Equality and the Citizens of Sister States

Douglas Laycock
University of Chicago Law School
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DOUGLAS LAYCOCK*

Professor Laycock’s commentary is written in response to Lea Brilmayer's article in this edition. Brilmayer and Laycock agree that states owe equal treatment to citizens of sister states, and that that obligation does not extend to the exercise of government power. But Laycock would derive these rules from constitutional text and the structural needs of the federal union. He thinks that Brilmayer’s broader political theory is only marginally relevant to their shared conclusion.

Professor Brilmayer argues that citizens of one state are not entitled to full rights of political participation in other states, but that they are frequently entitled to demand that other states treat them equally with the other states’ own citizens. This thesis is so obviously sensible, so inherent in the structure of the federal union, that it is hard to believe it is controversial. Yet like so many proponents of common sense these days, Brilmayer feels obliged to defend herself against simultaneous attack from two directions.

I agree with the thesis; indeed, I find it easier to defend than she does, and in some ways I would carry it further. But in some ways I would state it more narrowly. And even though we agree on the broad statement of the thesis, we emphasize quite different points along the way, and disagree on some of them. In this Commentary, I will restate the thesis and the supporting argument.

Brilmayer’s thesis follows from the structure of the federal union. Citizens of one state cannot vote or hold office in another; this conclusion follows from the decision to preserve the states as separate political entities. In nearly all other matters, states must treat citizens of sister states equally with their own; this conclusion follows from the countervailing commitments to equality and na-

* A. Dalton Cross Professor at Law, The University of Chicago. J.D., 1973, The University of Texas at Austin.

Lea Brilmayer is my friend, co-author, and former colleague; it is a pleasure to build on her work. I understand that she may think I am building in the wrong direction.

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tional unity. The exceptions to the second half of the thesis are few, and are themselves defined by the needs of the union.

It is not necessary to explore more fundamental questions of political philosophy, nor is it very helpful. The relationship among the American states is fundamentally different from the relationship among independent nations, and the casual equation of domestic and international examples is an error. We are not committed to unity with foreign nations, and our relations with them are not restricted by a privileges and immunities clause, a full faith and credit clause, a ban on war and diplomacy, a Supreme Court with authority to decide disputes between states, or any of the other features of our Constitution. Our rules and practices for dealing with foreign countries must allow for the possibility of political and economic regimes wildly different from our own. But our rules for dealing with sister states presuppose that in every case, we are dealing with a regime that has a republican form of government, is bound by a common set of constitutional rights, and shares a common legal and political tradition.

Sound political philosophy must treat these situations quite differently. Any philosophy that considers these two situations together must proceed at such a high level of abstraction that its conclusions can be easily modified or overridden by the more specific needs of the federal union or the realities of lawless foreign regimes. Analogies from international law are at most suggestive of hypotheses about interstate relations. Often the international analogy simply highlights a problem that the union was designed to solve. Any hypotheses from international law must be tested against the needs of the federal union and the positive law of the Constitution.

If I understand her correctly, Brilmayer would not disagree with my argument for her thesis. She offers a more general and philosophical argument in the alternative, in hopes of persuading readers who are unimpressed by anything so mundane as positive law or the federal structure. If she persuades anyone, I should be grateful. But I do not find her additions to the argument helpful. Her

2. Id. at 399-400.
4. Id. § 1.
5. Id. art. I, § 10, cl. 3.
6. Id. art. III, § 2, cl. 1.
7. Id. art. IV, § 4.
8. Id. art. I, § 10, cl. 1; id. amends. I-IX, XIII, XIV, XV, XIX, XXIV, XXVI.
political philosophy is interesting as a matter of general democratic theory. But it is so far removed from the particular system of interstate relations adopted in the United States that, for me at least, it has no explanatory power within that system. Sometimes philosophical inquiry is more fundamental, but sometimes, it is just further afield.

I also fear that the flight to philosophy may be harmful. If the problem is that some theorists ignore positive law or the federal structure, to argue with them on their own terms may tend to legitimate their enterprise. Political philosophy is useful in filling in the large interstices of our Constitution. But it is illegitimate when offered on its own authority, displacing or overriding the Constitution we actually have.9 Thus, I much prefer to support Brilmayer's thesis by examining the structural needs of our federal union and the express constitutional provisions that created the union and addressed those needs.

