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COMMUNITY AND FAIRNESS IN DEMOCRATIC THEORY

MARK TUSHNET*

This commentary responds to an article by Lea Brilmayer in this edition. Professor Tushnet challenges Professor Brilmayer's assertion regarding democratic theory that the process theory of United States v. Carolene Products is irreconcilable with the interest theory which stems from conflict of law analysis.

PROFESSOR Brilmayer's thought-provoking article¹ directs our attention to some important anomalies in the ways that constitutional law and choice of law theory have assimilated some aspects of democratic theory. Her arguments, however, do not quite bring those anomalies into focus. By sharpening the focus in this Commentary, I hope to contribute to the project that Professor Brilmayer has begun.² I define that project as reconciling the claims of community with the claims of fairness.³

I. TWO DEMOCRATIC THEORIES OF THE LEGISLATURE

Professor Brilmayer criticizes the "two orthodoxies in the law of interstate discrimination"⁴—the process theory of *United States v. Carolene Products*,⁵ and interest analysis in the conflict of laws—for "draw[ing] exactly . . . opposite conclusion[s] from the

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1. Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U.L. REV. 389 (1987) [hereinafter Brilmayer].

2. Along the way I will point out some elisions or minor errors in Professor Brilmayer's presentation. I devote this note to one that will not come up again. Professor Brilmayer rejects as "simple-minded" the theory of interpreting statutes that are the product of interest group compromise. Brilmayer, *supra* note 1, at 410. That theory has been developed by Judge Frank A. Easterbrook. See generally Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984). Professor Brilmayer's dismissal of this theory is too brusque. As the title of Judge Easterbrook's article suggests, this theory of statutory interpretation attempts to find a basis in democratic theory for a link between the roles of legislatures and courts. Professor Brilmayer does not develop a theory of the judicial role. She relies on the work of Cass Sunstein. Brilmayer, *supra* note 1, at 411 n.34 (citing Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984)). But that work, to the extent that it has such a theory, is quite problematic.

3. See generally Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006 (1987).

4. Brilmayer, *supra* note 1, at 393.

5. 304 U.S. 144, 152-53 n.4 (1938).

. . . fact . . . [of] political exclusion.”⁶ As we will see, they do not draw “exactly” opposite conclusions; they draw somewhat different conclusions that seem reconcilable to an outsider to conflict of laws theory such as me. As Professor Brilmayer hints, the reconciliation does pose acute problems for a theory of community and fairness.

A. *The Dormant Commerce Clause*

Professor Brilmayer’s analysis of the *Carolene Products* process theory places two cases at its center: Arizona’s long train law case, *Southern Pacific Co. v. Arizona*,⁷ and Iowa’s short truck law case, *Kassel v. Consolidated Freightways Corp.*⁸ She takes my presentation of the process theory as her primary text.⁹ Two things seem out of focus here, and they appear to be related. She develops criticisms of the application of process theories to the *Southern Pacific* and *Kassel* problem. That problem is not usually considered to be a problem of discrimination, but a problem of “facially neutral statutes with significant effects on interstate commerce.”¹⁰

Process theory of the dormant commerce clause¹¹ can make sense of these cases—which I again emphasize usually are not thought of as cases of interstate discrimination¹²—only by imposing “a general efficiency criterion.”¹³ In alluding to the similar efficiency requirement that the Court imposed in *Lochner v. New York*,¹⁴ I had not thought that I was commending a process theory of these cases.

The word to stress in this context, though, is “general” rather than “efficiency.” Dormant commerce clause doctrine aims to rec-

6. Brilmayer, *supra* note 1, at 395; see also *id.* at 415 (two methods “inconsistent with one another”).

7. 325 U.S. 761 (1945).

8. 450 U.S. 662 (1981).

9. Brilmayer, *supra* note 1, at 403 n.21 and accompanying text (citing Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 [hereinafter Tushnet]).

