

What States Owe Outsiders

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I. Table of Contents

Introduction	391
I. Defining the Problem	394
A. Impartiality and Equal Treatment	394
B. The Case Law	401
C. The Academic Literature	410
II. The Structural Argument	415
A. The Paradigm Case: Distributing the State Fisc	420
B. The Argument in General	430
Conclusion	437

Introduction

Should state legislators give equal weight to the well-being of all U.S. citizens? Or should they rather advance in-state interests at the expense of out-of-staters? This is a problem that the Supreme Court must regularly confront, whenever out-of-staters claim that their treatment violates the dormant Commerce Clause, the Article IV Privileges and Immunities Clause, the Equal Protection Clause, or some other provision that might prohibit state parochialism. As yet, the Court has not given a clear answer.

This Article seeks to provide one. I will argue that the state legislator owes a general duty of impartiality to the citizens of other states—that the legislator should always give equal weight to the out-of-stater’s well-being, *ceteris paribus*, at some level of generality.

By contrast, the “parochialist” view is that state legislators should give zero weight to the out-of-stater’s well-being, absent some federal side-constraint. A federal side-constraint is a statutory or constitutional norm that accords out-of-staters specific equality rights or substantive rights. As interpreted by the Supreme Court, the Constitution contains (at least) an anti-protectionism side-constraint under the dormant Com-

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merce Clause, a fair taxation side-constraint under the same provision, and an anti-discrimination side-constraint under the Privileges and Immunities Clause of Article IV. The first precludes tariffs, quotas, embargoes, and other devices that are designed to improve the competitive position of in-state economic actors at the expense of their out-of-state competitors.¹ The second requires that a tax must not “discriminate against interstate commerce” and that it must be “applied to an activity with a substantial nexus with the taxing State,” “fairly apportioned,” and “fairly related to the services provided by the State.”² The third prohibits the state from discriminating against outsiders in certain “fundamental” ways.³ These rules are side-constraints because they have limited scope. They define the boundaries within which the state should seek to advance the well-being of in-staters, or so the parochialist argues. For example, the side-constraints listed here do not require the state legislator to share the state fisc with outsiders, nor do the rules prohibit facially neutral, non-protectionist statutes that adversely affect outsiders. Under the parochialist model, the state legislator should spend tax revenues for the sole benefit of in-staters, and ignore outsiders’ interests in choosing between facially-neutral, non-protectionist statutes.⁴

The parochialist model better comports with our intuitions. We intuit that the state legislator’s obligation to serve in-staters flows from the very fact that states are political communities: that states have a citizenry which elects the state government. “Nonrepresentation of [out-of-state] interests follows from the simple fact that there are separate states.”⁵ This intuition is wrong, as I explain in part I.A below. Although “citizenship” is a non-empty concept, which entails and grounds various distinctions between in-staters and out-of-staters, the existence of these distinctions does not preclude state impartiality. Rather, it is the impartial legislator’s task to take account of the distinctions.

Part I.B analyzes the Supreme Court case law. The case law does not clearly decide whether state legislators should generally take an impartial or a parochial point of view. Although the Court now construes

1. See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1095 (1986).

2. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

3. See *Baldwin v. Montana Fish & Game Comm’n*, 436 U.S. 371, 387-88 (1978) (“With respect to . . . basic and essential activities, interference with which would frustrate the purposes of the formation of the Union, the States must treat residents and nonresidents without unnecessary distinctions. . . . [These] activities [are] ‘fundamental’ under the Privileges and Immunities Clause . . .”).

4. Cf. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 2833 (1974) (describing “side—constraint” model of individual moral action).

5. Regan, *supra* note 1, at 1164-65. Regan’s article is more fully discussed *infra* note 67.

the dormant Commerce Clause and the Article IV Privileges and Immunities Clause to embody only side-constraints and not a general impartiality principle, the Court has also extended the Equal Protection Clause to out-of-staters. I interpret the Equal Protection Clause cases as articulating a general impartiality principle which is binding on state legislators but not enforced by the Court. This is a colorable, albeit controversial, interpretation.

Part I.C reviews the academic literature. Constitutional scholars have generally argued against state parochialism, but their arguments have not been very persuasive. Anti-parochialist scholars have tended to ignore that parochialism may well be legitimate at the level of the nation-state. It may well be true that France should generally ignore Australians' interests, or at least the interests of Australians nonresident in France, absent some international side-constraint. The opponent of state parochialism can: (a) show that parochialism is never legitimate, including nation-state parochialism; or (b) concede that nation-state parochialism may be legitimate, but show why the states are different from nation-states. The existing anti-parochialist literature fails to prove either proposition.

This article seeks to prove the latter. Rather than focusing on the Constitution's text and history, as other anti-parochialist scholars have done, I will advance a structural argument for state impartiality. What would a well-reasoning Framers require of state legislators, given other features of the Constitution in its current form? Part II shows that this imaginative exercise does not endorse state parochialism, but rather impugns it. Part II.A considers a concrete case: Would the well-reasoning Framers instruct the state legislator to take a parochial point of view in distributing the state fisc? Is the legislator required to exclude outsiders from receipt of state monies, even absent some impartial justification for doing so? The answer is no, for a variety of reasons. These reasons are elaborated and generalized in part II.B. To summarize them: the Framers might well believe that out-of-state interests should not determine a given decision by state legislators, but because legislators are perfectly competent to evaluate out-of-state interests, this belief is not a sufficient ground for imposing a constitutional requirement that legislators ignore out-of-state interests with respect to that decision.

It is a separate question whether the Framers would choose to have the federal courts enforce the duty of impartiality on the state legislator. This Article does not purport to answer that question. Even if the impartiality principle is unenforced, the principle exists nonetheless and is binding on state legislators. The state legislator has the constitutional

obligation to consider the well-being of all U.S. citizens, and not just of in-staters.

I. Defining the Problem

A. Impartiality and Equal Treatment

The thesis of this Article is that the Constitution imposes a general duty of impartiality on the state legislator. This duty requires the legislator to take an impartial point of view towards out-of-staters with respect to every legislative decision. The legislator takes "an impartial point of view" with respect to a particular decision by giving out-of-state interests equal weight, *ceteris paribus*, at some level of generality, in determining that decision. "*Ceteris paribus*" means that out-of-staters' interests can be given unequal or even zero weight if the legislator has good reason for doing so. "At some level of generality" means that the legislator can make an impartial meta-decision to ignore outsiders' interests in resolving this particular decision.⁶ In short, the legislator takes an impartial point of view towards out-of-staters if their interests are given reasoned consideration. A general duty of impartiality means that the legislator must always give reasoned consideration to out-of-state interests.⁷

Impartiality is crucially different from equal treatment. The concept of equal treatment has a variety of meanings. It can mean identical treatment or equally favorable treatment. Whatever it means, the equal treatment of outsiders does not invariably follow from the legislator's impartial point of view. The legislator who takes an impartial point of view, who gives reasoned consideration to out-of-state interests, may well identify some reason for distinguishing between in-staters and out-of-staters. This legislator may ultimately promulgate a statute that discriminates against outsiders or that has a disparate impact upon them. In other words, the legislator may accord them "unequal treatment," however defined. In *Toomer v. Witsell*,⁸ the Supreme Court most forcefully and elegantly expressed this idea: "[impartiality] does not preclude disparity of treatment in the many situations where there are perfectly valid

6. The concept of impartiality "at some level of generality" is more fully explicated below. See *infra* text accompanying notes 118-20.

7. The idea of impartiality is commonplace in liberal moral theory. See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 419 (1980); BRIAN BARRY, *THEORIES OF JUSTICE* 282-92, 357-66 (1989); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272-78 (1977); ALAN GEWIRTH, *REASON AND MORALITY* 12950 (1978). Constitutional lawyers are familiar with Dworkin's notion of "equal concern and respect," which is one version of this idea.

