SHAPING AND SHARING IN DEMOCRATIC THEORY: TOWARDS A POLITICAL PHILOSOPHY OF INTERSTATE EQUALITY

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Interstate cases pose most dramatically the question of the legitimacy of a state’s exercise of coercive power. Professor Brilmayer analyzes two existing theories of interstate relations, rejects the notion that democratic theory requires that interstate equality need be an all-or-nothing issue, and suggests that the basis for a state’s coercive power towards outsiders should be sharing in the burdens and benefits of state law.

HOW SHOULD we treat noncitizens? To what rights are they entitled? As a matter of constitutional law, there is a commitment to equality—more or less. Several clauses of the Constitution seem to mandate equal treatment;¹ yet there are numerous situations in which discriminatory treatment has been upheld.² And there are numerous theories about when and why discrimination

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1. These include the equal protection clause, the privileges and immunities clause, and the commerce clause.

ought to be permitted. In fact, the subject of interstate equality seems to be enjoying something of a revival of interest.

We would make more progress on these issues if we could clarify some basic issues of democratic theory. Some of the existing paradigms seem to assume that interstate equality is an all-or-nothing issue. Either democratic theory requires that outsiders should be treated the same as insiders in all important respects, or it requires that they should be treated differently from outsiders in all important respects. They assume, moreover, that those who share the benefits and burdens of state law should necessarily be the same set of persons who have a role in shaping what those benefits and burdens ought to be. This does, indeed, resonate with the reasoning apparently underlying democratic processes: Those who are affected by a decision should be those who participate in making it. But such appealing reasoning is inapposite to nonresidents. They are disenfranchised, and they are supposed to be so. The shaping of the laws is in this way disengaged from the sharing of its consequences.

We will see below how the theory of interstate relations depends upon such issues. While it is important to clarify the philosophical justification for subjecting an outsider to the state's coercive power, the answer does not lie in democratic theory as it is usually


5. Not all of the articles cited in notes 3 and 4 commit the errors described below. My criticisms extend primarily to the articles cited above that rely extensively on process-based approaches, and to those adopting a “state interest” approach.

6. Cf. Dahl, Procedural Democracy, in Philosophy, Politics and Society 97 (5th series 1979). Dahl states that a decision rule should take equally into account the expressed preference of each member, id. at 101, with members being those persons to whom the rules apply, id. at 97. Dahl acknowledges that visitors need not be allowed to vote, id. at 122, but claims that the reason is that they are unqualified because of unfamiliarity and because once visitors leave they will no longer be affected by the laws, id. at 123 n.20. This analysis is really inadequate because both arguments sometimes also apply to citizens. Citizens are of course sometimes ignorant of the issues. Furthermore, they often vote on issues that will have little bearing on their lives (e.g., voting for school board members when one has no children). It is therefore unclear that these arguments support a black-and-white distinction between members and visitors, for the latter may, of course, be present for a long time, or may own property in the state that is subject indefinitely to local law.
understood. Democratic theory is misleading in its focus upon participation, or shaping, as the *sine qua non* of legitimacy. For outsiders, sharing is a rationale unto itself.

### I. Existing Approaches

#### A. Political Theory and Interstate Relations

Perhaps we should start by asking what democratic theory has to do with interstate relations. Interstate cases pose most dramatically the question of the legitimacy of a state’s exercise of coercive power. This is because the state’s power is at its most legitimate when it is dealing with its own citizens, acting within its own territory, and affecting only persons and property that are also local. This is not to say that such questions of the legitimacy of local power are philosophically trivial; an anarchist, for example, might deny that state coercion is ever justified and a radical might deny that existing governments may legitimately coerce. The point is merely that the further one moves from regulation of local persons and occurrences, the more problematic the justification becomes.

In short, the law of interstate relations can be recast as a question of political theory. Whenever a state attempts to exercise either adjudicative or legislative power over a controversy—that is, to assert personal jurisdiction or to apply its own law—there is an issue of its right to regulate that occurrence. While even purely local cases have embedded within them questions of political theory such as whether the government is violating protected rights, an outsider can make all of these substantive challenges to a government decision, and then some. The outsider can claim that even if the government might treat its own citizens in such a way, it has no comparable power over noncitizens.

A political justification gives a government the right to act in some circumstances but not in others. To give one example, if we were to justify the government’s right to coerce in terms of electoral participation (a typical assumption in democratic theory) then the right to coerce would extend only to those who have the right to vote. We will see in a few moments that this is a drastic oversimplification, but it illustrates the general point. Whatever the conditions for legitimate exercise of power, the exercise of power is legitimate only so long as those conditions are fulfilled. This the-

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7. International relations have some similar structural problems, but are different in the relative lack of constitutional protection for travel, trade, and immigration.
ory, which I have developed at length elsewhere, is a "vertical" approach to interstate relations.\(^8\) It analyzes problems of interstate or international affairs in terms of the legitimacy of the vertical coercive link between the individual and the state.

Seen from this perspective, the law of interstate relations is on the cutting edge of democratic theory, more controversial in practice than political theory usually turns out to be. John Rawls, in an early article on political obligation, can afford to start with the assumption that most of us believe that there is an obligation to obey the law.\(^9\) Most challenges to the existence of political obligation are primarily theoretical; they result from the fact that it is extremely difficult to explain the source of such an obligation. However, the belief in political obligation persists, even if on shaky theoretical grounds. In this sense, political theory is like epistemology. We may be very uncertain about the theoretical basis for knowledge, but still be convinced as a practical matter that the physical objects whose existence we cannot prove do indeed exist. Our factual beliefs about the real world are like our normative belief in political obligations: hard to demonstrate theoretically, but nonetheless intuitively convincing.

When we turn to the law of interstate relations, the theoretical uncertainty about the explanation of political obligation has practical ramifications. There seems to be a lot more up for grabs in determining what the basis for political obligation might be. Every interstate case presents a potential issue of whether the state has a right to tell some particular individual what to do. Is it an adequate basis for coercion that an individual was present in the state, that the individual engaged in actions with foreseeable consequences within the state, that the injured party is a forum resident? These questions cannot be answered without some theory about the proper conditions for the exercise of government power. Practical issues turn on one's understanding of the theoretical foundations.

