, it is readily apparent that Louisiana Revised Statutes sections 37:831(37), 37:831(41), and 37:842(A)–(C), the statutes at issue in this case, are "rent-seeking" provisions, meaning that they protect the economic interests of funeral directors and produce no cognizable benefit to consumers. Louisiana Revised Statute section 37.831(37) defines "funeral directing" to include, *inter alia*, selling caskets. Section 37.831(41) prohibits "funeral directing" by individuals who are not state-licensed funeral directors. Section 37:842(A)–(C) sets forth the minimum qualifications for obtaining a license as a funeral director, including the completion of 30 semester hours at an accredited college or university, completion of a one-year apprenticeship, passing an exam, and paying an application fee. In short, the statutes require that individuals who wish to make and sell caskets to consumers, such as the plaintiffs-appellees in this case, meet all of the same requirements as a funeral director who provides other funeral-related services and handles human remains.

As this section explains, these statutory requirements bear all of the hallmarks of legislation passed to transfer wealth from consumers to a special interest group in return for political support. Additionally, the Court should view with great skepticism the State Board's self-serving descriptions of the public

benefits of licensing casket retailers. Industry cartels and their patrons in government know that they cannot be candid with the public about the real purposes and effects of irrational occupational regulations, and hence they must proffer hypothetical justifications that never really fool anyone, much less economists with a background in public choice theory.

1. Regulations Of The Funeral Industry Bear The Hallmarks Of "Rent-Seeking" Legislation

Regulations of the funeral industry are less likely to reflect consumer interests than regulations of many other types of industries for several reasons. Louisiana funeral directors form a relatively small group of approximately 1,200 members. Regulations supported by such a small, homogenous group with a specific set of interests are not likely to reflect public interest. *See* Olson, *supra*. Moreover, Louisiana funeral directors are already organized within a trade association, the Louisiana Funeral Directors Association, making it easier for them to communicate and organize their lobbying efforts to support legislation that benefits their industry. This is especially true here, where the board of nine members governing the funeral industry is, by law, made up of eight funeral directors, La. Rev. Stat. § 37:832(B), who have every incentive to make it more difficult for others to enter the market and compete with them. *See* Elhauge, *supra*, at 690–91. Moreover, consumers have less of an incentive to block this type of legislation as compared to regulations of other industries due to the infrequent

nature of casket purchases. Because an individual consumer purchases a casket so infrequently, most consumers will very rarely feel the price effect of the anticompetitive regulations and have little incentive to organize to block or repeal the legislation. *See* USCA5 at 773:14–774:4 (Professor David Harrington correctly explaining that funeral regulations are likely to represent the interests of the funeral directors and not consumers under public choice theory).

This conclusion is strengthened by appellees' correct analysis of the State Board's asserted rationales for imposing a licensing requirement on third-party retailers of caskets. As plaintiffs-appellees conclude, the statutory sections do not plausibly advance any of the purported, virtuous sounding, state interests. Resp. Br. at 35–43. Defendants-appellants are resorting to these implausible rationales because they do not want to admit to the statutes' actual, self-serving purpose: rent seeking, or transferring wealth from consumers to members of the Louisiana funeral industry.

2. Public Choice Principles Predict That The Anticompetitive Effect Of The Statutes Could Not Be Corrected Legislatively

While Professor Zywicki does not offer an opinion on the constitutionality of rent-seeking legislation, he does want to emphasize that this Court should have no illusions about the effect of its decision in this case. Defendants-appellants claim that if the Abbey wishes to object to the statutes at issue, it "'must resort to the polls, not the courts.'" Op. Brief at 24 (quoting *Williamson v. Lee Optical of*

Oklahoma, 348 U.S. 483, 487 (1955)). But as public choice principles make clear, the statutes, and their defense by the funeral-director cartel, are textbook examples of how industry groups capture the legislative and regulatory process. The exact same failures in the political process that produce special interest legislation such as this explain why these special-interest laws once enacted are so immune to correction through legislative processes. Indeed, because legislative efforts must survive multiple roadblocks to the passage of legislation (often referred to as "veto gates"), well-organized special interests can even more easily frustrate the repeal of special interest laws than they could enact the laws in the first place. *See* Maxwell Stearns & Todd J. Zywicki, *Public Choice Concepts and Applications in Law* 72 (2009) ("'veto gates' are in place to slow down or to stop legislation that benefits the public at large at a cost borne largely or entirely by a narrow interest group").

If this Court were to reverse the decision below and uphold the Louisiana statutes, public choice theory predicts that the legislation's anticompetitive effects would not be fixed legislatively. In effect, the ability of the Abbey, as well as other unlicensed groups and individuals, to compete in the marketplace will be determined conclusively by this Court.

CONCLUSION

Louisiana Revised Statutes sections 37:831(37), 37:831(41), and 37:842(A)–(C) are classic examples of "rent-seeking" legislation as that concept has been developed in the field of public choice economics. The statutes' sole, verifiable purpose is to transfer wealth from consumers to the funeral-services industry. Courts routinely recognize the possibility that economic markets can fail and require correction, such as fraud and monopoly. Over the past several decades public choice economics has demonstrated that the political marketplace can have systematic failures as well, such as the domination of the process by well-organized interest groups. This case presents exactly that scenario, which should be accounted for by this Court.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER, LLP

/s/ Mary G.H. Lang

MARY G. H. LANG
3161 Michelson Drive
Irvine, California 92612
Telephone: (949) 451-3800
Facsimile: (949) 451-4220
Attorney for Professor Todd J. Zywicki

CERTIFICATE OF SERVICE

I hereby certify that service of a copy of this Amicus Brief has been made on all parties through their attorneys of record via the Court's ECF system pursuant to Fifth Circuit Rule 25.2.5 on this 15th day of December, 2011.

/s/ Mary G.H. Lang
MARY G. H. LANG
Attorney for Professor Todd J. Zywicki

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 2,578 words, excluding the parts of the Brief exempt by Fed. R. App. P. 32(a)(7)(B)(iii).

This Brief also complies with the type face requirement of Fed. R. App. P. 32(a)(5) and the type-style requirement of Fed. R. App. P. 32(a)(6) because the Brief has been prepared in a proportionately spaced type-face using Microsoft Word 10 in 14 point font size in Times New Roman.

Dated: December 15, 2011

/s/ Mary G.H. Lang
MARY G. H. LANG
Attorney for Professor Todd J. Zywicki