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A POST-SCRIPT TO *CAROLENE PRODUCTS*

*Frank R. Strong**

A well-known chain distributor of dairy products advertises that it does "Our Dairy Best" to serve its customers. For a century dairy interests in the United States have done their very best to stifle competition from product substitutes. The classic instance is the determined effort to suppress lower-cost oleomargarine when it gained popular favor after a patent on the process for its manufacture was obtained in 1873. Resort to protection from this interloper quickly followed in the legislative halls of state assemblies and the Congress. In 1885 Pennsylvania enacted a prohibition on the manufacture or sale of oleomargarine; the law was upheld by the Supreme Court in *Powell v. Pennsylvania*.¹ In 1886 Congress imposed on colored oleo a heavy excise tax, which the Supreme Court sustained in *McCray v. United States*.² With victory in the legislatures and in the Court, the dairy interests enjoyed until mid-century a suppression of colored oleomargarine, equivalent to total prohibition because of consumer distaste for white spread.³

At this juncture in butter's battle against oleo, dairy interests became aware of a threat from another quarter. Filled milk is produced by extracting the butter fat from whole milk and replacing it with a vegetable oil. Like oleo, the substitute is marketable at a lower price. Back to legislatures went the dairy interests. Again their reception was cordial; state lawmakers enacted the requested prohibition on filled milk, and Congress crowned success with passage of the Filled Milk Act in 1923⁴ prohibiting the movement of

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1. 127 U.S. 678 (1888).

2. 195 U.S. 27 (1904).

3. A notable exception to state court decisions upholding anti-oleo laws was the action of the Supreme Court of Wisconsin holding unconstitutional a Wisconsin law prohibiting the production and sale of oleo, which by then was no longer made from animal fats. *John F. Jelke Co. v. Emery*, 193 Wis. 311, 214 N.W. 369 (1927). Writing for the court, Justice Rosenberry (later Chief Justice) was not taken in by pious pretensions of concern for the public health. He flatly rejected the argument "that in order to promote one important industry the Legislature may, in the exercise of its power to promote the general welfare, cripple or destroy another competing industry." *Id.* at 322, 214 N.W. at 373. *Powell* was "explained" away.

4. 21 U.S.C. §§ 61-64 (1982).

this product in interstate commerce. The constitutionality of the federal law was duly challenged by Carolene Products Company, a major producer of filled milk.

My book, *Substantive Due Process of Law: A Dichotomy of Sense and Nonsense* (1986), recounts in chapter 8 the *Carolene Products* litigation in which the Supreme Court twice sustained the Act, first on demurrer to the indictment,⁵ and subsequently on appeal from conviction.⁶ I vigorously criticized *Carolene II* on dual grounds. First, the assertion of inferior quality had evaporated because the company meanwhile had fortified its product through introduction of vitamins A and D. Second, when product quality was equalized, the claim of consumer confusion afforded no rational basis for governmental destruction of product competition. Yet after forty years, the federal prohibition was still on the statute books at the time of my research, as verified by both personal check and computer inquiry.

Hostility to product competition from filled milk was typical of anticompetitive regulatory legislation. Reacting to political pressures like those brought to bear by the dairy interests, municipal and state legislatures had been induced to restrict or forbid competition in the same product by enactment of occupational licensing regulations. By the time of *Carolene Products I*, commentators were calling attention to the great number of such ordinances and statutes and to their debilitating effect on commodity competition.⁷ Thirty-five years later inroads on commodity competition were, if anything, worse. Walter Gellhorn, an acknowledged authority in administrative law, identified instances of abuse in licensing and declared, "That restricting access is the real purpose, and not merely a side effect, of many if not most successful campaigns to institute licensing can scarcely be doubted."⁸

Recent investigations confirm the continuation of extensive legislative hindrances to open competition. Monopolistic-like marketing barriers in the form of licensing ordinances or statutes impose untold toll on commodity competition to the public detriment. In 1982 the Center for Occupational and Professional Assessment of the Educational Testing Service of Princeton published a compre-

5. *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938).

6. *Carolene Products Co. v. U.S.*, 323 U.S. 18 (1944).

7. Hanft & Hamrick, *Haphazard Regimentation Under Licensing Statutes*, 17 N.C.L. REV. 1 (1938) (with special reference to North Carolina); Silverman, Bennett & Lechliter, *Control by Licensing Over Entry Into the Market*, 8 LAW & CONTEMP. PROBS. 234 (1941) (the situation nationwide).

8. Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 11 (1976).

hensive study of occupational regulation in the United States.⁹ Appendix 3 lists sixty-four (64) "Occupations Regulated in the States" from abstractor to weighmaster. This listing is far from complete, omitting such occupations as horseshoers, egg candlers, and lightning rod installers. The total is said to be 800. In ten chapters Dr. Shimberger examines all facets of three types of regulation: practice control (licensing), title control (certification), and registration (listing for business entry with the prescribed government agency). Major emphasis is upon the first type.