The answers to such problems are unsettled; the courts are actively open to new analyses of the justification for interstate power. The precise limits of political obligations in the interstate context are questionable due to the controversial nature of the theoretical

\(^8\) L. Brilmayer, Jurisdictional Boundaries as the Limits of Political Theories (unpublished manuscript on file, Florida State University Law Review).

\(^9\) Rawls, Legal Obligation and the Duty of Fair Play, in LAW AND PHILOSOPHY 3 (S. Hook ed. 1964) ("I shall assume, as requiring no argument, that there is, at least in a society such as ours, a moral obligation to obey the law . . . .")
rationales offered to justify these obligations. In this sense, interstate relations is a fertile field for applied political philosophy. The subject is not only philosophically interesting, it also presents a rare opportunity to put basic philosophical insights to good practical use.

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? Like other problems of interstate relations, the normative answer to the question depends upon the proper basis for exercising coercive power over nonresidents in the first place. The theoretical foundation for the power to coerce influences the contours of what a state is entitled to do.

This little corner of the general problem of interstate relations will be shown to highlight some interesting points about democratic theory even in the purely local context. The appealing assumption that coercion is justified by ability to participate in the political process is untrue, or at least incomplete. On the road to a more complete description, we will see two erroneous models of the problem of interstate discrimination. Although they are diametric opposites of one another, they both make a fundamental error of equating the shaping of official values—that is, participation in the process of norm formation—with the sharing of official values—that is, subjection to the benefits and burdens that legal norms impose.

B. Two Models of Interstate Relations

There are two orthodoxies in the law of interstate discrimination. One of these is the “process-based” reasoning employed by footnote four in United States v. Carolene Products Co.\(^\text{10}\) The other is the reasoning employed by the modern choice of law method known as governmental interest analysis. The Carolene Products reasoning is undoubtedly more familiar to those outside the precise academic specialty of interstate relations. Indeed, it has grown beyond the confines of the precedent itself, spawning a whole literature and a distinctive school of thought. The analysis of state interests that pervades modern choice of law theory should be as widely understood, however, because it embodies assumptions of equally wide-ranging application.

\(^{10}\) 304 U.S. 144, 152-53 n.4 (1938).
Carolene Products and its academic expositors analyze discrimination in terms of exclusion from the political processes. Its reasoning suggested that ordinarily, great deference would be due to the products of democratic decisionmaking. The deference would be inappropriate, however, when the classification in question worked to the disadvantage of a group that had been excluded from the processes of democratic decisionmaking. In such cases, more than a rational basis for the challenged norm is necessary; the challenged norm must serve a more crucial governmental interest, and must do so without substantial over- or underbreadth. Discrimination against those excluded from the political processes, in other words, was ordinarily suspect.

This reasoning has been applied in the interstate relations field to discrimination against noncitizens. Noncitizens are a clear example of individuals who are excluded from political processes. Therefore, so the reasoning goes, discrimination against them is suspect. Academic enthusiasts of Carolene Products add that invalidating legislation on such grounds does not undercut democratic decisionmaking; it serves as a remedy for the process defect of exclusion from democratic decisionmaking procedures.

Our other paradigm of democracy in the interstate context, namely the reasoning employed in modern choice of law analysis, leads in exactly the opposite direction. On the surface, this analysis of governmental interests seems to deal with a different problem than the Carolene Products reasoning. The latter deals with a state law that differentiates between insiders and outsiders; the former deals with a state law that may or may not apply. But since the modern choice of law reasoning makes this determination of applicability in terms of whether an insider or an outsider would benefit, the issue is similar to that in Carolene Products.

In an interstate case, so the argument goes, the way to decide whether the forum's law applies is by analyzing the policies underlying the particular law. This is supposed to be done just as it would be done in a domestic case: through the ordinary processes of statutory construction and interpretation. Assume, for instance, that the forum has a strict liability approach to torts, and the other state uses negligence. Whether the strict liability rule should

11. See, e.g., Ely, supra note 3, at 83; Eule, supra note 3; Tushnet, supra note 3; Simpson, supra note 3, at 384; Austin v. New Hampshire, 420 U.S. 656, 662 (1975).
be applied depends on whether applying it would further forum policies.

It would further forum policies to apply the law, the argument continues, only if the person who would benefit from the application of the rule is a forum domiciliary. The rule was adopted, after all, to benefit locals. The forum's interests would not be advanced by applying it to the advantage of an outsider. Moreover, if the plaintiff is a local, so that the state has an interest in applying its law, the state should do so even if this conflicted with the interest of some other state (such as the interest of the other state in having its defendant-favoring rule applied to a local defendant).

This strikes some Carolene Products enthusiasts as inherently suspect. The result, after all, is discrimination against outsiders. Insiders can get the advantage of forum law, but outsiders do not have such an opportunity. Note, however, that the state interest reasoning is deliberately grounded in a species of democratic theory. The basis for the reasoning is the forum state legislature's obligation to further the interests of local citizens. The individual legislator is acting as a fiduciary, to advance the interests of those to whom he or she is politically responsible. More specifically, if there is a conflict of interest between two states, then under this theory the forum state is supposed to advance the interest of its own legislature. Again, the reason is one of democratic theory: courts obey the injunctions of a democratically elected legislature.

The conflict with the Carolene Products reasoning could not be more pronounced. The two lines of reasoning draw exactly the opposite conclusion from the same fact, namely political exclusion. The reasoning in Carolene Products suggests that the extension of the benefits of forum law is a proper remedy for political exclusion. Those who do not shape the law are entitled to share in its benefits as compensation. The state interest analysts suggest the opposite, namely that the restriction of the benefits of forum law is the proper response to political exclusion. Even when the legislature did not explicitly say so, its statutes should be interpreted to deny benefits to those who do not participate in the political processes. At stake is a very general question of democratic theory. How does the legislature’s duty to its constituents compare to its responsibil-

15. Currie, supra note 13, at 182-83.
ities to outsiders? Are there any obligations toward outsiders at all?

The puzzle is not merely that the two lines of reasoning point in different directions. It is not unusual for principles to conflict with one another, requiring that they be balanced or accommodated. Here, however, there is more than a coincidental conflict. They draw opposite conclusions from the existence of political exclusion. Moreover, the opposing lines of reasoning both claim to be based upon principles of democratic decisionmaking. Both are founded upon the responsibilities of legislators in a democratic form of government. One says, however, that legislators have special obligations not to discriminate against those who do not vote, while the other concludes that there are special obligations to discriminate.