8. 334 U.S. 385 (1948).

independent reasons for it.”⁹

These “perfectly valid independent reasons” exist because the states are political communities. States have members (citizens) and nonmembers (noncitizens), and the members have a number of defining characteristics. First, they reside in the state. State residents have a right to citizenship.¹⁰ Conversely, the state has the authority to exclude nonresidents from citizenship.¹¹

Second, state citizens have the full right to participate in state politics. The state has the authority to reserve electoral and certain office-holding rights for its citizens.¹² Noncitizens may lobby the state legislature or deliberate about state issues, but are barred at a minimum from voting in state elections. Thus, whatever democratic obligation the state legislator owes to the state electorate, that obligation is only owed to in-

9. *Id.* at 396.

10. “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1.

11. *See, e.g.,* *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972) (“An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community.”). The Court generally uses the terms “citizen” and “resident” as synonyms. *See* Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 380 nn. 10-11 (1979) (citing cases).

12. *See* *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 68-69 (1978) (“No decision of this Court has extended the ‘one man, one vote’ principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions. On the contrary, our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.”); *Dunn*, 405 U.S. at 343 (“[T]he States have the power to require that voters be bona fide residents of the relevant political subdivision.”). For cases where the Court has upheld State residency requirements for political rights, *see* *Marston v. Lewis*, 410 U.S. 679 (1973) (per curiam) (50day durational residency requirement for state franchise); *Kanapaux v. Ellisor*, 419 U.S. 891 (1974) (residency requirement for state elective office); *Sununu v. Stark*, 383 F. Supp. 1287 (D. N.H. 1974), *aff’d*, 420 U.S. 958 (1975) (same); *Chimento v. Stark*, 353 F. Supp. 1211 (D. N.H. 1973), *aff’d*, 414 U.S. 802 (1973) (same).

In *Sugarman v. Dougall*, 413 U.S. 634 (1973), an alienage case, the Court stated in dictum that “[t]his power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.” *Id.* at 647. The Court subsequently upheld the exclusion of aliens from various “political jobs,” and presumably out-of-staters could be denied those jobs as well. *See* *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (probation officer); *Ambach v. Norwick*, 441 U.S. 68 (1979) (public school teacher); *Foley v. Connelie*, 435 U.S. 291 (1978) (policeman). *Cf.* *Supreme Court of Va. v. Friedman*, 487 U.S. 59 (1988) (voiding state discrimination against out-of-state lawyers); *Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1985) (voiding state exclusion of out-of-state lawyers from state bar); *Bernal v. Fainter*, 467 U.S. 216 (1984) (voiding state exclusion of aliens from position of notary public); *In re Griffiths*, 413 U.S. 717 (1973) (voiding state exclusion of aliens from state bar).

staters. Perhaps the legislator must do what the majority of voters would want if the voters were fully informed and rational. Or perhaps the legislator must do what the majority of voters actually want, even if irrational or uninformed, if they want that with sufficient intensity. The democratic obligation is a general concept, and these are specific conceptions.¹³ But whatever conception a particular state adopts, it covers only the citizen-electors.

Third and finally, citizens are fully liable to state authority. They have a complete jurisdictional connection to the state. This is the flip side of full participation. To be sure, noncitizens are not wholly exempt from state power, just as they are not wholly excluded from the political process. The state has territorial jurisdiction over citizens and noncitizens alike. The fact that an activity takes place inside the state's territory is a legitimate predicate for state regulation, or adjudication, or taxation of that activity. However, the actor's citizenship is an independent predicate. Persons may be sued in state courts, or have their income taxed, or be subject to the state's civil law simply because they belong to the state.¹⁴ This is domiciliary jurisdiction.¹⁵

13. See *infra* text accompanying notes 108-12.

14. See LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM (1986); see also Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1 (1991) (distinguishing between "specific jurisdiction," i.e., territorial jurisdiction, and "general jurisdiction," i.e., domiciliary jurisdiction).

It is an oversimplification to say that states always have general jurisdiction over their citizens. First, citizenship is simply a *prima facie* reason for jurisdiction. The state legislator may decide that this reason is less weighty than location, and cede jurisdiction to the state that has territorial jurisdiction. For example, State *A* choice-of-law doctrine may prescribe that, where an accident takes place in State *B*, State *B* tort law applies, even if State *A* citizens are involved. And for some kinds of jurisdiction, regulatory jurisdiction, for example, territorial location is the *only* basis; in such a case the state legislator does not have the option of exercising general jurisdiction. See Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865 (1987). However, citizenship is a *prima facie* reason for other sorts of civil jurisdiction. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (choice of law); Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257 (1990) (civil adjudicative jurisdiction); Walter Hellerstein, *State Taxation of Interstate Business*, 41 TAX LAWYER 37 (1987) (tax jurisdiction).

15. Domiciliary jurisdiction is simply the flip side of participation. When a state regulates citizens' out-of-state activities, or taxes their income earned out-of-state, it legitimately does so because the citizens participate in framing state regulations and spending programs: they elect the legislator, and the legislator owes them some kind of democratic obligation. This is an impartial justification for exercising domiciliary jurisdiction over state citizens, and conversely for allowing the out-of-staters' home states to exercise domiciliary jurisdiction over them. *Ceteris paribus*, state law should govern state citizens, because they fully participate in the framing of that law. Brainerd Currie and his followers have offered "interest analysis" as an alternative, parochial theory of domiciliary jurisdiction, and Currie's anti-parochialist critics have generally argued for a territorial approach to choice of law. See Douglas Laycock, *Equal*

Residence, plus the full right to participate in state politics, plus a complete jurisdictional connection, are the core characteristics of state citizenship. The state citizen has at least these features, and other features may flow from them.¹⁶ For example, the state may pool and spend citizens' resources for the citizens' benefit. If so, citizenship means membership in this resource-pooling enterprise.¹⁷ Or citizens may view the state as a "community" in the sense that Michael Walzer, Alasdair MacIntyre, Michael Sandel, and other so-called "communitarians" describe.¹⁸ In other words, the citizen may constitute his or her well-being in terms of political participation or other communal practices and

Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 COLUM. L. REV. 249, 252-56 (1992) (reviewing literature). Nevertheless, there is no necessary connection between territorialism and anti-parochialism. See Lea Brilmayer, *Rights, Fairness and Choice of Law*, 98 YALE L.J. 1277 (1989) (anti-parochial justification for domiciliary jurisdiction).

16. Cf. Geraint Parry, *Conclusion: Paths to Citizenship*, in THE FRONTIERS OF CITIZENSHIP, 166 (U. Vogel and M. Moran eds., 1991) (describing different models of citizenship).

17. More concretely, state citizens may be "shareholders" in a "corporation" constituted by the state. Judge Cardozo brilliantly articulated this concept of the state as a private corporation in *People v. Crane*, 108 N.E. 427 (1915), which upheld the exclusion of aliens from the New York public works.

The people, viewed as an organized unit, constitute the state . . . [which is thus] conceived of as a body corporate. Like any other body corporate, it may enter into contracts, and hold and dispose of property. In doing this, it acts through agencies of government. These agencies, when contracting for the state, or expending the state's moneys, are trustees for the people of the state.

Crane, 108 N.E. at 429. The private corporation concept repeatedly appears in the Supreme Court's out-of-stater cases, particularly those cases involving positive rights. In Article IV jurisprudence there has long been a "common property" doctrine, that conceptualizes state citizens as the co-owners of in-state natural resources. "[Citizens], and they alone, owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit." *McCready v. Virginia*, 94 U.S. 391, 396 (1876); see *infra* note 22 (discussing "common property" doctrine). Similarly, the "market participant" exception to the dormant Commerce Clause conceptualizes the state as a "private business." "There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market Restraint in this area is . . . [counseled by] 'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Reeves, Inc. v. Stake*, 447 U.S. 429, 437-39 (1980) (quoting *United States v. Colgate and Co.*, 250 U.S. 300, 307 (1919)); see *infra* note 24 (discussing "market participant" doctrine). Both the "market participant" and "common property" doctrines are particular applications of the private corporation concept. Cf. Michael Wells & Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980) (discussing other instances of the idea of government as private entity).