In addition to emphasizing the needs of the union, I give more weight than Brilmayer does to the theory that discrimination against outsiders is suspect. Her quarrel with that theory is aimed at the excesses of some of its supporters. Properly understood, that theory is fully consistent with her thesis.

I. Shaping: The Right of Membership in the Polity

Brilmayer summarizes her thesis with a distinction between shaping and sharing. She says that visiting nonresidents are not entitled to shape political choices, but they are entitled to share in the benefits, and obligated to share in the burdens, of the choices that are made.10 The shaping and sharing formulation is catchy, but as she appears to recognize,11 it is not quite right.

A. The Exercise of Government Power

Outsiders are not wholly excluded from the shaping of political choices. They have all the rights of political participation except for voting and holding office. Most important, they have the same speech rights as local citizens and may direct their speech to political issues. They may march in the streets, lobby the legislature, or

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10. Brilmayer, supra note 1, at 401-02.
11. Although she speaks generally of shaping values and of exclusion from the political process, all her examples deal with voting. Id. at 399-401.
buy political advertising on local television. They may contribute to campaign funds for candidates or referendum issues. No corporations can vote or hold political office, so in-state and out-of-state corporations have identical rights to shape political choices. Legislators are generally more receptive to in-state interests, but that deference is not a matter of right. Everyone has a right to speak; no one has a right to be listened to. Organized out-of-state groups exercise their right to speak extensively and sometimes effectively. Groups from all points on the political compass invoke these rights: not just General Motors and the American Tobacco Institute, but also Common Cause, the Sierra Club, and the United Auto Workers.

Thus, the distinction is not between shaping and sharing, but between a particular contribution to shaping and everything else. What is special about voting and holding political office? The restriction of voting and office holding to the residents of each state is essential to the states' existence as separate polities. The decision to preserve the states as separate polities requires the identification of boundaries that determine who is and is not a member of each polity. If every American were a full member of the polity in all fifty states, apathy about distant matters would be the only source of political separation among the states. Apathy would suffice for some voters and some elections, but not for all. Political activists would vote in many states, especially in highly visible senate races, and the constitutional structure would be defeated.

Thus, the logic of the constitutional structure is that, at any given time, each of us is a member of one and only one state polity. The rule for allocating persons to polities is residence. The fourteenth amendment makes that allocation explicit: every citizen of the United States is also a citizen of the state in which he resides.

This explains why there must be some political distinction between citizens of different states, but it remains to explain why the line is drawn at voting and office holding. Why are those rights, and only those, reserved to members of the polity? The answer is that the entrance to the voting booth marks the line between attempting to persuade the holders of government power and actually exercising government power. Political speech attempts to per-

suade. It may succeed, but it may also be ineffective or even wholly disregarded. Speech has no binding consequences.

Votes may not be disregarded, and they do have binding consequences. The state must count every vote, the votes must be in some sense equally weighted, and the majority of votes directly determines the policy of the state or the identity of the office holders empowered to make that policy. The individual voter exercises a proportionate part of the state's power to govern. Demonstrators, lobbyists, advertisers, stump speakers, and campaign contributors do not. The direct exercise of governing power is reserved to members of the polity. That is why nonresidents are allowed to speak, but not to vote.

This justification is functional as well as formal. It is true that a clever person who writes a persuasive television ad, or a wealthy person who funds it, can have far more influence than he could have by casting a single vote. But the wealthy person could have even more influence if he could import large numbers of outsiders to vote for his position. Such "colonizing" of voters was allegedly common before the development of modern registration systems.

In the 1850s an unknown number of Missourians voted for slavery in Kansas—some accounts say thousands. The perceived illegitimacy of the results contributed to the creation of rival state governments and the armed violence of "Bloody Kansas." It has been alleged that several thousand Philadelphians "hoodlums" cast the decisive votes in New York that elected Benjamin Harrison to the Presidency.


16. Goldman, Move—Lose Your Vote, 45 NAT'L MUN. REV. 6, 6-7 (1956) (quoting J. Harris, Registration of Voters in the United States (1929)).