In another sense, however, the two lines of reasoning are oddly similar. Both find it crucially relevant that some group does not have a voice in the political process. Both analyze the right to share in the values that are created by the official decisionmaking processes in terms of the ability to shape those processes. While one links shaping those values with sharing in the benefits, and the other links exclusion from shaping to the sharing of the benefits, both see shaping and sharing as intimately linked.

This is where these two orthodoxies are both mistaken. Not only do they conflict with one another, they are both wrong, although for different reasons. Shaping and sharing are independent approaches to political justification; one does not turn on the other.

C. The Problem with State Interests

Starting with the state interest analysis, what intuitively seems to be the matter is that it is excessively self-interested and parochial. The contrast with the Carolene Products reasoning is striking. The Carolene Products reasoning is concerned with what ought to be, not just with what some legislature actually wants. In fact, given the prejudices and self-interests of majorities and their representatives, the Carolene Products reasoning treats as potentially suspect what a legislature actually wants. The interest analysis, in contrast, treats what furthers the interests of the forum citizens and their legislature as the primary relevant consideration.

Under the interest analysis theory, the primary vice to be avoided is a state’s meddling in affairs in which it has no interest. Selfishness, under this view, is not a vice; it is a virtue, as long as it is enlightened selfishness, reflecting the state’s actual interests and not just some irrational preference about how other states manage
their internal affairs. One might view things from exactly the opposite perspective, however, believing that the primary vice to be avoided is the ruthless pursuit of one’s own self interests. States ordinarily will look after their own interests; the law need not monitor whether they are doing so effectively. Instead, the law should be concerned with preventing the assertion of state interests in situations where a state has no legitimate right to have things its way, regardless of how rational its preferences are. The goal of law is to place limits on self-interests, not to limit persons and states to self-aggrandizement.

This latter perspective focuses not on state interests, but on state and individual rights. The relevant question is whether the state has a right to impose its will upon a given situation. This fits with the view expressed earlier that interstate relations are an aspect of applied political theory. The issue must always be: Does the state’s justification for acting coercively extend to the particular interstate problem now before the court? Does the state have a right to assert its will in this case? This perspective focuses self-consciously upon legitimacy.

However, governmental interest analysis also claims to be consistent with democratic theory. How is it that both theories claim to encapsulate the principles of fair governance? If both think in terms of fairness, why are their outcomes so different? The answer lies in the question, fairness to whom? When the interest analysts talk of democratic theory, they are thinking of responsiveness to the inhabitants of the forum. It is the legislature’s responsibility to these constituents that supposedly gives rise to an obligation to further state interests single-mindedly. This is democratic theory with a vengeance. The legislature has an overwhelming responsibility to those who elected it. Totally absent is any sense that the legislature might have a responsibility to other people who are affected by its decisions.

It is precisely this absence that is the interest analysts’ crucial failing. The method amounts to 100% democracy, 50% of the time. There is total fidelity to the wishes of those who elected the legislature, but complete insensitivity to the needs and rights of the entire rest of the world. This seems a caricature of what the democratic process ought to be about. It seems that democracy ought to involve sensitivity to all individuals who are affected by the decision, not merely to all those who happened to vote in some particular elections.
This failure to address the issue of responsibilities to nonvoters is characteristic of democratic theory generally. Typically, democratic theory separates the world into two groups, those who are affected by a decision and therefore presumptively ought to be allowed to vote, and those who need not be allowed to vote because their interests will not be affected. This dichotomy, however, overlooks the existence of individuals who will be affected but are not allowed to vote, such as visiting nonresidents. By focusing almost exclusively on the relationship between voters and rulers, democratic theory has failed to develop standards for evaluating the fairness of the relationship between legislators and affected nonvoters. A negative implication might then seem to follow that democratic theory imposes no such standards.

Given that our Constitution apparently establishes a democratic society, it might then be concluded that a legislator owes responsibility only to those who elected him or her. It could be argued that responsibilities towards outsiders do not exist in a democracy, because there is no electoral relationship. But the logic of this position is clearly distorted. 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. I am granted a right to vote in order to ensure that my rights and interests are respected, not granted rights and interests because I am a person who has a vote. The question then remains, what responsibilities are owed to those who do not vote? Unless theoretical legitimacy can be shown, the state has no right to assert its interests. We will return to this question of what fairness requires at a later point.

D. The Problem with Process-based Analysis

The state interest theory oversimplifies because it sees democratic theory as concerned exclusively with the responsibilities of a legislator to his or her constituents. It disregards the broader aspiration that decisionmakers be responsible to all those that their decisions affect. The Carolene Products style of reasoning also oversimplifies, however. While it focuses on the responsibilities of a legislator to those with no voice in the political process, it mistakes the nature of those responsibilities.

Recall how the Carolene Products reasoning, as developed by the academic commentators, is structured. Ordinarily, deference is given to the workings of the democratic processes. However, in certain circumstances the process itself fails to live up to its ideals.
There is something akin to the political version of the economists' "market imperfection," which arises when some group is excluded from the political process. The solution is to strictly scrutinize (and usually to invalidate) those laws which discriminate against such excluded groups, namely the "discrete and insular minorities." They were not the result of the proper functioning of the democratic political processes, anyway.

The problem with this line of reasoning is that it is not clear in what sense exclusion of outsiders from the political processes is a "process defect," which must be remedied by invalidation of discriminatory laws. Ordinarily one would not expect to be allowed to vote in states or nations where one was not a resident. If I travel to Florida to give a paper, I do not expect to be able to vote, even if there is an election during the time that I am there. The same goes a fortiori if no election is held while I am there; yet I am expected to obey Florida's laws, and probably will.

My criticism of governmental interest analysis seemed at first to play right into the hands of the Carolene Products reasoning. It suggested that legislatures had responsibilities to those who did not vote in the political process. It suggested that there was a problem in conceiving democratic theory solely in terms of the relationship between the voters and the elected representatives. Even those who did not get to vote were entitled to some sort of solicitude, simply because those who do not vote may nonetheless be affected by a law and this effect must be justified in democratic terms because it is coercive.