18. See ALASDAIR MACINTYRE, *AFTER VIRTUE* (1984); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983); see also Richard H. Fallon, Jr., *What Is Republicanism and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989) (describing and criticizing communitarianism); Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992) (same); Amy Gutmann, *Communitarian Critics of Lib-*

thereby develop special bonds with fellow citizens, as if they were friends or co-religionists.¹⁹

Because state citizenship is not an empty concept, noncitizens do not have a general right to equal treatment. "The exclusion of [noncitizens] from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. . . . [Noncitizens] are by definition those outside of this community."²⁰ Noncitizens, by definition, do not vote. And where citizenship also means membership in a resource-pooling scheme, noncitizens need not share in whatever privileges legitimately flow from such membership. Where citizens view citizenship as a constitutive, communal practice, which entails a certain loyalty and affection for fellow-citizens, they need not give outsiders the legitimate benefits of that loyalty and affection.

In particular, the Constitution does not guarantee the out-of-stater equal positive rights. As the Court stated in *Truax v. Raich*, a 1915 decision: "the public domain . . . [and] the common property or resources of the people of the State . . . may be limited to its citizens as against . . . the citizens of other States."²¹ The modern rule is somewhat narrower. Out-of-staters do have a constitutional equality right to certain state-controlled natural resources.²² But they have no right to share in the state

eralism, 14 PHIL. & PUB. AFF. 308 (1985) (same); Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1 (1989) (same).

19. I will call a community that is constitutive of the citizen's well-being or some other aspect of the citizen's identity a "thick community." For purposes of this article, I assume that the Constitution permits the state political community to be "thick."

20. *Cabell v. Chavez-Salido*, 454 U.S. 432, 439-40 (1982). *Cabell* is an alienage case, but its reasoning also covers out-of-staters.

21. *Truax v. Raich*, 239 U.S. 33, 39-40 (1915).

22. In the nineteenth century, the Court conceptualized in-state, unowned natural resources as the citizens' "common property," which they might reserve for themselves. See, e.g., *Geer v. Connecticut*, 161 U.S. 519 (1896) (wild game; relying on "common property" exception to dormant Commerce Clause), *overruled by* *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *McCready v. Virginia*, 94 U.S. 391 (1876) (oysters; relying on "common property" exception to Article IV); *Corfield v. Coryell*, 6 F. Cas. 546, 552 (E.D. Pa. 1823) (No. 3230) (in-state oysters; relying on "common property" exception to Article IV). The concept had a more checkered career in the early twentieth century. Parochial natural-resource policies were at times upheld. See *Patson v. Pennsylvania*, 232 U.S. 138 (1914) (wild game; aliens excluded plus dictum that out-of-staters could be excluded as well); *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908) (water). At other times, such resource policies were overturned. See *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (shrimp); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (natural gas); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (natural gas). Then, in *Toomer v. Witsell*, 334 U.S. 385 (1948), the Court squarely rejected the common property exception to Article IV and struck down a state licensing scheme that discriminated against out-of-state shrimp fishermen. *Hughes v. Oklahoma*, 441 U.S. 322 (1979), extended *Toomer* to the dormant Commerce Clause, holding that protection-

fisc. In general, neither the prohibition on "fundamental" discrimination embodied in Article IV,²³ nor the anti-protectionism rule of the dormant

ist resource policies would be voided. At the same time, however, *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 385-86 (1978) reintroduced the common property concept into Article IV jurisprudence, as a presumption rather than an exception. Under *Baldwin's* approach, a state may legitimately reserve for in-staters certain in-state, unowned natural resources.

There is an extensive scholarly literature on this subject. See FISCAL FEDERALISM AND THE TAXATION OF NATURAL RESOURCES (Charles E. McClure ed., 1983); Thomas K. Anson & P.M. Schenkkan, *Federalism, the Dormant Commerce Clause and State-Owned Resources*, 58 TEX. L. REV. 71 (1980); Walter Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 SUP. CT. REV. 51; Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983); Carol A. Fortine, Note, *The Commerce Clause and Federalism: Implications for State Control of Natural Resources*, 50 GEO. WASH. L. REV. 601 (1982).

23. On the Court's construction of Article IV as prohibiting "fundamental" discrimination, see *infra* text accompanying notes 39-43. It is clear from the case law that this prohibition does not generally cover state spending. Indeed, the Supreme Court has never required that a state include out-of-staters in its spending programs. The so-called "durational residency" cases simply held that new residents may not be excluded from various such programs. See *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986) (civil service employment); *Hooper v. Bernalillo County*, 472 U.S. 612 (1985) (tax exemption); *Zobel v. Williams*, 457 U.S. 55 (1982) (distribution of state surplus); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (medical care); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare). See generally William Cohen, *Equal Treatment for Newcomers*, 1 CONST. COMMENTARY 9 (1984); Bryan H. Wildenthal, Note, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557 (1989). Soon after *Shapiro v. Thompson*, the Court voided state welfare programs that excluded aliens who were resident in-state. See *Graham v. Richardson*, 403 U.S. 365 (1971). But the durational-residency and alienage cases scrupulously declined to say that nonresidents would have to be included as well and indeed suggested the opposite. See, e.g., *Memorial Hospital*, 415 U.S. at 267; see also *Vlandis v. Kline*, 412 U.S. 441, 452 (1973); *Doe v. Bolton*, 410 U.S. 179, 200 (1973). Then, in the early 1970s, higher tuition rates for out-of-staters at state universities were summarily affirmed. See *Sturgis v. Washington*, 368 F. Supp. 38 (W.D. Wash. 1973), *aff'd*, 414 U.S. 1057 (1973); *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971); see also *McCarthy v. Philadelphia Civil Service Comm'n*, 424 U.S. 645 (1976) (per curiam) (upholding municipal residency requirement for municipal employment as applied to out-of-stater). Finally, in *Martinez v. Bynum*, which upheld a state residence requirement for free public education, the Court discussed the case law at length and made it quite clear that state residence is generally a legitimate condition for the receipt of tax-funded benefits. *Martinez v. Bynum*, 461 U.S. 321, 325 (1983) ("On several occasions the Court has invalidated requirements that condition receipt of a benefit on a minimum period of residence within a jurisdiction, but it always has been careful to distinguish such durational residence requirements from bona fide residence requirements."). I see *Bynum* as the leading Supreme Court case for the proposition that out-of-staters need not share in the state fisc. But see *Laycock*, *supra* note 15, at 271 n.139 (arguing that *Bynum* language is dictum).

The *Bynum* Court qualified its general principle by noting that "the 'service' that the State would deny to nonresidents [cannot be] a fundamental right protected by the Constitution. A state, for example, may not refuse to provide counsel to an indigent nonresident defendant at a criminal trial where a deprivation of liberty occurs." *Bynum*, 461 U.S. 321, 328 n.7. Presumably, too, the Constitution would prohibit a state from denying police protection to out-of-staters or banishing them from state roads, even if the roads and the police were wholly funded from the state fisc. Jonathan Varat, who has analyzed this problem at some length, takes the

Commerce Clause,²⁴ covers the state's expenditure of its monies. The only side-constraint that does apply is the anti-expropriation rule of *Complete Auto Transit v. Brady*: a state's tax on out-of-staters must be "fairly related to the services provided by the State."²⁵ In other words, out-of-staters have a constitutional right to the monies that they contributed. But they have no right at all—not a right to equal treatment, and surely not a substantive right—to monies that were contributed by in-staters. There are myriad potential reasons, flowing from the concept of "citizenship," why the state legislator might reserve in-staters' resources for in-staters.²⁶

Yet it remains an open question whether the legislator, in distributing those resources, should take a parochial point of view. There are two possibilities: either the reasons for excluding outsiders from the state fisc are evaluated by the legislator, and perhaps ultimately found to justify exclusion; or outsiders are excluded simply because that result is not barred by Article IV, the dormant Commerce Clause, or any other side constraint. The parochial legislator reasons: "Out-of-staters have no constitutional right to share in the state fisc; therefore I should exclude them." The impartial legislator takes a different approach: "Out-of-staters have no constitutional right to share in the state fisc, but it still may

view that "when a state uses state revenues to create public goods and services, it has a *prima facie* justification for allocating those resources to state residents . . ." Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 529 (1981) (emphasis added). I will assume *arguendo* that this *prima facie* justification is almost always a conclusive justification for purposes of constitutional law. In other words, I will assume that the Constitution almost never requires the state to share in-staters' resources with out-of-staters. My aim, here, is to show that the Constitution requires state impartiality in the distribution of in-staters' resources even if it does not require equal treatment. See *infra* part II.A.

