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Response

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RESPONSE

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Professor Brilmayer responds to the commentaries of Professors Laycock, Tushnet, and George.

IT IS gratifying not only that three scholars have taken the time to comment on what is essentially only a preliminary sketch of an approach to interstate discrimination, but that they are scholars from such different backgrounds. Academic specialization takes its toll when only choice of law scholars are willing to comment on choice of law ideas, when constitutional scholars limit their attention to their particular subspecialities of constitutional law, and when readers of journals turn only to the one article in a hundred whose concepts and jargon are comfortably familiar. What we lose in detail and technical flamboyance when we write outside the fields we know best we often gain in freshness and enthusiasm. With this in mind, one feels particularly fortunate to have incited persons with a variety of expertise to address interjurisdictional issues, which sometimes tend to present a rather dry and predictable appearance.

On the other hand, when one writes in a well-defined specialty with well-defined schools of thought, one can at least expect a fiercely fought fight from a well-defined opposition. If the battle lines are already drawn, then it is guaranteed that someone, somewhere, will have a vested interest in proving that you are not only wrong, but so pigheadedly and maliciously wrong that you should never have been allowed to publish your article in the first place. While such battles (as they say) often shed more heat than light, it makes for good journal copy. More to the point, it guarantees that there will be something to say in a rejoinder. Where four persons, in contrast, find a great deal to agree upon, and proceed to help develop one another's thoughts, then the probability that there will be something interesting to put into a rejoinder seems rather slim.

In particular, I find it virtually impossible to disagree with Professor Laycock.[1] Although he takes a different route than I do, we come out (as he realizes) in almost exactly the same place. The primary difference between our approaches lies in the different styles of justification. Laycock is happy to rely upon the constitu-

1. Laycock, *Equality and the Citizens of Sister States*, 15 FLA. ST. L. REV. 431 (1987).

tional text, with occasional excursions outside the literal text to ascertain "the needs of the federal union."[2] I agree with him 100% that the Constitution itself clearly incorporates the right of outsiders to equal treatment, but that it does not compel that outsiders be given a political voice. One perhaps does not need fancy philosophical arguments, or even the sort of simplistic philosophical arguments that my article offers, to resolve actual litigation challenging discrimination against nonresidents.

I am less convinced, however, that such arguments do not have other value. While one may well believe that philosophical arguments are not necessary while passing (as a judge) on the constitutionality of state action, there are other important reasons for investigating the philosophical foundations of one's constitutional principles. What if it were to be proposed that we amend the Constitution to omit any protection prohibiting discrimination against nonresidents? One would hope that legal scholars would have professional opinions on such a change. This surely requires recourse to extra-legal arguments.

Theoretical analysis of the basis for constitutional provisions is not necessarily designed as a tool of judicial activism, as a way to get judges to ignore what the Constitution says. It may simply be a way of analyzing whether we like the constitution that we have, or it may simply be an academic inquiry into an important aspect of our legal environment. It puzzles me that Professor Laycock would find such an enterprise dangerous. If nothing else, one wants to carry on the foundational dialogue initiated by scholars such as Brainard Currie and John Ely. Academia, for better or worse, is something of a self-perpetuating enterprise, where law professors think about the foundations of our legal institutions because the foundations are there, because they have an important effect on our lives, and because others have thought about such things before.

Professor Laycock, of course, does not fault me uniquely for investigating foundations. His more pointed criticism is reserved for Ely's *Democracy and Distrust*.[3] I think he dismisses too quickly what is an important work of constitutional theory (although one with which I disagree, as must be obvious). This leads me to clarify one point, namely the relationship of my arguments to suspect class theory. Professor Laycock seems to assume that I disagree

2. *Id.* at 432.
3. J. ELY, DEMOCRACY AND DISTRUST (1980).

with suspect class analysis. It is not suspect class analysis that I criticize, however, but one particular explanation for why we *have* suspect class analysis.

One might justify suspect class analysis on the ground that certain groups have historically been denied equal rights and therefore discrimination against them ought to be prima facie invalid. Or one might justify suspect class analysis on the ground that the drafters of the fourteenth amendment sought to protect certain groups, and therefore discrimination against those groups ought to be prima facie invalid. Both of these lines of reasoning differ, however, from the argument that those groups that ought to be protected are exactly the ones that have been systematically denied a political voice to which they were entitled. This is the argument that there are "process defects" when some groups are so politically powerless that whether or not they are formally entitled to vote, they are effectively excluded.