But this argument does not give rise to the Carolene Products reasoning. It does not necessarily follow that the exclusion from the political processes is itself unjust, because it may be fair to exclude certain people from electoral processes. Indeed, it is not difficult to come up with plausible reasons why outsiders might not be entitled to vote, reasons that should be convincing even to the outsider that is thereby excluded. The purpose of democratic decisionmaking processes is to give individuals control over the political decisions that affect their lives. A system that divides the world into insiders and outsiders often actually increases the amount of control that individuals have.

17. Brilmayer, Carolene, Conflicts, and the Fate of the "Inside-Outsider," 134 U. Pa. L. Rev. 1291 (1986). The same point has been made in Regan, supra note 4, at 1164.
The reason is that dividing the world into smaller units often protects diversity. If everyone were entitled to vote in Florida elections, then this would give everyone a say in Florida decision processes. However, to be consistent one would also have to allow the citizens of Florida to vote in all the other elections as well. Not only would I have a right to vote in Florida elections, Floridians would have a right to vote in Connecticut elections (and each of us might have the right to vote in the elections of San Jose, Paris, and any other place making laws that might affect us). No one would be excluded from any decision process that might ultimately affect their interests; the same group of people would be voting everywhere.

The result would be homogenization of the political process. While my influence over the decision processes of San Jose and Pakistan would be increased, my influence over the decision processes of Connecticut would be diluted. In order to make it more likely that there be some political unit, somewhere, that more closely reflects my preferences, we would have to divide up the world into smaller political units.

Division makes possible diversification, and therefore can promote freedom of choice. While division of this sort necessarily means exclusion, from a broader perspective that is not necessarily so bad. It is not only to my advantage to have greater control over the decision processes in New Haven, it may actually be to my advantage to have no control over the decision processes in Paris. Paris is not like Disneyland, where somebody artificially creates a deliberately different environment for me to experience. If one of the reasons that I might wish to travel to another country is to experience cultural diversity, then I might prefer that that country not reflect my own tastes, even my own taste to experience something diverse. The other country is interesting precisely because it is a genuine expression of other persons' tastes and values. As long as I have my own state to return to, I can have the best of both worlds: a place where my own preferences are reflected, and other places in which they are not.

While political exclusion is permissible in some circumstances, however, it does not necessarily follow that the electoral processes

19. I don't claim that exclusion will always increase freedom of choice, because where one group monopolizes the desirable territory it may deny others the right to move in to enjoy the diverse benefits. The claim is a weaker one, namely that limiting political participation to insiders is not necessarily inconsistent with promoting freedom of choice in all cases.
need not recognize any rights of excluded persons. Both Carolene Products and interest analysis supporters see things in an all-or-nothing light. The Carolene Products process-based reasoning says that it was wrongful to exclude you, that this exclusion was a process defect, and that therefore you have rights. Interest analysis says that you were not entitled to be included, and therefore you have no rights. The Carolene Products reasoning is “all,” interest analysis is “nothing.” Both divide the world into only two camps: those who ought to be allowed to vote and therefore have a full set of rights, and those who seem to have no claim to legislative consideration at all.

Instead, what we need is a halfway point. It is certainly not the case that everyone is entitled to vote in any electoral process that has consequences for his or her life. We ordinarily do not expect to vote except in our homestate’s elections, although the actions of other states have important consequences for us. On the other hand, the fact that we do not vote, and do not think that we have a right to vote, does not mean that we have no rights at all. Political powerlessness is not a justification for oppression.

The problem with both of these approaches is that they conflate two different types of political rights: the right to shape political values, and the right to share in the values that are thereby created. Shaping has to do with influencing the political processes. Elected decisionmakers have to make choices between efficiency and redistribution, between environmental quality and industrial growth, and between money for day care centers and money for defense. Most political issues have at least something to be said for both sides, and making a decision often involves choosing between competing values. The political processes are designed to give citizens a voice, a role in shaping the values that rule their legal lives.

Sharing is a different question. Even once the value is chosen, there may still be issues about who should be entitled to receive its benefits and pay the burdens. Which industrial growth should we support? To some degree, this is also a problem of choice amongst substantive values. After all, when we decide to support the automotive or farm industries rather than piano manufacturers, it is because of some value judgment about what kind of industry is valuable to us.

In the interstate context, however, this sort of value choice drops out of the picture. The value choices have already been made domestically, and the question is whether to extend them to comparable out-of-state interests. The decision has been made to com-
pensate victims of non-negligent defective products, but should this include outsiders injured locally, insiders injured while outside the state, or outsiders injured by products manufactured inside the state? This is a problem of how widely to share the benefits and burdens of a legal choice, not of how to shape that choice in the first instance.

My thesis is that insiders to the political process are entitled, presumptively, both to shape the process and to share its results. I say “presumptively” because there are circumstances where the exclusion from the process is arguably justified (minors, convicted felons, those who fail to register to vote on time, etc.) and where a substantive difference in treatment may also be fair (children, again, are an example). Without going into the complicated questions of when this presumption would be defeated, it does seem fair to say that in some general sense everyone is ordinarily entitled to vote, and in this same sense everyone is entitled to equal application of laws of general formulation.

Outsiders, in contrast, are not entitled to shape political choices, but will in many circumstances be entitled to share in the choices that are made. This is less obvious than the hypothesis that insiders are entitled both to shape and to share. To establish this proposition, we need to examine at greater length the process of enacting legislation with interstate consequences.

II. THE LEGISLATIVE PROCESS IN THE INTERSTATE ARENA

Both the Carolene Products academic commentary and the state interest lines of reasoning depend, implicitly, on a vision of what the legislative process is like in interstate problems. Their visions are remarkably the same descriptively, but rather different in the normative conclusions that they draw. Both see the forum legislature as helping itself, whenever possible, to the wealth that out-of-staters possess. The modern choice of law analysts seem to view legislation designed to draw wealth into the state as normatively acceptable—a “balance of payments” theory of choice of law.20 The Carolene Products enthusiasts, to the contrary, see this as the primary evil to be avoided. A richer descriptive analysis of what legislatures actually do, when passing statutes with interstate implications, will indicate which aspects of these two paradigms ought to be rejected and which ought to be preserved.