24. The leading case here is *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), which involved the preferential subsidization of in-state scrap processors. *Alexandria Scrap* found that the subsidy program was outside the reach of the dormant Commerce Clause. "Nothing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810. Essentially, *Alexandria Scrap* and the subsequent "market participant" cases mean that the anti-protectionism side-constraint embodied in the dormant Commerce Clause does not reach so far as to cover tax-funded benefits. See *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); see also *New Energy Co. v. Limbach*, 486 U.S. 269 (1988) (market-participant exception does not apply); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (same). "[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace." *Reeves*, 447 U.S. at 436-37. See generally Dan T. Coenen, *Untangling the Market-Participant Exception to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989); Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097 (1988).

25. 430 U.S. 274, 279 (1977). See *Wells & Hellerstein*, *supra* note 17 (discussing *Complete Auto Transit*).

26. See *infra* part II.A.

be wrong to exclude them. Citizenship may or may not constitute a reason for differential treatment, and that is an issue for me to resolve.” Even if the two legislators reach an identical result, the impartial legislator employs a very different process of justification, a process that in other cases will produce an outcome that no constitutional side-constraint compels and that the parochial legislator will therefore reject.

The constitutional concept of citizenship necessarily means that non-citizens lack a general right to equal treatment.²⁷ But it does not necessarily vitiate a general duty of impartiality. Perhaps state legislators must themselves decide whether citizenship constitutes a relevant distinction, even absent a federal side-constraint. The fact that states are political communities does not, by itself, prove that state legislators should be parochial.

B. The Case Law

The Supreme Court case law concerning out-of-staters is open to two different interpretations, as I will try to show in this section. The first interpretation is that the Constitution does not require state impartiality. The second is that this requirement exists yet is partially unenforced by the federal courts.²⁸ Although the dormant Commerce Clause and the Article IV Privileges and Immunities Clause are not now understood to embody a broad impartiality principle, as they once were, out-of-staters are also protected by the “rational basis” component of the Equal Protection Clause. But “rational basis review” is ineffectual: parochial state laws will survive it. The parochialist views the “rational basis” component of the Equal Protection Clause as a legal fiction, which amounts to no obligation at all for state legislators. By contrast, I view it as an impartiality norm that is binding on state legislators whether or not the federal courts will enforce it.

The famous case of *Corfield v. Coryell*²⁹ exemplifies the side-con-

27. My position is quite different from those legal scholars who argue that out-of-staters have a general equal treatment right, subject only to certain narrow exceptions such as the state franchise. See, e.g., Laycock, *supra* note 15, at 261-73; Varat, *supra* note 23, at 487-94; Simson, *supra* note 11, at 386-89. If out-of-staters lack a wide range of political rights and positive rights, as they legitimately do, then equal treatment is hardly the general norm.

28. Constitutional norms may well be unenforced. See *infra* text accompanying notes 84-85.

29. 6 F. Cas. 546 (E.D. Pa. 1823) (No. 3230). *Corfield*, rather than a Supreme Court opinion, is the best example of the pre-Civil War view of Article IV. Very few Article IV cases reached the Court prior to the Civil War, and the Court in these cases declined to provide the full gloss furnished by Justice Washington in *Corfield*. See, e.g., Conner v. Elliott, 59 U.S. 591, 593 (1855) (“We do not deem it needful to attempt to define the meaning of the word *privileges* in this clause of the constitution. . . . [W]e are dealing with so broad a provision . . . that any

straint model. A New Jersey statute that forbade out-of-state fishermen from taking oysters in state waters was challenged under Article IV. Justice Washington, sitting as Circuit Justice, rejected the challenge. He understood Article IV as no more than a guarantee of specific equality rights and substantive rights.

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments. . . . [These include] [t]he right of a citizen of one state to pass through . . . any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state

. . . .³⁰

These rights did not include the right to share in the state's natural resources, which *Corfield* conceptualized as the "common property" of in-staters.

They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use.³¹

Nor did Justice Washington require the legislators to justify their distribution of New Jersey's "common property." *Corfield* did not find a general principle of impartiality anywhere in the Constitution.

*Toomer v. Witsell*³² is the opposite case. *Toomer*, like *Corfield*, involved the exclusion of out-of-staters from in-state natural resources. South Carolina had promulgated a licensing statute that discriminated against out-of-state fishermen. But Chief Justice Vinson took a very different view of Article IV:

Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it.³³

merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief.").

30. *Corfield*, 6 F. Cas. at 551-52.

31. *Id.* at 552.

32. 334 U.S. 385 (1948).

33. *Id.* at 396.

This general impartiality principle covered the state's distribution of in-state resources, no less than other state decisions.

The whole ownership theory [i.e., common property], in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.³⁴

Moreover, the principle would be enforced by the federal judiciary. "Thus the [judicial] inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them."³⁵ Because the *Toomer* Court could find no impartial justification for the South Carolina scheme—because "non-citizens [did not] constitute a peculiar source of the evil at which the statute [was] aimed"³⁶—it struck down the statute.

*Southern Pac. Co. v. Arizona*³⁷ is the dormant Commerce Clause analogue to *Toomer*. While the *Toomer* Court enforced a principle forbidding unjustified discrimination, the *Southern Pacific* Court engaged in "balancing." Arguably implicit in *Southern Pacific* was the principle that the state legislator, in regulating commerce, should give equal weight to out-of-staters' interests:

[There are an] infinite variety of cases, in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved

. . . [W]here Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.³⁸

While *Toomer* demands a justification for discriminatory statutes, *Southern Pacific* covers facially-neutral statutes as well, but only where they involve commerce. Yet both *Toomer*'s Article IV norm and *Southern*

34. *Id.* at 402.

35. *Id.* at 396.

36. *Id.* at 398.

37. 325 U.S. 761 (1945).

38. *Id.* at 768-69. "National interests" might be read narrowly as including only certain kinds of interests shared by out-of-staters and in-staters, e.g., an interest in the free flow of goods, or it might be read more broadly to include any legitimate interest held by a U.S. citizen. See Regan, *supra* note 1, at 1101-04.

Pacific's Commerce Clause norm are approximations to a general impartiality principle. Both go well beyond some narrow side-constraint.

But *Southern Pacific* and *Toomer* are no longer the law of the land. The Court no longer interprets Article IV and the dormant Commerce Clause as incorporating an impartiality principle. *Toomer's* approach was abandoned in *Baldwin v. Montana Fish & Game Comm'n*,³⁹ which is now the leading Article IV case. *Baldwin* upheld a Montana statute that discriminated against out-of-state hunters. The *Baldwin* Court construed the Privileges and Immunities Clause to provide the out-of-stater a set of "fundamental" equality rights.

There are a "range of activities that are sufficiently basic to the livelihood of the Nation that the States may not interfere with a nonresident's participation therein without similarly interfering with a resident's participation. [These] rights or activities [are] 'fundamental' under the Privileges and Immunities Clause"⁴⁰

Where the regulated activity was fundamental, unjustifiable state discrimination would be prohibited: "[w]ith respect to such basic and essential activities, . . . the States must treat residents and nonresidents without unnecessary distinctions."⁴¹ However, no such prohibition applied to "non-fundamental" activities. These simply "[did] not fall within the purview of the Privileges and Immunities Clause."⁴² In other words, *Baldwin* read Article IV as a mere side-constraint (providing a specific set of equality rights) just as *Corfield* had. In each case, out-of-staters challenged a particular kind of differential treatment that the Article IV side-constraint did not cover: Montana's decision to exclude out-of-state hunters in *Baldwin* and New Jersey's decision to exclude out-of-state fishermen in *Corfield*. In each case, Article IV was not interpreted to require an impartial justification for that kind of differential treatment.