My argument is that this "process defects" theory of suspect class analysis makes no sense in the interstate context. Some groups are properly disenfranchised; this is not a "process defect." For example, nonresidents do not vote and should not be allowed to vote. I nowhere claim that process theorists actually believe that nonresidents should be allowed to vote. However, some like Professor George [4] refer to this exclusion as "wrongful"; characterization as somehow "wrongful" seems necessary if the exclusion is to be considered a "process defect." I feel confident that most process theorists would, upon reflection, agree that nonresidents are *properly* disenfranchised. Once they admit this point, it is hard to understand how disenfranchisement is a "process defect." It is not that they believe that nonresidents should vote; it is rather that the characterization of exclusion as a "process defect" is inconsistent with the fact that nonresidents are properly excluded. This point is spelled out at greater length in an earlier article of mine.[5]

So it is not suspect class analysis that is suspect, but the assumption that suspect class analysis results from defects in the majoritarian processes. Notice that the process defects argument lumps together racial minorities and nonresidents, who surely have entirely different claims against political exclusion. Political exclusion, therefore, cannot be the explanation, if we analyze as "sus-

4. George, *Asking the Right Questions*, 15 FLA. ST. L. REV. 449 (1987).

5. Brilmayer, *Carolene, Conflicts, and the Fate of the "Inside-Outsider,"* 134 U. PA. L. REV. 1291 (1986).

pect" discrimination against individuals with such different process rights. Professor Laycock and I agree that as a descriptive matter, legislatures may sometimes feel equally motivated to discriminate against nonresidents and racial minorities. However, it is the norm requiring equal treatment, and not who should be allowed to vote in a democracy, that makes such discrimination invalid.

Professor Tushnet addresses entirely different aspects of my article.[6] Here is where academic specialization once more threatens to rear its ugly head. He concedes at the outset that he is (blissfully) ignorant of choice of law theory. I wish that I could get him to address choice of law theory at greater length, because his interpretation of modern choice of law theory is considerably more attractive than actual modern choice of law theory. A little cross-disciplinary fertilization would add a lot to the subject.

The point at which his understanding of modern choice of law theory departs from current formulations concerns his efforts to explain it in terms of democratic participation. The interest analysts, as I pointed out, thought that their theory was compelled by democratic principles because the courts of one state had an obligation to further the purposes of the democratically elected legislature of that same state. Democracy, under this view, consists of responsiveness to the wishes of one's own electorate. Thus there is no need to take into account the needs or interests of persons from other states. In fact, to do so would be to violate one's duty towards residents.

Since legislators are assumed to care only about the needs of local persons, there is no state interest in applying local law when it would only work to the benefit of nonresidents. Professor Tushnet argues that this seems fairly democratic, because it means that the nonresident will be governed by the law that he or she helped formulate at home. If he or she does not like that law, then the solution should be to change the law at home. Indeed, suggests Professor Tushnet, there might be a process problem if the nonresident were to be governed by local law (even if that law worked to his or her benefit). "Citizens . . . would [in that case] be governed by a law of a state in which they had no representation."[7]

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6. Tushnet, *Community and Fairness in Democratic Theory*, 15 FLA. ST. L. REV. 417 (1987).

7. *Id.* at 421.

As I pointed out in my initial article, however, one cannot simply argue that it is democratic to deny the benefits of local law on the grounds that the nonresident's rights will be determined under home state law. The reason is that the only circumstance in which home state law is available to the nonresident is when it works to his or her disadvantage.[8]

If Professor Tushnet believes that there may be a process difficulty with holding a nonresident to a norm which he or she did not help formulate, then he ought indeed to be concerned about modern choice of law theories. They are quite willing to hold the nonresident to local law. In fact, there is a state interest in applying local law in exactly those cases where it helps out a local person at the expense of an outsider, and in such cases local law will be applied to the detriment of the outsider.