19. Id.; A. Craven, supra note 17, at 361.

Such invasions of the local electorate are intolerable. They are different in kind from an out-of-state ad or campaign contribution. Local voters may reject the message of an ad campaign; if they accept the message and vote accordingly, that is their decision and not the advertiser's. But if the deciding votes are cast by visiting outsiders, the choice of local voters is overridden, and the resulting decision is not that of the polity. This is why a residence requirement for voting has been thought "necessary to preserve the basic conception of a political community." 21 Holding political office is an a fortiori case.

Even if limitation of the franchise to resident citizens were merely conventional, 22 the framers of our current constitutions shared the convention. The federal Constitution requires Senators and Representatives to be citizens of the United States and inhabitants of the state from which they are chosen. 23 The President must be both a natural-born citizen and a long term resident of the United States. 24 The right to vote is left to the states, 25 subject to some federal constitutional protections; those protections are limited to citizens of the United States, 26 and to the "inhabitants" of each state. 27 State constitutions routinely limit voting to resident citizens. 28


23. U.S. Const. art. I, § 2, cl. 2; id. § 3, cl. 3.

24. Id. art. II, § 1, cl. 5.

25. Id. art. I, § 2, cl. 1; id. amend. XVII, § 1.

26. Id. amend. XIV, § 2; id. amend. XV, § 1; id. amend. XIX, § 1; id. amend. XXVI, § 1.

27. Id. amend. XIV, § 2. See Richardson v. Ramirez, 418 U.S. 24 (1974) (exclusions from franchise expressly authorized in § 2 of fourteenth amendment are insulated from review under § 1).


Gerald Rosberg reports that all states now require United States citizenship for voting. Rosberg, supra note 22, at 1100. Nearly half the states let aliens vote at various times in the
B. An Unnecessary Issue: The Diversity Argument for the Existence of States

Brilmayer's explanation of residence requirements for voting goes well beyond that issue; she also tries to explain why we have separate states in the first place. She says that creating separate polities and limiting political participation to residents fosters diversity, which is good for everyone. If Texans have different values from people in Connecticut, both states should be able to act on those values without dilution by meddling nonresidents. Yalies can enact their Connecticut values at home and enjoy the locals when they visit elsewhere.29

A Texan must obviously recognize the force of such claims. Texas was really sovereign, not just fictionally so, and the Alamo, the Revolution, and the Republic are unparalleled symbols of state identity. The Lone Star flag still flies over thousands of public and private buildings; a visitor from Yale once told me he had never seen the flag of Connecticut. But despite such diversity among the states, Brilmayer's point is both overstated and unnecessary to her thesis.

Her diversity argument would be better adapted to her overbroad formulation about exclusion from the political process than to the narrower exclusion from voting and holding office. There are very substantial differences in political climate between Texas and Connecticut, but neither state's values are insulated from the other's. Both states watch the same national television networks and read the same national magazines and newspapers, and both states contribute journalists to those media.30 Texas and Connecticut businesses lobby for their interests in the other state. Some accounts would have it that three men from Connecticut died at the Alamo.31 Brilmayer herself migrated from Connecticut to past, often as a means of attracting new settlers, but none have done so since 1926. Id. at 1093-100.

29. Brilmayer, supra note 1, at 400.
30. Walter Cronkite was a Texan. Someone must have come from Connecticut.
31. Alas, it may be that no one from Connecticut had such foresight. George Lewis Baker and Samuel Robbins, both of Connecticut, are listed among the heroes of the Alamo in A. Williams, The Siege and Fall of the Alamo 197, 202 (1926) (M.A. thesis available in Perry-Castañeda Library, The University of Texas at Austin). But there are many false claims to such an honor, and it appears that neither Baker nor Robbins was actually there. Both are omitted from the more definitive list in A. Williams, A Critical Study of the Siege of the Alamo and of the Personnel of its Defenders 292-353 (1931) (Ph.D. dissertation available in Perry-Castañeda Library, The University of Texas at Austin). They are also omitted from the list in W. Lord, A TIME TO STAND 214-19 (1961).
Texas and back again, and Jack Getman has since moved from Yale to Texas (but not as the proverbial player to be named later). Connecticut heiresses marry Texas ranchers, and George Bush is allowed to wander between the two states at will. Whatever the cost to Texas values, we make little effort to preserve them uncontaminated by outside influence.