The movement in Article IV doctrine from *Toomer* to *Baldwin* is paralleled by the Court's abandonment of *Southern Pacific*. Donald Regan has analyzed the dormant Commerce Clause case law and argues that the Court no longer balances in-state against out-of-state interests. Just as Article IV has been reinterpreted to embody a narrow prohibition on "fundamental" discrimination, so the dormant Commerce Clause

39. 436 U.S. 371 (1978).

40. *Id.* at 388. Subsequent Article IV cases include *Hicklin v. Orbeck*, 437 U.S. 518 (1978); *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208 (1984); *Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1985); *Supreme Court of Va. v. Friedman*, 487 U.S. 59 (1988). These cases generally follow the *Baldwin* approach. That approach had been anticipated in *Austin v. New Hampshire*, 420 U.S. 656 (1975).

41. *Baldwin*, 436 U.S. at 387.

42. *Id.* at 388.

may well have been narrowed to an anti-protectionism principle.⁴³

But this reinterpretation of the dormant Commerce Clause and the Privileges and Immunities Clause does not necessarily vindicate the parochialist. One plausible interpretation of a case like *Baldwin* is that it articulates but does not enforce a broad impartiality principle, which is located in the Fourteenth Amendment rather than Articles I or IV. Scholars have generally ignored the last section of *Baldwin*,⁴⁴ where the Court considered an equal protection challenge and rejected that challenge on the merits. The Court stated that “[w]e need not commit ourselves to any particular method of computing the cost to the State of maintaining an environment in which elk can survive in order to find the State’s efforts rational, and not invidious, and therefore not violative of the Equal Protection Clause.”⁴⁵ What is crucial is that the Court did reach the merits. *Baldwin* assumed that the Equal Protection Clause applied to “distinctions drawn between residents and nonresidents,” even where such distinctions were not “fundamental” and therefore did not “fall within the purview” of Article IV.

What did the Court mean when it said that Montana’s discriminatory scheme would have to be “rational”? I follow Cass Sunstein in asserting that the rational-basis component of the Equal Protection Clause can plausibly be interpreted as an impartiality principle.

[The] function [of the rational basis test] is to ensure that classifications rest on something other than a naked preference for one person or group over another. Thus, to take the most familiar example, in *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955), the Court upheld differential treatment of optometrists and opticians on the ground not that the equal protection clause tolerated an unprincipled distribution of wealth to one rather than to the other . . . but that the differential treatment was a means of protecting consumers. The Court has made clear in rationality cases that the government must be able to invoke some public value that the classification at issue can be said to serve.⁴⁶

43. Regan, *supra* note 1, at 1206-87. More specifically, Regan claims that “[i]n the central area of dormant commerce clause jurisprudence, comprising what I shall call ‘movement-of-goods’ cases . . . the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism,” and concedes that “[i]n cases other than movement-of-goods cases—cases involving regulation of railroads or highways, cases about taxation—the Court has had certain limited goals over and above preventing protectionism.” *Id.* at 1092.

44. See, e.g., LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-35 (1988); Varat, *supra* note 23, at 509-15; Simson, *supra* note 11.

45. *Baldwin*, 436 U.S. at 389.

46. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1713 (1984); see Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218 (1978) (“The equal protection clause [can be

On this view, a statute that discriminates between two persons has a “rational basis” only if the legislator has accorded those persons equal concern and respect—only if the legislator has given their well-being equal weight, *ceteris paribus*, at some level of generality.⁴⁷ However, the rational-basis requirement is applied in so lax and tolerant a manner that the challenged statute is inevitably upheld. “Application of this level of review is in fact tantamount to a reflexive validation of the challenged classification, because the ‘test’ incorporates a theory and practice of extreme deference to the judgment of the enacting official or body.”⁴⁸ Federal courts have evolved various devices to find “rationality”; in particular, the legislature need not articulate its “legitimate purpose,” and the statute need not be narrowly tailored to that purpose.⁴⁹

Baldwin supports and illustrates this interpretation of rational basis review. The *Baldwin* Court adduced various justifications for the Montana statute: “[t]he resident obviously assists in the production and maintenance of big-game populations through taxes”⁵⁰; “[there has been] an alarming . . . increase in the number of nonresident hunters”⁵¹; “the nonresident occasional and short-term visitor is more likely to commit game-law violations”⁵²; and “nonresident hunters create greater enforcement problems.”⁵³ These are just the kinds of factors that could be relevant to the impartial state legislator. Like *Toomer*, *Baldwin* made clear that noncitizens should “constitute a peculiar source of the evil at which the statute is aimed.”⁵⁴ However, by contrast with *Toomer*, which grounded the impartiality principle in Article IV, *Baldwin* did not enforce the principle. Instead the Court was quite deferential, as it normally is in seeking a rational basis. “That Montana might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional.”⁵⁵ Although *Toomer* voided the challenged statute, *Baldwin* up-

seen] as a prominent example of a constitutional norm which is underenforced to a significant degree by the federal judiciary . . .”).

47. How about a facially neutral state statute that adversely affects out-of-staters? Must this statute, too, have a “rational basis”? As far as I know, the Supreme Court has not addressed the issue. Thus the case law does not vindicate my theory as fully as it might. *See infra* note 64.

48. Sager, *supra* note 46, at 1215.

49. *See generally* TRIBE, *supra* note 44, §§ 16-1 to 16-5.

50. *Baldwin v. Montana Fish & Game Comm’n*, 436 U.S. 371, 389 (1978).

51. *Id.*

52. *Id.* at 390.

53. *Id.* at 391.

54. *Toomer v. Witsell*, 334 U.S. 385, 398 (1948).

55. *Baldwin*, 436 U.S. at 390 (citations omitted).

held it, yet both decisions insisted that the state legislator have some neutral reason for discriminating against out-of-staters.

Of course, it is possible to read *Baldwin* quite differently. The rational-basis component of the Equal Protection Clause could be a mere fiction. The legislator's duty of "rationality" could be just the minimal duty to refrain from passing statutes that the Court will strike down—statutes that are patently arbitrary—and no more. This is the parochialist's view, and I will not here try to refute it as a matter of textual interpretation. My claim is simply that *Baldwin* and similar cases can plausibly be interpreted as embodying an unenforced impartiality norm, not that this is the only plausible interpretation.⁵⁶

Since the late nineteenth century, the Court has followed the *Baldwin* approach and routinely applied the Equal Protection Clause to cases where the state has discriminated between citizens and noncitizens.⁵⁷ In

56. I may be conceding too much to the parochialist. The modern Court has more than once voided discriminatory state taxes under the Equal Protection Clause. *See generally* Matthew J. Zinn & Steven Reed, *Equal Protection and State Taxation of Interstate Business*, 41 TAX LAWYER 83 (1987). The most prominent example is *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), where the Court voided a discriminatory tax on out-of-state insurance companies. *Metropolitan Life* relied on the Equal Protection Clause because the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, exempted state regulation of the insurance industry from the dormant Commerce Clause.

Alabama's aim [in promulgating the tax] is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there. Alabama's purpose . . . constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent. . . . [T]his Court always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation.'

Metropolitan Life, 470 U.S. at 878 (citing *Allied Stores v. Bowers*, 358 U.S. 552, 533 (1959)); *see also* *WHYY, Inc. v. Glassboro*, 393 U.S. 117 (1968) (voiding discriminatory tax exemption); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949) (voiding discriminatory tax). *Metropolitan Life* has been heavily criticized as contravening congressional intent. *See, e.g.*, William Cohen, *Federalism in Equality Clothing: A Comment on Metropolitan Life Ins. Co. v. Ward*, 38 STAN. L. REV. 1 (1985). Whatever the merits of this criticism, *Metropolitan Life* also shows that "[t]he equal protection clause . . . has recently begun to emerge as a significant support mechanism for the rights of out-of-state residents." Zinn & Reed, *supra* note 56, at 83. The parochialist cannot argue that the clause is a complete "fiction" as regards out-of-staters because it embodies a judicially-enforced principle against parochial state taxation.