The following appears in the introduction to the Shimberger study:

The uncritical acceptance of licensing began to lose ground during the late 1960's and early 1970's as several federal agencies conducted studies of licensing and issued reports that were quite critical of the way in which licensing had been used in several occupations [naming the prescription drug industry, the ophthalmic dispensing industry, and the funeral industry]. The FTC reports on these industries charged that licensing boards sometimes used their powers to restrict competition so that consumers had to pay more for goods and services.

Similar charges were made by the Antitrust Division of the U.S. Department of Justice. Legal actions were instituted against a number of professional associations and state licensing boards, alleging anticompetitive practices. For example, engineers, architects, and accountants were accused of prohibiting competitive bidding by characterizing such bidding as "unprofessional conduct." . . . One effect of such litigation has been to reinforce in the public mind the impression that licensing boards, at least in some fields, were using their power to restrict competition and that such restrictions were not in the public interest.

In 1986, the American Association of Retired Persons published a study of its Section on Consumer Affairs, based upon research undertaken for the Section by the Regulatory Alternatives Development Corporation. Entitled "A Report on the Effect of Certain State Occupational Licensing Regulations on Consumers," investigation was made of "four areas of particular concern to older consumers: Optometry, Dentistry, Hearing Aid Sales, and Funeral Sales." From data brought together on these areas, relying *inter alia* on hearings and reports of the Federal Trade Commission, the conclusion reached in each instance was that these restrictions are anticompetitive and undesirable.

Detail on restrictive devices and variations from state to state is exhaustive. Tables I and II of the appendix graphically set forth commercial practice restraints in selling eyewear and dental services, respectively. Forty-five states impose employment restrictions in optometry; 41 restrict lay corporations in dentistry. Exactly the same number of states (44) ban use of trade names in each profes-

9. B. SHIMBERGER, OCCUPATIONAL LICENSING: A PUBLIC PERSPECTIVE (1982).

sion. By contrast, in optometry restrictions are frequent with respect to location (33) and branches (22), whereas with dentistry only 10 states proscribe branches while Virginia alone restricts location. The report concludes: "Significant savings on the cost of professional goods and services are denied to consumers by the existence of unjustified, anti-competitive laws and regulations."

Wholesale destruction of commodity competition was open season for those who politically were able to secure governmental favoritism against business rivals, for such legislative displacement of market forces survived challenge after challenge in the Supreme Court. An early attack was repulsed in *Ohio ex rel. Clarke v. Deckebach*.¹⁰ In the late 1940s, after *Carolene Products II*, two challenges failed in rapid succession.¹¹

It was the same story in the next decade, *Williamson v. Lee Optical, Inc.*¹² and twenty years later, in *New Orleans v. Dukes*.¹³ With this repeated refusal of the Court to invalidate monopolistic incursions against competition in the same product, what hope was there for judicial protection of less-recognized competition among rival products, especially after 1981 when the Court had tolerated a replica of *Carolene Products*?¹⁴

Imagine, then, my astonishment when my spouse spotted 12-ounce cans labelled FILLED MILK in large lettering on a shelf of a local supermarket! Small print on the otherwise plain labels identified the distributor as a food broker located in Richmond, Virginia; the product appeared to be flowing in interstate commerce despite the federal law. Upon my inquiry, the broker disclosed the surprising fact that the producer was Carnation Co., nationally known for its production and distribution of evaporated whole milk. The broker courteously forwarded my inquisitive letter to Carnation; in due course the resulting reply from the Carnation Co. resolved the mystery.¹⁵

10. 274 U.S. 392 (1927) (Cincinnati ordinance prohibited the licensing of aliens for operation of pool and billiard halls).

11. *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947) (Louisiana law required piloting at New Orleans by pilots certified by the Board; the Board certified only friends and relatives of incumbent pilots); *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220 (1949) (South Carolina law outlawing business specializing in "funeral insurance").

12. 348 U.S. 483 (1955) (Oklahoma law restricting opticians in favor of optometrists and ophthalmologists).

13. 427 U.S. 297 (1976) (city ordinance forbidding pushcart food vendors in the French Quarter except for two, one selling hot dogs and the other ice cream, who had been first in the business).

14. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (plastic milk containers barred but paperboard milk cartons permitted).