Americans do value diversity among the states, but we plainly have strong countervailing values. Where Brilmayer sees welcome diversity, Gerald Neuman sees discrimination that must be justified. Too much diversity once led us into civil war; the resulting constitutional amendments sharply and deliberately reduced diversity. Revolutions in transportation and communication have vastly accelerated the trend to integration and homogenization. The vast expansion of the federal government reflects a series of political choices to do more and more things at the federal level, a choice at odds with preservation of state diversity. State government may be obsolete when corporations can coerce state policy choices by threatening to move jobs and investment elsewhere. For individuals, most interstate moves are dictated by employment chances rather than political values. For many, the principal significance of federalism is standing in line to get a new driver’s license and auto registration. State diversity will either survive these integrating forces or it will not, but the legitimacy of denying voting rights to nonresidents does not depend on the outcome.

Brilmayer need not take on the burden of showing that states are a good thing. The original decision to preserve the states had little to do with political theory and everything to do with experience. Despite weaknesses that some feared would be fatal, the states were familiar and widely-trusted units of government. The proposed federal government was unfamiliar, untested, and dangerous, but it promised to correct for the states’ weaknesses. The fight was over whether the federal government’s potential benefits were worth the risk; abolishing or consolidating the states was

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Gordon C. Jennings did die at the Alamo, and one source credits him to Connecticut. DAUGHTERS OF THE REPUBLIC OF TEXAS, THE STORY OF THE ALAMO (undated brochure distributed to pilgrims and tourists). But more serious scholars trace him only as far as Missouri. A. WILLIAMS, supra, dissertation at 324; W. LORD, supra, at 217.

32. Reinhold, On a West Texas Ranch, the Twain Not Only Meet but Marry, N.Y. Times, July 1, 1987, at C1, col. 1 (nat’l ed.).


never a viable option. The states existed as separate polities before the Constitution, and the framers were wholly incapable of changing that.

We can debate whether we would choose the same structure today, after two hundred years of experience with both levels of government. But that debate would be relevant only to proposals for the most fundamental constitutional amendment in our history. The Constitution we have preserves the states as separate polities, but also federates them into the larger polity of the union. The logic and needs of that structure, not broader political theory, drive the constitutional solutions to the problems of relationships between states and citizens of other states.

II. SHARING: THE REQUIREMENTS OF NATIONAL UNITY AND EQUALITY

The Federalists who pushed through the Constitution faced the daunting task of creating one nation out of separate states, and of doing so without abolishing those states. Much of the Constitution addresses that task; many of its provisions are obviously designed to foster national unity.35

The key clause for present purposes is the privileges and immunities clause of article IV, which provides that Americans visiting a sister state are “entitled to all Privileges and Immunities of Citizens.”36 Visiting citizens of sister states must be treated as citizens; they cannot be treated as aliens or foreigners. I believe the clause is universal in its scope and absolute in its terms, subject to only those implied exceptions that are dictated by the needs of the union.37 The Supreme Court’s view is narrower: states can discriminate with respect to unimportant things,38 or for substantial and

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37. I hope to develop this thesis in a subsequent article. The exception for voting and office holding has been explained in Part One of this paper. The exception for subsidized social welfare services avoids serious free-rider problems that would inhibit all states from providing such services in the first place. Varat, State “Citizenship” and Interstate Equality, 48 U. Chi. L. Rev. 487, 522-23 (1981). The exception for inspections and quarantines serves a national interest in containing infectious disease and is contemplated by constitutional text. U.S. Const. art. I, § 10, cl. 2. Brilmayer explains the rationale of the exception for domiciliary choice of law rules that do not disadvantage citizens of sister states. Brilmayer, supra note 1, at 412-13.
closely tailored reasons. Even on that view, the clause is a sweeping commitment to the equal treatment of citizens of sister states. That commitment is essential to national unity.