57. The clause has a qualifying phrase: it prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see* John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 181 n.23 (1981) ("There is an initial if little noticed question whether the Equal Protection Clause—whose protection, unlike that of its sister Due Process and Privileges and Immunities Clauses, is limited to persons 'within [the state's] jurisdiction'—was meant to protect out-of-staters at all."). The qualifying phrase could be read to mean that the Equal Protection Clause does not cover out-of-staters who are not "within" the state. Indeed the phrase was given this sort of reading in the out-of-state corporation cases, beginning with *Philadelphia Fire Ass'n. v. New York*, 119 U.S. 110 (1886). *See* *Western & So. Life Ins. Co. v. Board of*

particular, the Court has applied the Equal Protection Clause to out-of-stater cases involving positive rights. In *Baldwin*, of course, the clause was read to cover natural resources (wild animals). *Martinez v. Bynum*⁵⁸ and *Hughes v. Alexandria Scrap Corp.*⁵⁹ repeated the *Baldwin* pattern and showed that the state fisc was covered as well. *Bynum* upheld a Texas statute limiting free public education to state residents. The Court (implicitly) found that the Article IV side-constraint did not apply, but then reviewed the statute for Equal Protection Clause rationality. “[A residency] requirement with respect to attendance in public free schools does not violate the Equal Protection Clause of the Fourteenth Amendment”⁶⁰ because there is a rational basis for it.⁶¹ *Alexandria Scrap* involved a Maryland program that gave preferential subsidies to in-state scrap processors and held that the subsidy program was outside the reach of the dormant Commerce Clause. “Nothing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others.”⁶² Essentially, this “market participant” doctrine means that the

Equalization, 451 U.S. 648, 660 (1981) (overruling *Philadelphia Fire*) (“[*Philadelphia Fire*] held that a corporation is not a ‘person within the State’s jurisdiction’ . . . for purposes of the Equal Protection Clause unless it is in compliance with the conditions placed upon its entry into the State, and that a corporation assents to all state laws in effect at the time of its entry.”); George F. Carpinello, *State Protective Legislation and Nonresident Corporations: The Privileges and Immunities Clause as a Treaty of Nondiscrimination*, 73 IOWA L. REV. 351 (1988); David W. Haller, Note, *Within the State’s Jurisdiction*, 96 YALE L.J. 2110 (1987). However, the *Philadelphia Fire* doctrine never reached more broadly than corporations. The Court has always applied the Equal Protection Clause to discrimination against out-of-state individuals. See, e.g., *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926); *Ferry v. Spokane Ry.*, 258 U.S. 314 (1922); *Maxwell v. Bugbee*, 250 U.S. 525 (1919); *Kane v. New Jersey*, 242 U.S. 160 (1916); *Southern Ry. Co. v. Greene*, 216 U.S. 400 (1910); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909); *Williams v. Fears*, 179 U.S. 270 (1900); *Central Loan and Trust Co. v. Campbell Co.*, 173 U.S. 84 (1899); *Eldridge v. Trezevant*, 160 U.S. 452 (1896); see also *Toomer v. Witsell*, 334 U.S. 385, 403 (1948) (“Appellants maintain that by a parity of reasoning the statute also contravenes the equal protection clause of the Fourteenth Amendment. That may well be true, but we do not pass on this argument since it is unnecessary to disposition of the present case.”). In *Plyler v. Doe*, 457 U.S. 202 (1982), an alienage case, the Court reviewed this case law and explicitly endorsed the narrow construction that the phrase “within its jurisdiction” had always been given outside of the *Philadelphia Fire* context. See *Plyler*, 457 U.S. at 214 (“[w]ithin its jurisdiction’ was intended in a broad sense to offer the guarantee of equal protection to all within a State’s boundaries, and to all upon whom the State would impose the obligations of its laws.”); *Plyler*, 457 U.S. at 215 (“[t]he Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State’s territory.”).

58. 461 U.S. 321 (1983). See *supra* note 23 (discussing *Bynum*).

59. 426 U.S. 794 (1976). See *supra* note 24 (discussing *Alexandria Scrap*).

60. *Bynum*, 461 U.S. at 328.

61. *Id.* at 328 n.7.

62. *Alexandria Scrap*, 426 U.S. at 810.

anti-protectionism side-constraint embodied in the dormant Commerce Clause does not cover state spending. But *Alexandria Scrap* also explicitly decided that the out-of-state scrap processor “[could] claim Fourteenth Amendment protection”⁶³ and reached the merits of that claim. There may well be a positive-rights exception to Article IV and the dormant Commerce Clause, but there is no such exception to the Equal Protection Clause.

In short, the Court has fluctuated in its willingness to enforce the impartiality principle—*Toomer* and *Southern Pacific* did not appear until the New Deal period⁶⁴ and have since been abandoned—but the Court has consistently stated that noncitizens are covered by an impartiality norm. The modern cases that fail to enforce this norm, such as *Baldwin*, *Bynum*, and *Alexandria Scrap*, nonetheless articulate it, while *Corfield*, which denies it, is a relic of the pre-Civil War period.⁶⁵ This, at least, is

63. *Id.* at 811 n.21.

64. In the Reconstruction era case of *Paul v. Virginia*, 75 U.S. 168 (1868), the Court in dictum anticipated *Toomer* and read the Privileges and Immunities Clause as a broad impartiality principle.

It was undoubtedly the object of the [privileges and immunities] clause . . . to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; . . . it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

75 U.S. at 180 (citation omitted). This remarkable passage seemingly embodies the structural argument offered in Part II. *Paul* supposes that “the citizens of the United States [are] one people,” and from that premise moves to a broad conception of the state legislator’s obligation to noncitizens. The legislator’s powers must be used for their “advantage” as well as the citizens’: the well-being of outsiders takes equal weight (“the same footing”). However, subsequent Article IV cases from the pre-New Deal period generally took a *Baldwin*-like, “fundamental” rights approach to Article IV. See TRIBE, *supra* note 44, at § 6-34; *Baldwin*, 436 U.S. at 397-98 (Brennan, J., dissenting) (discussing this period).

Similarly, the “balancing” approach to the dormant Commerce Clause was a New Deal innovation. See Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940). Prior to the New Deal, the Court basically understood the Commerce Clause as prohibiting state protectionism and as allocating jurisdiction between Congress and the states. See F. RIBBLE, *STATE AND NATIONAL POWER OVER COMMERCE* (1937); John B. Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556 (1936).

65. This picture of the case law, even if true, is not a perfect one for the anti-parochialist. First, the cases involve discrimination against nonresidents, not facially neutral statutes that adversely affect them. The Equal Protection Clause, as interpreted by the Court, may or may not cover such statutes. Compare *Washington v. Davis*, 426 U.S. 229 (1976) (holding a facially race-neutral law will violate equal protection if motivated by a discriminatory purpose). Second, it may or may not apply to every instance of residency discrimination. *Plyler v. Doe*, 457 U.S. 202 (1981), gave a narrow reading to the limiting phrase “within its jurisdiction,” but the phrase was not reduced to a nullity. Rather, *Plyler* emphasized the notion of territorial jurisdiction. *Plyler*, 457 U.S. at 21215. If a state sends welfare checks to its own residents, but not

my interpretation of the Supreme Court case law. Although the parochialist also has a plausible interpretation, that reading is not clearly right. State impartiality may be a counterintuitive position, but it is not a position that the Court has been willing to reject, and it thus deserves the serious and searching attention of constitutional scholars.