10. G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, CONSTITUTIONAL LAW 290 (1986) (section heading) [hereinafter CONSTITUTIONAL LAW]. Note also that the prior section of this work is headed “Protection against Discrimination.” *Id.* at 258.

11. U.S. CONST. art. I, § 8, cl. 3.

12. *But see* *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 n.12, 676-77 (1981) (plurality opinion of Powell, J.) (discussing significance of exemptions favoring local interests).

13. Brilmayer, *supra* note 1, at 405 (quoting Tushnet, *supra* note 9, at 143). I agree with Professor Brilmayer that my argument for this conclusion did not expressly invoke the Coasian point about the reciprocity of externalities, though I believe that my argument does implicitly rely on the point.

14. 198 U.S. 45 (1905). See also Tushnet, *supra* note 9.

oncile the states' independent legislative authority with their obligation under the supremacy clause¹⁵ to consider national interests. One might have developed that doctrine so that the commerce clause prohibited only discrimination, perhaps augmenting the doctrine with a rule that finding a burden on interstate commerce that appears to be excessive can be a proxy for finding discrimination. The Supreme Court has not been so modest.¹⁶ Whether justified by a process theory or some other, its "undue burden" cases¹⁷ necessarily rest on the proposition that some national norm constrains local preferences. To that extent the supremacy clause prohibits Maine from being too different from Texas.¹⁸ Professor Brilmayer properly notes that democratic values are promoted by allowing states—and therefore their citizens—to act on different distributions of preferences.¹⁹ Dormant commerce clause doctrine merely establishes that on occasion local preferences must yield to national norms.²⁰

The problem for democratic theory is that these national norms are the product of democratic processes as well. This is often obscured by a focus on Supreme Court cases. What matters is that "a national viewpoint must be inserted in the process."²¹ I believe that one gets a better grasp on the problem for democratic theory by focusing on the power of Congress to preempt local legislation that either discriminates against²² or imposes an undue burden upon²³ interstate commerce.²⁴ When the "national viewpoint" is

15. U.S. CONST. art. VI, cl. 2.

16. *But see* CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637, 1652-53 (1987) (Scalia, J., concurring).

17. *See, e.g.*, Kassel Consolidated Freightways Corp., 450 U.S. 662 (1981); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

18. Brilmayer, *supra* note 1, at 407-08.

19. *See also* CONSTITUTIONAL LAW, *supra* note 10, at 123-24 (federalism promoting individual choice).

20. For those who (unlike me) believe that there is a role for "undue burdens" doctrine, the problem, of course, is to identify the national norm and the occasions on which it overrides local preferences.

21. Brilmayer, *supra* note 1, at 404 (quoting Tushnet, *supra* note 9, at 143).

22. This was Justice William Johnson's theory of the scope of the commerce clause. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 225-26 (1824) (Johnson, J., concurring).

23. *See, e.g.*, Pacific Gas & Electric Co. v. State Energy Resources Conservation Comm'n, 461 U.S. 190 (1983) (state laws regulating nuclear power plants preempted insofar as they are based on safety concerns).

24. I believe that dormant commerce clause doctrine would be cleaned up if at least the "undue burdens" branch were recast as developing a series of canons of construction to be applied to federal statutes—always present in these situations—to determine whether state law has been preempted. *Cf.* Easterbrook, *supra* note 2.

provided by Congress, the conflict that federalism creates within democratic theory is clear: The democratic processes of one constituency, the state, are overridden by the democratic processes of another, broader constituency, the nation. As Professor Brilmayer repeatedly emphasizes, there is nothing within democratic theory in its usual incarnations that justifies imposing the preferences of the broader constituency on the narrower one.

As I have suggested, the justification, if any, lies in a theory that would reconcile the claims of community—the local as well as the national community—with the claims of fairness—those made by outsiders against the local community, as well as those made by the local community against the national one. We can get additional perspective on the problem of developing such a justification by considering Professor Brilmayer's discussions of interest analysis in conflict of laws theory.