Suspect class analysis is a second and independent reason for courts to narrowly construe exceptions to the clause and to scrutinize their application strictly. Brilmayer’s attack on process theory seems at times to condemn all suspect class theory. But I do not think she means that, and I am sure she should not mean that. Properly applied, suspect class theory provides strong reason for vigorous judicial enforcement of the privileges and immunities clause.

The essential contribution of suspect class theory is factual. Citizens of sister states are not allowed to vote or hold office at any stage of the political process that produces local law. Equally important, humans universally tend to form groups and to denigrate the qualities and interests of other groups. Finally, legislatures are relatively unresponsive to the interests of persons who cannot vote and are not part of any group with members who can vote.

These observations supply neither a normative principle nor a principle of positive law. From the observation that legislators are unresponsive to the interests of outsiders, one cannot deduce a rule that outsiders must be treated equally with insiders. The observation that outsiders are likely to be victimized would be irrelevant in a polity with no general commitment to equal treatment. To that extent, Brilmayer is right that the exclusion of outsiders from voting does not prove that they should receive special protection from discrimination.

But our polity has both a normative and positive commitment to equal treatment. The normative commitment is stated in general terms as a self-evident truth in the document that declares our existence as a separate polity: “We hold these truths to be self-evident: that all men are created equal . . . .” The positive commitment is stated in general terms in the equal protection clause.

Most relevant for present purposes, it is stated with specific refer-

40. Brilmayer, supra note 1, at 393-94, 398-99, 402-09.
42. Declaration of Independence para. 2 (U.S. 1776). This document is not to be confused with Declaration of Independence (Tex. 1836).
43. “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.
ence to citizens of sister states in the privileges and immunities clause. And in that context, the general norm of equality is powerfully reinforced by the need for national unity.

The implementation of our commitment to equality should be informed by observations about the likely treatment of outsiders whose political influence is sharply limited. The likely behavior of legislators should inform both the drafting and interpretation of constitutional protections. The risk of discrimination against citizens of sister states was a reason for the framers to include the privileges and immunities clause. And it is a reason for courts to be skeptical of claims that apparent discrimination against outsiders is in fact justified by some nondiscriminatory reason.

Thus, the full statement of the suspect class argument is as follows: The privileges and immunities clause commits each state in general terms to treat citizens of other states equally with its own citizens. In working out the details of that commitment, and in enforcing compliance, courts should take account of what they know of the workings of the political process. The usual political processes are predisposed against citizens of other states, because of their inability to vote and their status as outsiders. Thus, discrimination against citizens of other states is especially likely to be unjustifiable in terms consistent with the commitment to equal treatment stated in the clause. Courts will best implement that general commitment if they treat all such discrimination as suspect.

Nothing in this argument assumes that nonresidents are entitled to vote locally. That they cannot vote locally is not a "process defect." The argument does not assume that such persons should be able to vote; rather, it assumes that they cannot vote and inquires into the proper consequences of that. I doubt that anyone has misunderstood this; several privileges and immunities scholars have noted the point.

44. See Brilmayer, supra note 1, at 399; Eule, Laying the Dormant Commerce Clause to Rest, 91 YALE L.J. 425, 438-39 (1982).

45. See, e.g., Ely, Choice of Law and the State's Interest in Protecting Its Own, 23 WM. & MARY L. REV. 173, 189-90 (1981); Simson, supra note 12, at 387; Varat, supra note 37, at 520-21 (1981). Brilmayer's criticism is most applicable to Eule, supra note 44, at 437-43, but it seems quite unlikely either that he would extend his argument to voting or that he would think that his unwillingness to do so undermines his conclusions about commerce. The only article that extends the argument to voting is Rosberg, supra note 22, arguing that resident aliens should be allowed to vote because aliens are a suspect class. But even Rosberg would not extend the argument to nonresidents. Id. at 1110.
“Process defect” is a label introduced to constitutional law by scholars who were troubled by the tension between our written constitution and some supposed natural law of unlimited democracy. These scholars have attempted to minimize the substantive elements of constitutional law; John Ely’s book is the best known example. His argument that all or most constitutional violations result from process defects, and that the Constitution does not commit us to any substantive rights or values, was implausible even in its original context. The argument is even less plausible in the context of discrimination against citizens of sister states, but he did not make the mistake Brilmayer seems to accuse him of.