C. The Academic Literature

The topic of interstate equality has hardly escaped scholarly attention,⁶⁶ but legal scholars have not yet furnished a thorough defense of state impartiality,⁶⁷ for several different reasons. First, much of the

to persons living outside the state, are those nonresidents "within the state's jurisdiction" for *Plyler* purposes?

Perhaps the Equal Protection Clause cases can at best be interpreted as articulating the principle that state legislators usually must refrain from unjustified discrimination against out-of-staters. This is only an approximation to the general impartiality principle. On the other hand, it is substantially broader than the principle proposed by the parochialist. Under the parochialist model, there is no general prohibition on state discrimination, but simply specific side-constraints on certain discriminatory courses of action, such as protectionism. Thus the case law can be read to undermine the parochialist model, and to provide substantial if not complete support for state impartiality. The parochialist cannot contend that the idea of state impartiality lies outside the boundaries of well-socialized constitutional discourse, and that is all I really mean to show in this section. My argument favoring state impartiality is the structural argument provided in part II, and my contention here is simply that this argument is reasonably consistent with the case law.

66. See, e.g., Lea Brilmayer, *Carolene, Conflicts, and the Fate of the "Inside-Outsider"*, 134 U. PA. L. REV. 1291 (1986); Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Coenen, *supra* note 24; Cohen, *supra* note 23; Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988); Ely, *supra* note 57; Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Gergen, *supra* note 24; Laycock, *supra* note 15; Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983); Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261 (1987); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569; James M. O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 OR. L. REV. 395 (1982); Regan, *supra* note 1; Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885 (1985); Simson, *supra* note 11; Symposium, 15 FLA. ST. U. L. REV. 389 (1987); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WISC. L. REV. 125 (1979); Varat, *supra* note 23; Wildenthal, *supra* note 23; Adam B. Schiff, Comment, *State Discriminatory Action Against Nonresidents: Using the Original Position Theory as a Framework for Analysis*, 22 HARV. J. ON LEGIS. 583 (1985). This list omits most of the vast literature on choice of law. See Laycock, *supra* note 15, at 252-256 (summarizing academic debate about parochialism in choice of law).

67. Neither have legal scholars provided a full-blown defense of state parochialism, so far as I know. Donald Regan's well-known article, *The Supreme Court and State Protectionism*, *supra* note 1, is not intended as a defense of state parochialism. Rather, Regan generally focuses on the federal courts and contends that the dormant Commerce Clause does not require the courts to "balance" in-state against out-of-state interests. See also Redish & Nugent, *supra* note 66 (arguing against judicial enforcement of dormant Commerce Clause). This contention is consistent with my argument here. See *infra* text accompanying notes 84-85. Nonetheless,

scholarship is devoted to the problem of *equal treatment*, not the problem of impartiality. For example, Lea Brilmayer in an innovative article shows how "one's rights and obligations [vis-a-vis the state] depend on the nature of one's relationship to the state."⁶⁸ Jonathan Varat's well-known piece on *State "Citizenship" and Interstate Equality* sets itself a similar task: "to develop the substantive principles that should define the proper scope of state authority to favor state residents in the distribution of public resources."⁶⁹ Yet this is only part of the problem of "interstate equality," a term that Varat shares with Brilmayer. We need to consider whether the state legislator should give equal weight to outsiders' interests absent some relevant distinction between in-staters and out-of-staters. We also need to identify those distinctions. Brilmayer, Varat, and others have addressed the second issue, while I wish to focus on the first.

The first issue, albeit not ignored, has not been given the thorough attention it deserves. Anti-parochialist legal scholars have not given sufficient weight to the possibility that parochialism may be legitimate at the level of the nation-state⁷⁰ and thus have failed to show why state parochialism is wrong. For example, in his well-known article, *Choice of Law and the State's Interest in Protecting Its Own*, John Hart Ely impugned "the premise, widely invoked in modern American choice-of-law theo-

Regan does at points articulate our intuition that state legislators should generally serve the well-being of in-staters.

The [representation reinforcement] theory [of the dormant Commerce Clause] assumes that out-of-state interests really ought to be represented — the theory assumes it is a defect in our system that the system denies [out-of-staters] representation, as it is a defect if racial minorities or women are unrepresented or represented ineffectively. But that assumption is not warranted. Nonrepresentation of [out-of-state] interests follows from the simple fact that there are separate states; and the existence of separate states, while it might be a defect in an ideal political system, can hardly be treated as a defect in ours.

Regan, *supra* note 1, at 1164-65. See also *Edgar v. Mite Corp.*, 457 U.S. 624, 644 (1982) ("While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law."); *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 (1980) ("The State's refusal to sell to buyers other than South Dakotans is 'protectionist' only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve."). Such comments confirm my sense that the parochialist model has intuitive plausibility, and that a defense of state impartiality is not otiose.

68. Lea Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U. L. REV. 389, 413 (1987).

69. Varat, *supra* note 23, at 493.

70. The possible justifications for nation-state parochialism are briefly discussed *infra* text following notes 90, 130. See generally CHARLES BEITZ, *INTERNATIONAL ETHICS* (1985); STANLEY HOFFMANN, *DUTIES BEYOND BORDERS: ON THE LIMITS AND POSSIBILITIES OF ETHICAL INTERNATIONAL POLITICS* (1981); *Symposium on Duties Beyond Borders*, 98 ETHICS 647 (1988).

ricing, that a state has a greater interest in protecting its own citizens or residents than it has in protecting others.”⁷¹ Ely pointed to the Article IV Privileges and Immunities Clause. “The guarantee of Article IV . . . was plainly intended to prevent discrimination against out-of-staters: ‘It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.’ ”⁷² He then explained that this anti-discrimination rule embodied a basic principle of impartiality: “Discrimination against out-of-staters [was] singled out for prohibition in the original constitutional document because [of] . . . the unique political powerlessness of those with no voice in the local political process.”⁷³ As Ely explained at somewhat greater length in his book, *Democracy and Distrust*:

[T]he reason inequalities against nonresidents and not others were singled out for prohibition . . . is obvious: nonresidents are a paradigmatically powerless class politically. And their protection proceeds by what amounts to a system of virtual representation: by constitutionally tying the fate of outsiders to the fate of those possessing political power, the framers insured that their interests would be well looked after.⁷⁴

But this argument is unconvincing. The Privileges and Immunities Clause is not “plainly” a general anti-discrimination rule. The clause does not use the words “discrimination” or “equality.” It simply states that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Its language leaves open the *Corfield* interpretation: that the “Privileges and Immunities of Citizens in the several States” denote a particular set of rights, both substantive rights and equality rights. Under this reading, the out-of-stater is “entitled” to those particular rights, but not to equal treatment or impartiality more generally. At one extreme, if the United States were a confederation of independent nation-states, then *Corfield*’s would be the obvious reading. In that case, it would seem implausible that New Yorkers have a general equality right against California, any more than Australians have a general equality right against France.⁷⁵

71. Ely, *supra* note 57, at 173.

72. *Id.* at 181 (quoting *Toomer v. Witsell*, 334 U.S. 395 (1948)).

73. *Id.* at 189.

74. JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 83 (1980).

75. Lea Brilmayer has made precisely this point:

According to [the representation-reinforcement theory], the very exclusion of resident aliens is the basis for an argument that they must be allowed to vote This argument is curious, however, because it seems to justify inclusion on the basis of exclusion. Furthermore, the argument could be made with regard to any group, such as transient visitors who are presently denied the right to vote. The flaw in the

Ely could have argued that legislators have a global duty of impartiality, that aliens as well as out-of-staters have a right to "virtual representation." Conversely, he could have provided a theoretical argument why the states are different from nation-states, and why out-of-staters should be virtually represented even if aliens need not be. Instead, Ely relied upon the history of the Privileges and Immunities Clause. "Article IV's Privileges and Immunities Clause was intended . . . to mean that state legislatures cannot . . . treat out-of-staters less favorably than they treat locals."⁷⁶ In neither his book nor his article, however, does Ely adduce much specific evidence that the Framers actually intended the clause to embody a broad principle of equal treatment or impartiality, and it is hard to believe that such evidence exists. The precise nature of federalism was a hotly debated question in 1787.⁷⁷ The Framers agreed that the states were located somewhere on the spectrum between administrative subdivision and sovereign nation-state, but they strongly disagreed about the precise location. It is therefore implausible that the Framers shared a common view of state parochialism. Unless you believe in global impartiality, your view of state parochialism depends on your conception of federalism.⁷⁸

reasoning that leads to such paradoxical results is the premise that political exclusion is always a process defect.