B. *Conflict of Laws Theory*

I must state at the outset that conflict of laws ranks with oil and gas law and neurosurgery among the things that I do not want to learn a lot about. Professor Brilmayer's discussion of interest analysis does little to make me more enthusiastic, not because of her presentation but because of the object of her descriptions. For example, to the extent that she describes a conflict between some versions of interest analysis and some versions of process theory, the constitutional lawyer in me wants to say, "So much worse for those versions of interest analysis—and why on earth haven't the conflict theorists figured that out?" But, as we will see, there is more interesting material here.

Professor Brilmayer argues that interest analysis and process theories draw contradictory conclusions from the same democratic premises. Process theories, she says, claim to promote—or at least not undermine—democracy by forcing local legislatures to take into account the interests of outsiders. As she says, they place "special obligations" on legislators "not to discriminate against those who do not vote."²⁵ In contrast, interest analysis calls upon the courts to enforce the decisions of a state legislature acting as a fiduciary for its citizens, under an "obligation to further the interests of local citizens."²⁶

25. Brilmayer, *supra* note 1, at 396.

26. *Id.* at 395.

With respect to at least some problems of conflict of laws, however, this contradiction is superficial. Consider a problem arising out of an accident in which a citizen of Connecticut is a passenger injured in an accident in a car driven by a citizen of New York. Suppose that under New York law a driver is liable to a guest passenger and that under Connecticut law a driver is not liable to a guest passenger. According to Professor Brilmayer, interest analysts would counsel New York courts to deny recovery to the injured Connecticut guest, on the ground that New York has no interest in protecting the interests of out-of-staters. But, she says, they would insist that the New York driver would be liable to a New York passenger in similar circumstances. Thus, she argues, interest analysis urges that states positively discriminate against outsiders: the Connecticut passenger is disadvantaged by a decision of a state in which he or she has no influence.

At least in this version of the problem there really is no contradiction between interest analysis and process theories. The reason is analogous to the reciprocal nature of externalities to which Professor Brilmayer directs her attention. For one could say that in this situation the injured Connecticut passenger is disadvantaged—not by a decision of New York to follow interest analysis—but by a decision of Connecticut to structure its own law as it has chosen. If Connecticut passengers are sufficiently concerned about the threat of uncompensated injury due to New York's invocation of interest analysis (as well as being concerned about the threat of uncompensated injury due to accidents occurring in Connecticut), they face no obvious process difficulties in persuading their own state legislature to adopt a rule about driver liability like that of New York. Indeed, one might even say that if New York insisted on finding the New York driver liable to the Connecticut passenger, a true process problem would arise: Citizens of Connecticut would be governed by a law of a state in which they had no representation, while their own state makes them bear the cost of their own injuries.

The confusion in Professor Brilmayer's argument arises from an interesting ambiguity. In a federal system two constituencies vie for primacy as sources of democratic legitimacy. Any rule predicated on the promotion of democracy as to one of those constituencies necessarily impairs the promotion of democratic values with respect to the other. Consider for example the problem addressed

in *Garcia v. San Antonio Metropolitan Transit Authority*:²⁷ the existence or scope of judicially enforceable limits on Congress' power to regulate interstate commerce. The Court held that there were no such limits, while four dissenters would have enforced some limits on Congress' power. Both sides claimed to be promoting democratic values, and both were right. The dissenters correctly said that by allowing Congress to do whatever it wanted, the Court effectively licensed Congress to override the decisions made by local democratic processes. The Court correctly said that to enforce limitations grounded in concerns about local democracy would be to override the decisions made by national democratic processes. To the Court, the people acting in their capacity as citizens of a nationwide democracy chose to disregard decisions made by the people acting in their capacity as citizens of local democracies—that is, to disregard *their own* decisions.