Citizens of sister states are guaranteed equal substantive treatment without being guaranteed equal rights of political participation. Their right to equal treatment is not a procedural right, and their exclusion from full political participation is not a process defect, but their procedural exclusion is a reason to be suspicious of laws that arguably violate the substantive right. Brilmayer is right that outsiders are not entitled to vote, and given our general commitment to equality, the suspect class theorists are right that outsiders’ inability to vote is a reason to treat as suspect all legislation that discriminates against them. The two arguments are fully consistent.

As Brilmayer correctly notes, true process defects require that the process be fixed. When black adult citizens were denied the right to vote, that was indeed a process defect, and the remedy required that we create and enforce their right to vote. But this process defect was also part of the reason for treating all discrimination against blacks as suspect.

I do not understand Brilmayer to disagree with the factual claims of the suspect class argument. That is, I do not understand her to claim that Connecticut legislators care about Texans as much as they care about their own constituents, or to deny that they would be delighted to raise revenue with a tax that falls only on citizens of other states. Her discussion of externalities in state policymaking usefully cautions against inferring too much from

47. See, e.g., Tribe, THE PUZZLING PERSISTENCE OF PROCESS-BASED CONSTITUTIONAL THEORIES, 89 YALE L.J. 1063 (1980); Laycock, supra note 35.
48. See Ely, supra 45, at 189-90.
50. Brilmayer, supra note 1, at 402-09.
this insight, but that caution is relevant only to a different problem.

The bulk of her paper is about disparate treatment of citizens of sister states.\textsuperscript{51} Her discussion of externalities is relevant only to facially neutral laws that impose costs on citizens of other states. The distinction is not merely formal. The Supreme Court has been far more deferential to facially neutral laws than to facially discriminatory laws,\textsuperscript{52} and there is good reason for that.

Brilmayer develops the possible justifications for laws that burden outsiders. She reminds us that externalities run both ways: state regulation imposes costs on interstate commerce, and hence on citizens of other states, but interstate commerce also imposes costs on the states through which it passes.\textsuperscript{53} Second, and I think more originally, she notes that balancing costs and benefits from a national perspective does not wholly solve the problem. Disagreements about the proper scope of regulation may arise because different states have different values—different degrees of willingness to exchange public health, safety, or convenience for cheaper goods and services.\textsuperscript{54} She doubts that the federal government can act on a single set of national values,\textsuperscript{55} but in any event, Congress is better suited than the courts to strike the balance in close cases. Thus, she concludes, "the Court should be extremely wary of inquiring too closely" into laws that seem to externalize costs.\textsuperscript{56}

Her insight is sound with respect to facially neutral laws. Her insight weighs against, but does not negate, the countervailing insights that the states are likely to gerrymander regulation in a way that externalizes costs,\textsuperscript{57} and that there is something more than "faintly unsavory" about that.\textsuperscript{58} The privileges and immunities

\textsuperscript{51} "This Article is about only a small subset of the problems of interstate relations, namely interstate discrimination. Under what circumstances may nonresidents be treated differently from residents?" \textit{Id.} at 393.


\textsuperscript{53} Brilmayer, \textit{supra} note 1, at 404 (citing Coase, \textit{The Problem of Social Cost}, 3 J.L. & Econ. 1 (1960)).

\textsuperscript{54} Brilmayer, \textit{supra} note 1, at 406-07.

\textsuperscript{55} She seems to think the values of each state must be considered separately, \textit{id.} at 19, but that is a false difficulty. When the decision is made at a national level, state lines can be ignored. Any determination of collective values involves difficult summing problems, but they are no more difficult in this context than in any other.

\textsuperscript{56} \textit{Id.} at 408.


\textsuperscript{58} See Brilmayer, \textit{supra} note 1, at 404.
clause does not reach such facially neutral laws, but the dormant commerce clause does.\textsuperscript{59}

Facially neutral laws that burden outsiders are often ambiguous in both purpose and effect. They may flow from legitimate motives and create legitimate benefits that justify the costs to outsiders, or they may not. Courts can invalidate facially neutral laws that are deliberately hostile to outsiders, or laws that impose costs disproportionate to their benefits, but only in clear cases. Such laws will be upheld unless the burden on interstate commerce is "clearly excessive in relation to the putative local benefits."\textsuperscript{60} The main reason for such deference is that cost-benefit judgments are committed to legislators in the first instance. Brilmayer has adduced another reason why that should be.