20. I owe this metaphor to Maurice Rosenberg.
A. Shaping and the Exclusion of Nonresidents

The Carolene Products story of legislation with interstate implications runs as follows.\(^{21}\) Every statute entails both benefits and burdens. The benefits are the goals that the statute is designed to achieve. The burdens are the costs, both monetary and nonmonetary, that must be borne to achieve the goals. The costs of a scheme of taxation are, of course, monetary. The costs of lowering the speed limit in order to save lives are both monetary (if the new speed limit adds to transportation costs and increases the price of goods) and nonmonetary (since the new speed limit means a greater expenditure of people's time). When a legislature passes a statute, it is declaring that the benefits anticipated from the statute outweigh its expected costs.

This calculation, so the argument continues, is thrown off when some of the consequences occur outside the state. The legislature is unlikely to care about either the benefits or the costs incurred by outsiders. Outsiders are not part of their constituency. Legislators will receive no credit at the next election for any benefits that are bestowed on outsiders, nor will they be called to task for any burdens. Therefore, legislators take into the calculation only local consequences, whether good or bad. The fact that they unwittingly might bestow benefits on outsiders does not seem objectionable. But the negative externalities are not considered either, and this is the core of the problem. Each state would like to gain the benefits of its proposed statute while externalizing the costs. As Mark Tushnet states the problem:

State regulation increases the price of goods sold outside the state, when, for example, the increased costs of shipping goods through Arizona are passed on to California consumers. But Californians are not represented in the Arizona Legislature. Thus, the local legislature may be unconcerned with the real costs of regulation even as it acknowledges the willingness of its own citizens to bear a portion of the increased costs.\(^{22}\)

\(^{21}\) Prominent proponents of a process view of interstate relations include Tushnet, supra note 3; Ely, supra note 3; and Eule, supra note 3. This description is not so much a restatement of the arguments of any one of these authors as an attempted synthesis of the common idea.

\(^{22}\) Tushnet, supra note 3, at 143.
The role of the Supreme Court (or Congress, under some versions of the story) is to correct the imbalance resulting from the failure of legislatures to take such negative externalities into account. Although the local legislature fails to adjust the cost-benefit analysis of its statutes to reflect negative externalities, the federal government, with its nationwide constituency, reflects no such bias. A new cost-benefit analysis must be made, at the federal level, to determine whether the overall gains are worth the price. Thus, to use Tushnet's example, Arizona might impose highway safety rules because the benefits are all received within the state (fewer accidents, fewer highways fatalities, etc.) and the burdens are distributed outside of the state (higher shipping costs for truckers and higher prices to consumers). When the Supreme Court or Congress evaluates the rule, the situation is rectified, supposedly, by calculating costs on a nationwide basis. "A national viewpoint must be inserted in the process if the real costs are to be fully considered. In a sense, national supervision is designed to guarantee that the external costs of regulation are considered by local legislatures."

There are several serious problems with this analysis. The first point about this rather pessimistic account of interstate legislative activity concerns externalities. One gets the impression on reading such descriptions that Arizona has engaged in some faintly unsavory conduct. While legislators understandably are responding to the demands of their constituents, it is a regrettable capitulation to a dishonorable temptation. If only a legislature could be trusted not to do the easy thing! What escapes notice, however, is that the very reason a legislature is doing this may be to respond to "externalities" that are imposed by other states. For example, reconsider the Arizona safety regulation example. The other states may be perfectly happy with their own low safety regulations precisely because they get inexpensive goods while the bulk of the highway fatalities occur in Arizona.

This point should have been quite clear ever since Ronald Coase drove it home in the law and economics literature. Where the consequences of one person's actions fall on someone else, these are externalities. For example, a factory's soot may ruin wash

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23. Both Tushnet and Eule stress that Congress is an appropriate forum for issues of interstate commerce.
24. Tushnet, supra note 3, at 143.
25. Id.
hanging nearby. But by the same token, if the factory may not pollute because of the neighbor's wash, then the wash is imposing an externality on the industry. The identical point can be made in the interstate context. If Arizona is better off with the safety regulation, then to prohibit that legislation allows other states, with their tastes for cheap goods, to impose costs upon Arizona. Either the Arizona preference for highway safety imposes costs on the California market, or the California marketing system imposes costs on the Arizona highways.

There are two implications to this point. The first is merely that externalities, per se, are not the problem. It sometimes seems as though legislators are thought derelict in their responsibilities simply because their actions result in externalities. Simplistic condemnation of externality-imposing statutes helps carry the Carolene Products reasoning along its way because the problem is decision-making without representation. But if one looks closer, the argument must necessarily be different. Putting aside any disapproving accounts of legislatures ignoring externalities, the argument seems rather to be that a legislature might adopt a statute with inefficient externalities, namely ones where the overall benefits do not outweigh the gains. The Supreme Court is not being asked to prevent states from imposing externalities, but only to check to see whether the externalities are efficient. "To invalidate statutes with such [burdensome] effects, a general efficiency criterion must be read into the commerce clause."27

This raises the second point, which should also be familiar to those versed in the law and economics literature: Should efficiency be the criterion? What happens, for instance, if it turns out that the nationwide costs of the safety regulation are higher than the benefits, and the statute is struck down. Arizona now must endure the highway fatalities in order to facilitate markets in other states; the negative externalities are imposed by other states on Arizona. Perhaps this is efficient, but is it necessarily fair to Arizona? The fact that the rule is efficient does not answer this distributional question. Arizona is the loser in this round of constitutional litigation, and California is the winner. Perhaps we should be somewhat more skeptical towards a result that allows California to eat asparagus cheaply at the expense of Arizona drivers and pedestrians, simply because the savings in the price of asparagus outweigh the toll in local lives.

27. Tushnet, supra note 3, at 143.
It is of course possible to argue that the commerce clause was explicitly designed to adopt a nationwide perspective, that is, to ignore distributional effects. The free trade value it embodies was, under this view, designed to sweep away inefficient state law impediments to interstate commercial activity. Whether this was the goal of the clause, or whether the goal was simply to outlaw discriminatory protectionism, is open to dispute. 28 For it is equally arguable that the clause is satisfied by merely balancing in-state benefits against in-state burdens in order to assess whether the state is indeed pursuing a legitimate goal rather than engaging in hostile discrimination. A showing that the statute promotes a legitimate goal in local terms is arguably all that is required to refute imputations of discriminatory purpose. The point, at any rate, is that this process-based line of reasoning is fraught with more difficulties than its proponents realize. Its innocent reliance upon externalities and inefficiencies mask problems of which law and economics scholars have long been aware.