There is more at stake here than simply a quibble about the inanities of modern choice of law theory. Perhaps we should, like Professor Tushnet, simply be dismissive of modern choice of law. But one response, similar to my response to Professor Laycock, who is as uninterested in philosophy as Professor Tushnet is bored by choice of law, is that there is an important phenomenon in the legal landscape that we might profit by understanding. If current thinking contains mistakes, as I believe that it does, it is worth understanding where these mistakes come from. I believe that the mistakes in both of the interstate discrimination orthodoxies that I address arise out of conceptual oversimplification, albeit a seductive one. Improving our understanding of this oversimplification is the best way to avoid such seduction in the future.

A second reason that this is not just a petty disagreement about choice of law thinking is that Professor Tushnet's interpretation changes the very nature of the problem into a question of the proper size of governmental units. Professor Tushnet's interpreta-

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8. *See* Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. L. REV. 389, 412-13 (1987).

> A possible rejoinder [to my criticism of interest analysis] is that in the choice of law context, the result of a failure to extend the benefits of local law is merely to apply the law of the other involved state, typically the defendant's home state. If the defendant participated in the formation of that law, there is no way in which it can be unfair to hold him or her to it. . . .
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> . . . It would be one thing if the forum merely had a choice of law rule that made no reference to benefits. . . . the problem with the state interest reasoning is that unlike such rules, it makes choice of law turn on whether the rule works to an insider's advantage. The outsider bears all of the burdens of local law, but is not entitled to its application when that would be beneficial.

tion of interest analysis leads him directly to that question, because the problem of interest analysis is whether one should be governed by the law of one's state or by the law of the federal government. In other words, Professor Tushnet's problem is not between two different concepts of the structure of a democracy, but of two different ways of putting the same structure into effect. Under Professor Tushnet's interpretation, there is electoral democracy with the electorate composed of state residents, versus electoral democracy with the electorate composed of the residents of the United States. The two are structurally comparable, but differ only in scale. The important issue remaining to address, then, is the issue of the size of the appropriate unit.

However, this question of scale is not the real difference between interest analysis and other democratic theories. The real difference is a structural question about what democracy requires. The interest analysis version of democratic theory holds that democracy means responsiveness to the person who voted you into office. There is no requirement that those who bear the consequences of the decision be allowed to vote; outsiders can be burdened by application of local law so long as this is in the interest of the local voters. This is precisely the point of contrast with process-based theories of constitutional law. Under process theories, there seems to be some sort of claim to be represented in the decisions that effect one's interests, such that if one is not represented there is some sort of "process defect."

The difference between process theory and modern choice of law is therefore not one of the appropriate scale of the governmental unit. It is a question about whether officials owe consideration only to those that elected the official or also to others that are affected by the decision. Perhaps this can be seen more clearly by holding constant the size of the governing unit. If one assumes, for instance, that the appropriate unit is the United States of America, one would still have to address the tension between the interest analysts' perspective and that of the process theorists. Does democracy require fidelity to the interests of the American public, or the interests of all persons who bear the consequences of the decision, regardless of whether they are United States residents or not? Professor Tushnet's discussion of community, while helpful on the scope question, does not tell us very much about this problem of what democracy requires.[9]

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9. *See* L. Brilmayer, Foreign Affairs and the Implausibility of Democracy (forthcoming).

Professor George's response is similar to Professor Tushnet's in its willingness to probe the philosophical depths. Like Professor Tushnet, he embraces the dangerous enterprise against which Professor Laycock warns us. The highly metaphorical nature of some of his arguments leads me to respond in kind, for his article reminds me of nothing so much as a particularly beautiful passage of Indonesian poetry by Pramoedya Ananta Toer.[10]

> Suara itu hanya terdengar beberapa detik saja dalam hidup. Getarannya sebentar berdengung, takkan terulangi lagi. Tapi seperti juga halnya dengan kali Lusi yang abadi menggarisi kota Blora, dan seperti kali itu juga, suara yang tersimpan menggarisi kenagan dan ingatan itu mengalir juga—mengalir kemuaranya, kelaut yang tak bertepi. Dan tak seorangpun tahu kapan laut itu akan kering dan berhenti berdeburan.
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> Hilang.
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> Semua itu sudah hilang dari jangkauan panc[h]a—indera.

10. Quoted in B. ANDERSON, IMAGINED COMMUNITIES 134-35 (1983) (translation on file, *Florida State University Law Review*).