The analogue in Professor Brilmayer's argument is clear. Process theories insist on the importance of democratic processes considering the nation as the relevant political unit. Interest analysis appears to insist on the importance of democratic processes considering each state as the relevant political unit. I confess once again that as a constitutional lawyer I would have thought that conflict of laws theory would have figured out that the supremacy clause stands for the proposition that the latter perspective must yield to the former. It is not, as Professor Brilmayer suggests, a question of balancing or accommodation; it is a question of lexical ordering, wherein some things necessarily come before others.²⁸

The lexical ordering, though, solves the problem by mere stipulation. The underlying difficulty is that people in a federal system are citizens of two "sovereigns," each of which is democratic. What we need to know is whether it is possible to explain why one sovereign's democratic processes ought to prevail over the other's.²⁹ Professor Brilmayer's analysis of "shaping and sharing" moves us in the right direction, but it does not bring the solution—if there is one—into clear view.

27. 469 U.S. 528 (1985).

28. This is not to say that the supremacy clause principle must have the content apparently implied by process theories, but only that the supremacy clause principle, whatever it is, must prevail over the conflicts of laws principle to the extent that the latter is justified solely with reference to local democracy.

29. The supremacy clause is not an explanation in this sense; it is an expression of the greater power held by the national government.

II. COMMUNITY AND FAIRNESS BETWEEN COMMUNITIES

In poetic diction false rhymes such as "shaping and sharing" can serve to alert us to relations between apparently unrelated subjects. In this context, though, I think the false rhyme is ultimately misleading. Professor Brilmayer carefully defines "sharing," at the start, as being "subject[ed] to the benefits and burdens that legal norms impose."³⁰ In this sense the people of El Salvador "share" in United States foreign policy.³¹ Most of the time, however, "sharing" is a praise word; it is presumptively a good thing to share in public life. The ambivalence of sharing tends to disappear as Professor Brilmayer's exposition proceeds.³² To appreciate the dilemma of democratic theory that she has exposed, we should keep her initial perception at hand. It will help to identify some relatively minor preliminary issues.

Professor Brilmayer says that democratic theory typically divides the world into two groups: those affected by a decision who presumptively have the right to vote, and "those who need not be allowed to vote because their interests will not be affected."³³ She correctly notes that this ignores "individuals who will be affected but are not allowed to vote," a fact which "might" give rise to the negative implication that democratic theory has no "standards for evaluating the fairness of the relationship between legislators and affected nonvoters."³⁴ That negative implication need not be drawn. It arises only because Professor Brilmayer assumes that those who are actually nonvoters are properly so. Her first formulation was correct: Those who are affected have a presumptive right to vote, and when legislators affect nonvoters they are presumptively violating that right.³⁵

The issue then becomes: When is that presumption overcome so that legislators can affect nonvoters without violating the right to vote? Professor Brilmayer offers us one testing case—the visiting nonresident, and I have suggested another—the people of El Sal-

30. Brilmayer, *supra* note 1, at 393.

31. Professor Brilmayer notes that "[i]nternational relations have some similar structural problems." Brilmayer, *supra* note 1, at 391 n.7.

32. See, e.g., *id.* at 409 ("refusing to share with outsiders *the benefits*" of local policy) (emphasis supplied).

33. *Id.* at 398.

34. *Id.*

35. This point is developed in a slightly different way in M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW, ch. 2 (forthcoming 1988) [hereinafter RED, WHITE AND BLUE].

vador. We can begin with Professor Brilmayer's observation that when she travels to Florida to give a paper, she is expected to obey Florida's laws even though she did not share in their creation and she does not expect to be allowed to vote in any election that occurs during her visit. I defer discussion of the question of voting to devote attention here to the nonresident visitor's obligation to obey the law. Process theorists have some catch phrases that capture the essence of the explanation for that duty—that is, the reason why the presumption is overcome as to nonresident visitors. The catch phrases are “average reciprocity of advantage”³⁶ and “virtual representation.”³⁷ The underlying idea is simple: At the moment the state's general laws are enacted (without the nonresident's participation), there is no reason to believe that the interests of residents and nonresidents conflict.³⁸

The general criterion developed by process theorists from this sort of example has two elements. The presumption in favor of participation and the right to vote can be overcome when there appears to be no conflict of interest between insiders and outsiders. In the absence of such a conflict we have no reason to think that the preferences of insiders and outsiders are distributed differently in ways that are normatively troubling. Thus, the policy outcome will reflect the interests of everyone affected, even nonresidents who enter the jurisdiction at a later date. Second, the presumption in favor of participation is *not* overcome when there does appear to be a conflict of interest between insiders and outsiders, because then we do not believe that the policy outcome will reflect the interests of everyone affected.