A final problem with the process-based reasoning about externalities highlights the importance of shaping. The Supreme Court under the process-based view can no longer simply engage in identifying externalities. As we saw, externalities per se are not the problem. Instead, the Court must compare the relative gains and losses nationwide. But how is the Court going to do this? I am not referring merely to the possibility that judges might be inept at making complex legislative findings of empirical fact. While it is true that they may not be capable of estimating gains and losses, that is not my point. More relevant here is the problem of subjective valuation. Lives must be balanced against money and convenience. How much value should be attached to a life or to the convenience of persons averse to installing safety equipment?

Of course, such questions confront every legislature that attempts to ascertain the relative costs and benefits of a proposed safety measure. 29 That is a difficult problem in and of itself, but it is not unique to interstate discrimination issues. Furthermore, it is a problem that has already been confronted by Arizona and California. What is peculiar to the interstate context, however, is the problem that Arizona and California may have different views about the proper value to attach to lives or convenience. In fact,

29. Tushnet, supra note 3, at 144.
their different statutory schemes may reflect exactly such a difference of opinion. It is not unreasonable that some states might emphasize commercial needs, just as in earlier times some legal regimes reflected a felt need to protect commercial interests from burgeoning personal injury claims. Other times, and other states, may have a different view about the sanctity of human life and limb in relation to the saving of a few moments or pennies.

Making a new cost-benefit analysis at the federal level sweeps such differences of opinion under the rug, if not out the door. Whatever the Court's capacity to perform intricate cost-benefit analyses, it surely cannot be expected to factor into the equation the different values that different states assign to particular non-monetary costs and benefits. Under the nationwide cost-benefit theory, the Court ought to be taking the interests of all fifty states into account. Can the Court even pretend to do this while also recognizing the different subjective valuations of each of the fifty states? This is not only too complicated, it is somewhat implausible to think that the Court can adequately adopt the subjective vantage point of even a single state. While in theory an economic approach might accommodate this point, the process theorists have disregarded such potential complications.

The cost-benefit approach seems to assume that states are homogeneous in their preferences. It assumes that the reasons for having different statutes relates to the uneven distribution of costs and benefits. If states all had identical tastes, then it might be the case that states would adopt different legal rules primarily because the consequences are unevenly distributed. If every cost and benefit could be easily and objectively reduced to a dollar equivalent, this scenario might be plausible. But two highway deaths in Arizona may constitute a different sort of burden than two highway deaths in New York. A certain level of pollution may be perceived one way in New Jersey, another way in California, and still another way in Idaho. The process approach treats such differences in taste as immaterial.30

A different vision of the interstate legislative process focuses on legislators as they respond to such regional differences.31 Surely,
Despite the advanced and interdependent nature of our economy, we would not do away with such variation. Maine has a different character than Texas, Nevada emphasizes different values than South Carolina, and San Fransiscans complain bitterly about how their skyline comes more and more to resemble that of New York. Northern and Southern Californians joke about dividing the state in two precisely because it is thought that statehood appropriately reflects value choices, and two such different cultures are incongruously joined into a single state. Interstate legislation ought to, and does, respond to such differences in values. A theory of state government ought to recognize that one reason for having states is precisely in order to give expression to such a diversity of tastes. These differences are disregarded when a simplistic national cost-benefit analysis is performed.

It is therefore at least arguable that when legislation is motivated by such deliberate value formation, the Court should be extremely wary of inquiring too closely. Some legislation that seems to reflect invidious externalization of costs may very well be perfectly innocent expressions of the values that one state holds, despite the difference of opinions of the other forty-nine. It may no more be an effort to rearrange costs and benefits to its own advantage and the detriment of other states than all human actions are necessarily efforts to impose the costs of one’s own conduct on one’s fellow man. States, like persons, express beliefs and preferences in their actions, however imperfectly. One’s actions reflect such expressions of distinctive preferences, as well as attempts to corner more than one’s proper share of a benefit that everyone values equally.

Shaping is important in democratic theory because the democratic process is the way in which subjective value choices are reflected. In domestic as well as interstate legislation, legislatures do not merely tote up the costs and benefits. They assign values to the different costs and benefits, hopefully in ways that respect the wishes of their citizens. It is because of the importance of shaping to democratic theory that it is permissible, indeed desirable, to exclude outsiders from participating. Until they choose to exercise their right to establish local residence, they may be denied full participation in the political processes. In order to preserve a community’s own distinctive character, only community members are entitled to express their political preferences. Candidacy for elected
policymaking positions may, similarly, be reserved for members.\textsuperscript{32} For the same reasons that democratic theory requires responsiveness to the wants or needs of an actual community, as opposed to some bland abstraction of supposed homogeneous human interests, states are entitled to respond in a special way to the values of their own residents. Only insiders are entitled to shape the law.\textsuperscript{33}

The problem with process-based analysis seems to be that it underestimates the importance of shaping in the legislative process. It conceives of legislation as merely the passing around of costs and benefits, without addressing the issue of what costs and benefits the law ought to provide or impose. When shaping is taken into account, it becomes clear not only that outsiders are necessarily excluded, but that their exclusion is entirely appropriate. Legislators have special responsibilities to their own constituents that they do not have to outsiders, including obligations to take into account their constituents' views of what ought to be the special character of the state.

B. Rethinking State Interests: Sharing as a Basis for Coercive Power

If process-based reasoning overlooks the importance of shaping, state interest analysis overlooks the special importance of sharing. While the state interest theory properly acknowledges that there are special responsibilities towards insiders, it erroneously assumes that these consist of limiting the granting of benefits of legislation to insiders. Rather than merely excluding outsiders from shaping those values, it also excludes them from sharing in the values that are created. But refusing to share with outsiders the benefits that the insiders played a special role in creating is not an appropriate way to fulfill the legislative mandate to further the interests of the people of the state.