15. Letter from Attorney Christine M. Pfeiffer (March 11, 1987) (Legal Department, Carnation Corporation).

In late 1972, the reply explained, the constitutionality of the Filled Milk Act had been successfully challenged in a declaratory judgment action brought in federal court by Milnot Co., which in 1950 had succeeded to Carolene Products Co.. Defending was Elliott Richardson, then Secretary of Health, Education and Welfare.¹⁶ District Judge Morgan held the prohibition of the product's movement in interstate commerce to be violative of the due process clause of the fifth amendment. The basis of invalidity was the fact that certain imitation milk and dairy products, such as dairy creamers, which had been held to be outside the purview of the Act, were indistinguishable from Milnot in composition, appearance, and use. Judge Morgan did not question the applicability of the rational basis test in the *Carolene Products* decisions. In his judgment, however, the record was "crystal clear" that even that dilute nexus was wanting in the case before him. "The possibility of confusion, or passing off, in the marketplace, which justified the statute in 1944, can no longer be used rationally as a constitutional prop to prevent interstate shipment of Milnot. There is at least as much danger in this regard with imitation milk as with filled milk, and actually no longer any such real danger with either."¹⁷ Judge Morgan justified his reconsideration of the constitutional issue by relying on a principle earlier established by the Supreme Court in *Chastleton Corp. v. Sinclair*¹⁸: a law first held valid may later, by force of circumstances, become unconstitutional.

The government filed notice of appeal in the Supreme Court. Amazingly, however, the appeal was withdrawn and Judge Morgan's holding was allowed to stand. The explanation is found in the Federal Register.¹⁹ On consideration of the matter the Food and Drug Administration concurred in recommendation no. 8 of panel III-2, Final Report of the 1969 White House Conference on Food, Nutrition and Health: "Restrictive laws and regulations such as the Filled Milk Act . . . should be replaced immediately in order to permit all foods to compete in the marketplace on the basis of their overall properties." "Accordingly, it has been concluded that the decision in the *Milnot* case will not be appealed." Then followed the coup de grace:

This notice will serve to inform the public that, pursuant to the court decision in this case, the Filled Milk Act will no longer be enforced. Henceforth, filled milk products may be lawfully shipped in interstate commerce and will be regulated

16. *Milnot Co. v. Richardson*, 350 F. Supp. 221 (S.D. Ill. 1972).

17. *Id.* at 225.

18. 264 U.S. 543 (1924).

19. 38 Fed. Reg. 20,748 (1973).

under the provisions of the Federal Food, Drug, and Cosmetic Act, just as any other foods.

With this fundamental change from prohibition to permission, the Commissioner of Food and Drugs proceeded with promulgation of interim labeling requirements for filled milk products.²⁰

By the time of Judge Morgan's 1972 decision, "the majority of states now permit wholesome and properly labeled filled milk products."²¹ This fact was influential in his conclusion that the dangers of confusion which led to the Supreme Court's constitutional affirmation of the Federal Filled Milk Act "have long since ceased to exist."²² Repeal in 1960 of the Kentucky statutory ban on filled milk²³ is illustrative of the changing legislative position. In those states where prohibitory laws remained, invalidation by state courts had begun by the end of the 1960s. In 1968, Georgia overruled an earlier decision sustaining the prohibition, although in that year the Washington Supreme Court held that state's prohibition valid. Florida overruled in 1970, followed by Colorado and Idaho the next year.

A recent major decision is that of *Strehlow v. Kansas State Board of Agriculture*.²⁴ Overruling as a denial of due process an earlier validation of the state law forbidding sale of "filled dairy products," the Kansas Supreme Court quoted extensively from Judge Morgan's opinion and from the dissent in its own earlier decision. That dissent sensed the anticompetitive nature of the state statute, typing it as a trade-barrier law "designed primarily to advance the interests of the dairy industry." Other state courts have overruled similar statutes, based as was Judge Morgan's action on the absence of any nexus between filled milk laws and the legitimate reach of the police power.

In final result the full account of dairy opposition to filled milk closely resembles that for oleomargarine, which finally collapsed with and following World War II. Constitutionalists of liberal persuasion will express approval of these case histories on the basis that the outcomes demonstrate democratic governance at its best—judicial tolerance of legislative product favoritism until sufficient experience that the public interest has been thwarted rather than advanced. I disagree. Anglo-American history is replete with evidence of the evils of monopoly, the reaction to which early became

20. 38 Fed. Reg. 20,749 (1973).

21. *Milnot*, 350 F. Supp. at 224-25 n.1.

22. *Id.* at 224.

23. 1960 Ky. Acts ch. 247, § 24.

24. 232 Kan. 589, 659 P.2d 785 (1983).

embedded in substantive due process of law. The American constitutional plan does not allow free rein to political processes elsewhere in clashes between government and the individual over basic rights; there exists no justification for a differing standard in concerns of fundamental economic interests. The myth of preferred freedoms has no constitutional foundation.