The El Salvador example, in which citizens of that nation “share” our foreign policy, suggests that it will be no easy task to identify when conflicts of interest occur. The difficulty of that task may ultimately defeat the process theorists' efforts to use their approach as the basis for a theory of judicial review.³⁹ The conflict of interest approach does seem to make some headway in determining the relationship between being affected by a policy and prop-

36. This phrase usually arises in discussions of the takings clause.

37. See, e.g., ELY, *DEMOCRACY AND DISTRUST* 82-88 (1980); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1161-63 (1986).

38. A conflict of interest does arise at the moment the nonresident wants to violate the law. Because an identical conflict arises when some resident wants to violate the law, however, there is still no conflict of interest between residents and nonresidents as such.

39. I so argue in RED, WHITE AND BLUE, *supra* note 35.

erly being denied the right to participate in the making of that policy.

Perhaps some additional ground may be gained by returning to the supremacy clause. Democratic theory might support a presumption in favor of the more inclusive jurisdiction—the nation rather than the state. The reason is that the more inclusive jurisdiction avoids the problems created by the possibility that the less inclusive jurisdictions will ignore the interests of affected outsiders because the more inclusive jurisdiction has fewer outsiders to affect. Nor does a presumption in favor of the more inclusive jurisdiction repudiate all of the values promoted by the existence of less inclusive ones. Professor Brilmayer emphasizes the value of diversity.⁴⁰ Yet, to the extent that diversity as such is valuable, the more inclusive jurisdiction can allow as much diversity as its members find valuable. Here the relevant doctrine is the law of congressional consent to discriminatory state legislation. Under that law, Congress—the representative of all the people—can authorize states to enact legislation that discriminates against nonresidents.⁴¹ In doing so, Congress can preserve diversity.

Perhaps, though, diversity as such is not terribly valuable. It may be nice to live in a society in which Maine differs from Texas to the degree that it does, but that fact does not really seem to get at what matters here. Professor Brilmayer's concern is not with diversity as such, because she notes that she might prefer that another country be different *because* it does not reflect her own tastes, "even [her] own taste to experience something diverse."⁴² That is, it is not sufficient that the more inclusive jurisdiction create or tolerate diversity for its own reasons; we want the diversity to arise organically from the "genuine expression of another person's tastes and values."⁴³

We now can return to the fundamental problem of democratic theory, which I will present in the context of the right to vote. Voting has two faces. Process theories stress that voting is the mechanism by which an already constituted political community chooses the course it wishes to pursue. As this formulation suggests, process theories as such cannot produce much insight into the prior

40. Brilmayer, *supra* note 1, at 400.

41. This power is subject to constitutional constraints independent of federalism, such as the equal protection and privileges and immunities clauses. See CONSTITUTIONAL LAW, *supra* note 10, at 326-37.

42. Brilmayer, *supra* note 1, at 400.

43. *Id.*

question of who constitutes the political community.⁴⁴ We might augment process theories by drawing on textual analysis, as Professor Brilmayer suggests.⁴⁵ Thus, the three-fifths clause⁴⁶ can be read as defining the political community of 1789 to exclude blacks; "within its jurisdiction," as used in the equal protection clause,⁴⁷ may limit the state's duty to nonresidents; and the preamble's reference to "We the People of the United States,"⁴⁸ might resolve the question posed by my El Salvador example. The point to stress here, though, is that these definitions of the political community come from sources outside process theories.