Why might one assume that the benefits of local law should be denied to nonresidents? As with the Carolene Products reasoning, an intuitively appealing story of the legislative process accounts for


\textsuperscript{33} Conversely, and also contrary to the Carolene Products theory, "virtual representation" as demonstrated by the facial neutrality of a rule is an inadequate response to the exclusion of members from the electoral processes. If I am excluded, then my tastes will not be adequately reflected in the laws my state adopts. The fact that the legislature is willing to allow me to share in the values that are created does not remedy this exclusion. Sharing is not a remedy for improper exclusion from shaping. See generally Brilmayer, Carolene, Conflicts, and the Fate of the "Inside-Outsider," 134 U. PA. L. REV. 1291 (1986).
the mistake. We saw earlier that the Carolene Products reasoning was founded in part upon a simple but erroneous intuition that states should not be able to impose the negative externalities of their decisions on other states. Similarly, the state interest reasoning rests upon a superficial account of lawmaking. The intuition is that since a statute should be interpreted in light of its underlying policies, this requires limiting the benefits of its application to the individuals that motivated its enactment.

The story runs as follows. Every statute should be interpreted in light of its underlying purposes. In the multistate context, this means that the court deciding a choice of law issue should take account of the reasons for the statute's enactment. The legislation was enacted for the benefit of residents. We know this because the motivation for enactment was pressure from residents and the legislature's special sensitivities to the residents' needs. Since helping residents was the reason for the statute, there is no reason to apply it when it would only work to the advantage of nonresidents.

Transplanting this reasoning into a somewhat analogous context makes its illogic clear. Assume that the main support for tort reform comes from the insurance industry. After a great deal of political pressure, the Florida Legislature adopts a tort reform bill with a limitation on damages recoverable for pain and suffering. An important reason is to keep insurance costs within line. After the bill is passed, an accident occurs and suit is brought against a defendant who happens to be uninsured. Does the limitation apply? Unless the statute is by its terms phrased so as to apply only to insured defendants, it seems that it should. It seems unlikely that the plaintiff would be able to win unlimited recovery on the grounds that the damage limitations do not apply to uninsured defendants because it was pressure from insurance companies that gave rise to the statute.

Why not? If passage of the statute was motivated by pressure from the insurance industry, and not by pressure from individual citizens fearful of becoming defendants in lawsuits, then there is some sort of overbreadth in applying the law to a situation other than the one that concerned the rule's proponents. Yet even though the statute may have been passed in order to benefit the insurance industry, it would probably be applied even in cases where there was no benefit to the insurance industry. This is true despite the fact that simple-minded precision—limiting the statute's application so as to benefit only those for whom the statute's
benefits were designed—suggests that it is unnecessary to apply
the law where the defendant is uninsured.

The statute reflects a value choice, not simply a winning coalit­
ion of interests that managed to transfer wealth to themselves
from some other group of citizens. The value takes on a life of its
own; it is not restricted to those who fought to get it adopted. This
is not to say that it will be easy to determine exactly what the
values were that the statute incorporated. The scope of the stat­
ute’s application is bound to be controversial. The point is merely
that one cannot simplistically limit the sharing of the value to the
group of individuals who shaped it. This sort of simple-minded in­
terpretational scheme does not work.

In the interstate setting, likewise, one cannot automatically as­
sume that a statute should be limited in application so as to bene­
fit only those whose interests motivated its enactment. Not only is
this assumption not necessarily true, in the interstate setting there
are countervailing reasons why one should assume the contrary.
Sharing in the benefits is an important cornerstone of the very
right to impose local law in the first place. There are two sources of
support for this assertion, one in the case law, and one in the liter­
ature of political philosophy.

The cases concerning the right of a state to assert adjudicatory
authority are very clear that one of the reasons that a state is enti­
tled to coerce individuals is the benefits that such individuals re­
ceive from the regime of local law. To quote a famous phrase, the
exercise of personal jurisdiction over a nonresident defendant is
justified by the fact that the defendant “purposefully avails itself
of the privilege of conducting activities within the forum State.”
The Supreme Court has recognized that there must be a quid pro
quo. When one receives the advantages of local law, one ought to
bear the burdens also. This reasoning would obviously be unavaila­
ble if states were allowed to restrict the benefits to insiders.

Similarly, political philosophers searching for the theoretical ba­
sis for the legitimacy of state coercion have focused on the benefits
that individuals receive from the state. This quid pro quo argu­

34. See generally Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV.
35. See generally Brilmayer, Jurisdictional Due Process and Political Philosophy, 39 U.
ment has been termed the principle of "fair play," a phrase obviously reminiscent of the Supreme Court's slogan, "fair play and substantial justice." When an individual receives the benefits of a cooperative scheme, he or she ought to help bear the costs. As with the doctrinal argument, this basis for state coercion is absent when the state refuses to extend such benefits to outsiders.

A possible rejoinder to this argument 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. I would concede that the choice of law context is different from the usual discrimination context in an important way. In the usual discrimination context, there are really three norms involved. There is the norm that the forum applies to locals, the norm that the outsider's home state would apply to its locals, and a further norm that the forum uses to apply to outsiders. There are really two local norms, in other words; one for locals and one for outsiders. When these are combined with the foreign state's own rule, the result is a total of three different standards of treatment, rather than two as in the choice of law context. Furthermore, the forum norm for outsiders is typically less advantageous than either of the other two, which is why its application is disadvantageous and therefore discriminatory to the outsider. The question in such circumstances, therefore, is why the state has a right to apply its discriminatory norms. Arguably, however, no such issue arises as to application of the outsider's homestate law, which can legitimately be applied to him or her.

There is an important and interesting reason why this argument will not work. It would be one thing if the forum merely had a choice of law rule that made no reference to benefits. For instance, a choice of law rule might say: Apply the law of the corporation's home state to all matters of internal corporate affairs. Under such a rule, the local law would apply to domestic corporations

37. See Rawls, supra note 9, at 3. See also Hart, Are There Any Natural Rights?, 64 Phil. Rev. 185 (1955); Smith, Is There a Prima Facie Obligation to Obey the Law?, 82 Yale L.J. 950, 954 (1973).
39. Cf. Currie, supra note 13, at 720 (defendant cannot complain about being held to his or her own state's law).
40. This is, indeed, the usual rule. See generally DeMott, Perspectives on Choice of Law for Corporate Internal Affairs, 48 Law & Contemp. Probs. 161 (1985); Kozyris, Corporate Wars and Choice of Law, 1985 Duke L.J. 1.
whether or not it was the more advantageous one. 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.\(^{41}\) The outsider bears all of the burdens of local law, but is not entitled to its application when that would be beneficial.