When a law is facially discriminatory, there is little reason for deference, and Brilmayer's new reason for deference does not apply at all. When a law classifies in a facially discriminatory way, any explanation based on legitimate differences in values fails to fit the classification. Consider the Minnesota milk carton case.\textsuperscript{61} If Minnesota bans plastic milk cartons in favor of paper board, it may be either conserving a nonrenewable resource or protecting its paperboard industry. The odds are very high that both motives were at work; this is one reason for courts to examine burden as well as motive.\textsuperscript{62} The discrimination between plastic and paperboard reeks of protectionism, but conserving nonrenewable resources is such sound policy that it is hard for the Court to find either a protectionist motive or an unconstitutionally disproportionate burden on sister states. It is entirely appropriate that some

\textsuperscript{59} As to the commerce clause, see, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). There has been no need to litigate whether the privileges and immunities clause forbids facially neutral classifications with uneven incidence, because review under that clause would add nothing to review under the commerce clause. In any event, it is textually plain that a facially neutral law does not deny to citizens of other states any privilege or immunity accorded citizens of the acting state. Cf. Washington v. Davis, 426 U.S. 229 (1976) (racially neutral classification with uneven racial impact is not a racial classification for purposes of the equal protection clause).


\textsuperscript{61} The example is taken from Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

\textsuperscript{62} If the principal legislative motive was hostile or protectionist, then almost any resulting burden on interstate commerce should be invalid. There is no reason to defer to legislative balancing of interests when the balance is distorted by bad motive. But bad motive is irrelevant without burden or discrimination; there must be harm to plaintiffs, not just bad thoughts, to make out a constitutional violation. For the contrary argument that motive counts and burden does not, see Regan, supra note 57, at 1094-98.
courts would strike down the law and some would uphold it; the case could legitimately be decided either way.

Now suppose that Minnesota banned cartons made of imported materials and allowed cartons made of domestic materials. The ambiguity would disappear. The only value that could explain such a law would be a preference for Minnesotans. Discrimination on the basis of that value is unconstitutional. The Court should not defer to that value, nor should it defer to a rationalization that could not explain the legislative classification. The facially discriminatory classification must nearly always be struck down.

Brilmayer also notes that states are legitimately concerned with distributional consequences, and that these may sometimes justify local regulation that is inefficient from a national perspective. I fully agree. Having argued repeatedly that efficiency is not the only value, I have no desire to take a different position here. But the issue is not what kinds of considerations might justify a burden on interstate commerce. The issue is: Who should judge the sufficiency of the justifications? A single state cannot reliably judge either the efficiency or justice of an interstate distribution of costs and benefits. A national perspective does not ignore distributive considerations; indeed, obvious distributive injustice is an important part of the objection to laws that discriminate against citizens of sister states. States will rarely be motivated by a desire for inefficiency: no state sets out to reduce the gross national product. But states may often be motivated by a desire to redistribute costs to outsiders in ways that objective observers would condemn as unjust. Considering distribution as well as efficiency is fully consistent with the need to review state decisions from a national perspective.


64. Brilmayer, supra note 1, at 405.

III. INTEREST ANALYSIS AND THE LEGITIMACY OF MAKING VISITORS OBEY THE LAW

As with so much of her work,\(^66\) one of the most valuable aspects of Brilmayer's article is its treatment of interest analysis.\(^67\) Brainard Currie's extraordinary premise that states are legitimately interested in the welfare of only their own citizens\(^68\) was a frontal assault on the union. Brilmayer shows how this view is inconsistent with any reasonable conception of fairness to citizens of sister states.\(^69\) In my judgment, Currie's view is inconsistent with the constitutional commitments to equality and national unity, and it violates the privileges and immunities clause. Brilmayer's duty of sharing extends to rules of law.