We can now see why my earlier invocation of the supremacy clause simply solved the problem by stipulation. A federal system contains two competing political communities, the state(s) and the nation. Professor Brilmayer is interested in defining the proper scope of those competing communities. Stipulating that the supremacy clause means that the national community prevails over the local one does not resolve the normative question. Such a stipulation is analogous to resolving the issue by reference to textual concerns. We need normative reasons grounded in democratic theory to accept the supremacy clause stipulation, just as we do with textual concerns.

We might begin to think about how to develop such justifications by considering the second face of voting. The most hard-edged process theory—public choice theory—explains why votes should be aggregated according to majority rule. But it notoriously fails to explain why any rational person would vote in the first place, given that voting is costly in terms of forgone opportunities and that each voter's marginal contribution to the outcome is close to zero.⁴⁹ Once we think about real people in real communities, it is not hard to understand why they—or some of them—vote. Voting is not only a way by which community constitutes itself; it is a way for citizens to affiliate themselves with their co-citizens. Indeed,

44. It might be suggested that process theories can at least establish that, insofar as a right to vote is granted to people within a previously defined community, their votes have to be counted. One might counter that to the extent that the votes are not counted, the people discriminated against are not in fact members of the predefined political community.

45. The textual analysis is implicit in Professor Brilmayer's discussion of equal protection. See Brilmayer, *supra* note 1, at 413-15.

46. U.S. CONST. art. I, § 2, cl. 3.

47. U.S. CONST. amend. XIV, § 1.

48. U.S. CONST. preamble.

49. See generally Farber and Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 893-94 (1987).

the very formality and instrumental pointlessness of the act of voting makes it a better way of manifesting affiliation than the tacit consent on which Lockean consent theory places such weight.⁵⁰

The second face of voting explains why nonresidents cannot vote no matter how much they are affected by a community's selection of authoritative values. As the theologian Stanley Hauerwas puts it, "the state" is the name we give to those charged with upholding the patterns of cooperation achieved by our society to preserve our particular shared goods." And it is the *particularity* that matters here—again in Hauerwas' words, "that history that makes a people a people."⁵¹ Nonresidents, who have not shared in the particular history that constitutes a community, simply are not members, and so cannot engage in the acts of affiliation and voting which contribute to the ongoing reconstitution of the community.⁵²

Yet the preceding argument moves too quickly. It fails to take account of several aspects of the process by which communities are constituted. First, outsiders do contribute to the construction of the insiders' community. The insiders are who they are, and are able to conceive of themselves as a distinctive community, at least in part because they see themselves in opposition to the outsiders. Without outsiders, insiders could not be insiders; without nonresidents, the concept of residency is empty.⁵³ To the extent that a normative conclusion about voting and democracy is sought to be drawn from the ontological fact of the particular community, outsiders (who necessarily make such contributions) have as great a claim as insiders.

In addition, both Professor Brilmayer's presentation and my comments so far have made particularity something like an unalloyed good. It is, in her terms, the "genuine expression of [a group's] tastes and values"⁵⁴—and who could quarrel with that? There is an underside to particularity, though, that should be noted. To the degree that a community affirms its particularity, it denies the claims of other communities to their particularities

50. See generally P. SCHUCK AND R. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985) (favoring consent as a basis of citizenship).

51. S. HAUERWAS, *AGAINST THE NATIONS: WAR AND SURVIVAL IN A LIBERAL SOCIETY* 188 (1985).

52. See Brilmayer, *supra* note 1, at 408-09.

53. There are lots of fancy citations that could support this proposition. One might be to Hegel's analysis of the mutual dependency of masters and slaves. Another might be to French feminist theorists of *difference*. My choice is J.P. SARTRE, *ANTI-SEMITES AND JEW* (Schoken ed. 1948).