The result, given this rule of choice, is a composite norm that, from the outsider’s point of view, is worse than either of the local norms. He or she bears the costs of the homestate rule, but is not necessarily entitled to its benefits because when it suits the forum’s purposes the forum will help out the insider by choosing the local rule instead. It is because of this accounting imbalance that the interest reasoning resembles the third and less advantageous rule that is applied to outsiders in the typical discrimination controversy. The problem would not arise if the forum used a domiciliary-oriented rule in a nondiscriminatory fashion, as where local law is applied to local corporations whether it helps them or not.

C. Towards a New Model of Interstate Equality

Unfortunately, these observations do no more than begin the analysis. They set up broad parameters within which legitimate interstate legislation proceeds. Under this view, one’s rights and obligations depend on the nature of one’s relationship to the state, and there are at least three different types of relationships that are relevant for present purposes.

If we visualize these relationships as a set of concentric circles, then full membership is in the center circle. Members have a broad range of obligations to the state, including responsibilities to support the state even when they are not present in the state.\(^{42}\) States may, for instance, apply their laws to members’ activities in other states; they may also tax income that accrued in other states. The obligations of the state to members are far-reaching. Members are entitled to participate in their state’s decisionmaking processes. They are entitled to shape values, not merely to share in the benefits and burdens that others have created. Their obligation to support the state arises out of this right to shape. This intimate relationship is the one typically addressed by democratic theory.

Somewhat further removed from the core are those individuals who are inside the scope of the state’s authority, but are not enti-
tled to participate in the shaping process. A visitor to a state has an obligation to obey state law while in the state, and to pay taxes on income earned in the state if the state wishes to collect them. The state’s authority is specific, and not general. These responsibilities are more limited than the responsibilities of members, whose actions in other states may also be subjected to local scrutiny. But the responsibilities of the state to protect such persons are also more limited.

The state, for example, has a responsibility to share with visitors the benefits of forum law. There is no responsibility, however, to allow visitors to shape those benefits. The visitor is a passive recipient of whatever values the state seeks to create. The reason that the visitor has this right to share in the benefits of state law is precisely that he or she is asked to share in its burdens. Given that visitors are not entitled to participate, the best basis left for requiring obedience is the extension of benefits.

In the outermost ring are those who have basically no connection with the state at all. Such outsiders are entitled to no benefits under state law, but then they are not required to support the state either. The state is not discriminating against such individuals when it refuses to extend benefits to them. In the wording of the equal protection clause, they are not “within [the state’s] jurisdiction.” The clause requires equal protection of the laws only for those people that are somehow within the reach of the state’s power.

Setting the issue up in this way highlights two major problems. First, is the balance of benefits and burdens fair? Within each circle there is a package of responsibilities and entitlements: full participation and full responsibility in the center circle, responsibilities and benefits limited to specific in-state activities in the middle, and neither benefits nor responsibilities of any kind at the periphery. Within each package, is the balance adequate? When an outsider enters the state, how much benefit must be allowed in exchange for the amount of responsibility that the state seeks to impose? Certainly the visitor is not automatically entitled to all of the benefits (welfare, in-state university tuition, health care) simply because he or she was in the state for one day and while there


44. This assumes, of course, that these values do not violate federal substantive norms such as free speech or freedom of religion.

45. U.S. Const. amend. XIV, § 1.
obeyed all of the traffic laws. Especially with regard to this middle circle, it is likely to be rather difficult to determine how benefits and obligations correspond. The first problem is identifying what this balance requires.

Second, even assuming that each circle represents a fair balance, how does one determine in which circle an individual belongs? To a large degree, within the United States, we base this upon an individual’s voluntary choice. There are no barriers to migration nor to interstate travel; an individual may relocate in or visit any state that he or she likes. Or he or she may exit. Internationally, of course, this is not the case. Both immigration and emigration are sometimes restricted. And even in the United States, corporations may not be entitled to the same sort of mobility across state lines that individuals are.

Again, the most difficult problems come in separating the middle circle from the inner and outer ones. The Supreme Court has indicated that burdens may be imposed on an individual who has purposefully availed him or herself of benefits. It is not enough that the package of benefits and burdens is fairly balanced; it must also be an exchange that the individual has voluntarily undertaken. But this purposefulness is not always evident. The question of whether an outsider has injected him or herself into the state’s sphere of legitimate authority often is problematic.

Although these two questions pose problems, a model that focuses on them is not necessarily a bad model merely because the answers are not yet completely formulated. Initially what matters is really whether we are asking the right questions. The basic point is that the key to understanding member obligations is shaping; the key to understanding visitor obligations is sharing. Democratic theory is oversimplifying if it tries to derive all political responsibility from a single premise, namely participation, or shaping.

We said earlier that in the interstate context the state interest reasoning and the Carolene Products reasoning are not only inconsistent with one another, they are also both wrong. State interest analysis is wrong because it does not focus on the problem of justification. We can now see that the missing element of justification is sharing in the values that the state creates. The process-based reasoning is wrong because it assumed that even nonmembers should be granted some right to participate by democratic theory. Again,

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with regard to outsiders it is sharing and not shaping that forms the proper rationale.

At this point, however, we should perhaps emphasize the ways in which they are both right. State interest analysis is correct in insisting that there exists a special relationship between a legislature and its constituency, which establishes special obligations to respond to the wishes of that particular group of people. It is just that the special responsibility is to reflect their value choices, not to limit the benefits to them. In contrast, the Carolene Products style of analysis is correct that lack of participation is linked to equal treatment. The linkage is not exactly that sharing is a remedy for a process defect, because there is no entitlement to vote that has been violated. And anyway, sharing would not compensate for lack of shaping if a process defect did exist, for equal treatment of a member would not adequately compensate for excluding the member from the political processes. The member would be entitled instead to remedy that defect directly by having the exclusion lifted. Instead, the link must be that if some individual is situated such that it is appropriate to impose burdens on him or her even without participation, the justification must lie in the equal sharing of the benefits of local law.

If these observations seem somewhat sketchy, the reason should be clear. Even to adequately argue for the basic principles would be an enormous job. The difficulties of the problem of political justification have long perplexed philosophers and political scientists. A theory of interstate relations that builds upon such foundations is prone to all of the same ambiguities and complexities. To apply it to the complex reality of interstate relations is not an easy task either. Yet every project necessarily starts somewhere. Learning from the mistakes and successes of existing paradigms seems a good place to begin this one.