The recognition that Curriean interest analysis is discriminatory has long coexisted with the intuition that some choice of law rules can legitimately refer to domicile. A major contribution of Brilmayer's article is to reconcile these intuitions and mark the line between them. She shows how application of Curriean interest analysis to most interstate transactions creates a discriminatory regime of rules in which the outsider is worse off than he would be under the law of either state.\(^70\) Domiciliary choice of law rules that are acceptable even to territorialists, such as the rule that estates are administered under the law of the decedent's domicile, do not have that consequence.\(^71\) In those cases, domiciliary law is applied regardless of whether the estate or the local heirs are advantaged or disadvantaged. That is consistent with the needs of the union and with equality for citizens of sister states, and it is a legitimate exception to the privileges and immunities clause. Applying the rule that benefits the local litigant is not.

Brilmayer also usefully highlights the tension between Curriean interest analysis and our expectation that visitors will obey local law.\(^72\) We can hardly expect visitors to obey our law when it hurts

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\(^67\) Brilmayer, supra note 1, at 396-98, 409-13.


\(^69\) Brilmayer, supra note 1, at 396-97, 412-13.

\(^70\) Id. at 412-13.

\(^71\) Id.

\(^72\) Id. at 411-12.
them without giving them the benefit of our law when it would help them. Like any other unfairness in government, Curriean interest analysis undermines the legitimacy of government's demand for obedience. The point may have more fundamental roots than Brilmayer recognizes.

Brilmayer is concerned with justifying the power of government coercion. Why is it legitimate to demand that citizens and visitors obey the law? Because, she concludes, both citizens and visitors receive the benefits of government.73

This states the relationship backwards. There is a *quid pro quo* between subjection to government and entitlement to its benefits. But subjection to government comes first, logically as well as historically. People create governments and endow them with coercive power out of necessity—to preserve life, liberty, and the pursuit of happiness.74 Anarchy may appeal to a few dreamers and theorists, but no human society has ever actually functioned that way.

Coercive government power must bind everyone within the jurisdiction: citizen and visitor, adult and child, competent and incompetent. The purpose of such coercion would hardly be served if visitors were free to kill, rape, and steal because they had not been consulted in the writing of the laws. Thus, the power to coerce visitors is also derived from necessity. They must obey whether or not they can vote, and whether or not they are treated fairly, lest government fail in its essential purpose.

People create governments out of necessity, but they immediately face the problem that governments abuse their power and that there is no good way to decide who should be entrusted with such power. The American solution has been to vest ultimate power in the people collectively, to require government to treat people equally, to disperse and limit government power, and to guarantee fundamental rights. But recognition of the necessity of a government with power to coerce logically comes first. If we did not need government coercion, we would not need voting, equal treatment, or individual rights.

Thus, the power to coerce is not granted because people have the right to vote and share in government benefits. Rather, people are granted the right to vote and share in government benefits because

73. *Id.*
74. *See* Declaration of Independence para. 2 (U.S. 1776); T. Hobbes, Leviathan chs. 13 & 17 (1651).
the government has the power to coerce. It does not follow that nonresidents can vote, for the reasons discussed in Part One. But as Brilmayer argues, their obligation to obey strengthens the case for treating them equally in all other things, including choice of law.

V. Conclusion

Commentators are obliged to develop their points of disagreement with the principal paper; they cannot just repeat the points they like. The extent of disagreement between Brilmayer and me should not obscure our essential agreement. We agree that states owe equal treatment to citizens of sister states, and we agree that that obligation does not entitle nonresidents to exercise government power. She expresses this as a distinction between shaping and sharing.

Close attention to the structure of the union helps refine the two concepts. The exclusion from shaping applies only to voting and holding political office; it does not restrict attempts to influence voters and office holders. The duty of equality in sharing has few exceptions. Rules of law are one of the things that must be shared. Curriean interest analysis is fundamentally inconsistent with Brilmayer's duty of sharing; I believe it is also fundamentally inconsistent with national unity.

75. Cf. Brilmayer, supra note 1, at 398 ("The electoral relationship arises because of the political responsibility to govern fairly; the responsibility to govern fairly does not arise out of the existence of an electoral relationship." (emphasis in original)).
76. Id. at 411-12.