54. Brilmayer, *supra* note 1, at 400.

when the two come into contact. That is what produces the dilemmas of federalism. Diversity is attractive, but its companion is prejudice or knowing disregard of other communities. It may not be accidental that one of Professor Brilmayer's examples counterposes New Haven to Paris.⁵⁵ One might characterize that as counterposing the metropolis to the provinces. The idea that the particularity of both the metropolis and the provinces can be preserved makes complete sense when held by a resident of the metropolis; things might look different from the provinces.⁵⁶ The ultimate goal, and the underlying problem, is that we must somehow reconcile the particularity of one community with the demands by other communities for fair treatment.

Our evaluation of the claims of particularity must, as my use of the terms "metropolis" and "provinces" suggests, itself be particularized to take account of differences in the power of specific communities. When we do so in connection with federalism in the United States, one fact demands our attention. Communities, I have argued, are constituted in part by the act of voting. Voter participation in the United States has been declining for years.⁵⁷ The implication is that the communities that "genuinely express" their members' values are less and less genuine. We may not have reached the point of complete homogenization that Professor Brilmayer decries. Maine is indeed different—to a degree—from Texas. I suspect, however, that if one were magically transported on successive days to Bangor, Dallas, and San Salvador, one would find it rather easier to figure out where one was on the last day than on the day before.⁵⁸ This may account for the attraction of process theories; they make sense *because* they provide a normative justification for the social homogenization that we have already experienced. Professor Brilmayer apparently regrets that homogenization, as—to a degree—do I. Given the way things are, her call for developing a richer democratic theory is simultaneously a call for a different kind of society.

55. *Id.*

56. Again, consider the problem of the particularity of the United States when seen from El Salvador.

57. See, e.g., Abramson & Aldrich, *The Decline of Electoral Participation in America*, 76 AM. POL. SCI. REV. 502 (1982).

58. This assumes that one puts aside forces of nature such as climate and physical environment. I take it to be obvious that one would know that on Monday and Tuesday one was in the United States and that on Wednesday one was somewhere else. What is at stake, though, is being able to distinguish between Bangor and Dallas.

At this point it may be appropriate to enter a word of caution by directing attention again to the problem of fairness between communities. Particularity is nice, to some extent. The achievement of the Enlightenment was, in contrast, to insist on the value of universalism. It is one thing to describe this achievement as celebrating "some bland abstraction of supposed homogeneous human interests";⁵⁹ the pejorative tone may appropriately signal that the Enlightenment's heirs have gone too far. It is entirely another thing to deny the existence of universal human values.

In the end, that may be the deepest problem for democratic theory, for which federalism is only a metaphor. In a federal system people are citizens of two (or more) communities; each community may pursue policies arrived at by democratic processes internal to it; those policies may conflict. The problem this poses for democratic theory is obvious: Which of the competing democratic communities would prevail? Now we can eliminate the metaphor. In any society people are individual human beings who embody their particular, historically shaped values and the universal values of the Enlightenment tradition, and they are also members of historically constituted communities that in an interdependent and post-Enlightenment world must relate to each other in mutually respectful ways as each of them continually reconstitutes itself. Further, and moving even deeper into uncharted fields, there is little reason to think that those historically constituted communities have any necessary ties to geography. Those who have thought about community have identified a community of intellectuals, a community of proletarians, a community of Jews and one of Moslems, and the like. I suspect that we will get rather little insight on the problems raised by individuality and communities of this sort by drawing on such narrow subjects as constitutional law and conflict of laws. As Professor Brilmayer says, democratic theory has barely scratched the surface of the problems this poses.

I happen to believe that there are no answers, and that the problems simply describe the contradictions of the human condition.⁶⁰ It is the merit of Professor Brilmayer's essay that it opens these issues to view.

59. Brilmayer, *supra* note 1, at 409.

60. Professor Brilmayer's "new model" of concentric circles, *id.* at 413, does not seem to me helpful. It is largely descriptive and, so far as I can tell, contains no argument for placing one relationship in the center and others in rings around the center. I can readily imagine justifications for essentially all of the variants of the model, each with a different relationship at the core and different orderings of the elements in the rings.