Brilmayer, *Carolene, Conflicts and the Fate of the "Inside-Outsider"*, *supra* note 66, at 1325.

76. ELY, *supra* note 74, at 83.

77. See sources cited *infra* note 89.

78. Compare Gergen, *supra* note 24, at 1118-1128 (reviewing history of Article IV at length and concluding that "the Framers sought . . . only to ensure outsiders the right to engage in trade and commerce free from discriminatory tax or regulatory burdens") with David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794 (1987) (reviewing history of Article IV at length and concluding that the Framers intended a broad interstate equality principle).

In my view, the most interesting fact that emerges from these histories is: the precursors to the Privileges and Immunities Clause were considerably longer and more specific than the clause itself. For example, Article IV of the Articles of Confederation provided:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any state, to any other state, of which the owner is an inhabitant

U.S. ARTICLES OF CONFEDERATION art. IV. One inference from the relative brevity of the Privileges and Immunities Clause is that "familiar principles . . . were widely understood to inform the clause." Simson, *supra* note 11, at 384. Another view, inspired by public choice theory, is that the Framers promulgated a brief, ambiguous provision because they could not agree on a longer, more specific one.

In short, I believe that an historical or narrowly textual approach to constitutional interpretation will not work here.⁷⁹ The language and history of the Privileges and Immunities Clause will not tell us whether the Constitution creates a broad interstate equality principle because its language is ambiguous and its drafters did not share a single, common intent. Rather than focusing on the Clause or on some other short segment of constitutional text, I will employ the “structural” method exemplified by Regan’s article on *The Supreme Court and State Protectionism*. Regan asked the reader to “imagine that she is drafting a constitution for the United States in the economic and social conditions of [the present].”⁸⁰ This imaginative, theoretical exercise at first may not seem a valid method for interpreting the Constitution, however, upon closer inspection, it certainly is. The Constitution stipulates, ambiguously, that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States”⁸¹; and that “[no State shall] deny to any person within its jurisdiction the equal protection of the laws.”⁸² Each of these short segments of text can be read as a general principle of impartiality. One way to evaluate this reading, as against competing interpretations, is to ask whether the reading is theoretically consistent with the rest of the Constitution as amended.⁸³ The imaginative exercise proposed by Regan merely provides a vivid answer to this question.

One final point. The scholarly literature on interstate equality, like much legal writing, is focused on the federal courts.⁸⁴ Scholars have

79. Other prominent advocates of interstate equality besides Ely have also taken a historical approach. See, e.g., Laycock, *supra* note 15, at 262-66; Simson, *supra* note 11, at 383-86; Varat, *supra* note 23, at 489, 518 (Article IV “explicitly prohibit[s] state discrimination against the citizens of other states”; “[t]he Framers adopted the constitutional ban on state discrimination against nonresidents . . . primarily as an instrument of national unification”).

80. Regan, *supra* note 1, at 1110.

81. U.S. CONST. art. IV, § 2, cl.1.

82. U.S. CONST., amend. XIV, § 1.

83. See generally CHARLES BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1965) (advocating and illustrating the structural approach). The caveat “as amended” is quite important. The best reading of the Constitution will synthesize all its provisions, including amendments. See generally BRUCE ACKERMAN, *WE THE PEOPLE* 131-62 (1991). In particular, the meaning of the Privileges and Immunities Clause may have been changed by the post-Civil War and post-New Deal changes to the federal structure. See ACKERMAN, *supra*, at 58-80, 105-30 (contending that Civil War and New Deal involved constitutional “regime” shifts); see also *infra* text accompanying notes 123-25.

84. For that reason, legal scholars have almost completely ignored the Equal Protection Clause as a locus for interstate equality principles, even though this provision uses the word “equal” while Article IV and the Commerce Clause do not. See Ely, *supra* note 57, at 180-81 (“The clause that thrusts itself forward [as precluding parochialism], of course, is that first resort of constitutional argument, the Fourteenth Amendment’s Equal Protection Clause. Limiting the protection of local laws to local people is obviously ‘rational’ under traditional tests, but somehow that seems unsatisfying. Classifications that distinguish locals from out-of-

sought to guide judges in resolving out-of-stater cases, and the justiciability of a particular interstate norm has often been taken as a reason in favor or against the norm. But it is perfectly plausible to assert that state impartiality is a constitutional norm unenforced by the federal courts.

[C]onstitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of the federal courts' role in enforcing the norm. By 'legally valid,' I mean that the unenforced margins of underenforced norms should have the full status of positive law which we generally accord to the norms of our Constitution, save only that the federal judiciary will not enforce these margins.⁸⁵

"Does the Constitution require state impartiality?" is the question that ought to be analyzed first, independently from the question "Should the federal courts enforce this requirement?" Legislators as well as executive officers and citizens are bound by constitutional norms, even nonjusticiable norms; and conscientious legislators will want to know what these norms entail. In this Article, for the sake of brevity and clarity, I ignore the problem of judicial enforcement and merely try to show that an impartiality principle exists.

II. The Structural Argument

Imagine that the Framers is defining the state legislator's basic point of view. There are two plausible alternatives: either the legislator should generally serve the interests of in-staters, absent some federal constraint (the parochialist model); or the legislator should generally serve the interests of all U.S. citizens (the impartiality model).⁸⁶ The choice between

staters seem . . . suspect Since the special constitutional vulnerability of such distinctions is established quite directly by Article IV . . . , it is this clause that I shall proceed to consider."); Eule, *supra* note 66, at 454 (advancing same view).

85. Sager, *supra* note 46, at 12-21.

86. It might be objected that there is a third model, where the legislator is authorized but not required to consider out-of-state interests absent a side-constraint. However, this is not really an independent model of the legislator's point of view because it does not define the group of people whose well-being the legislator should serve. To say that the legislator is permitted but not required to consider out-of-state interests does not explain how the legislator decides whether to exercise this permission. Presumably the legislator makes *that* decision by considering the well-being of all U.S. citizens (in which case the permission must be exercised) or by considering only the well-being of in-state citizens (in which case the permission cannot be exercised). Ultimately, the legislator's "constituency" is still either in-staters or the entire U.S. citizenry.

There is a sense in which the legislator is "authorized but not required" to consider out-of-state interests under the impartiality model. If the state electorate demands that the legisla-

the two models is informed by relevant features of the Constitution, such as the fact that states are political communities and that a national Congress has certain powers. Which option would the Framers choose?⁸⁷

Let me make this imaginative exercise a little more precise. The Constitution should not be conceptualized as a "treaty" between the several States. It should not be supposed that the Peoples of the States sent representatives to the constitutional convention, where each representative took a parochial point of view and bargained with the others. Instead, the proper conception is that the Constitution was created by the People of the United States.⁸⁸ Rather than bargaining, the participants in the convention ought to have engaged in reasoned deliberation. They

tor ignore outsiders, then the legislator has a good, *impartial* reason for doing so. *See infra* text accompanying notes 108-12. Thus, in a sense, that legislator is authorized to consider out-of-state interests (if the electorate so allows) but not required to do so (if the electorate doesn't). However, I think it is more precise to describe this legislator as being required to give equal weight to out-of-state interests, *ceteris paribus*, at some level of generality, with the legislator's democratic obligation to the state electorate as a factor that may justify zero weight for out-of-state interests. This formulation explains why the legislator would exercise an authorization to give weight to out-of-state interests, while the "authorized but not required" formulation does not.

87. I am assuming that Constitution does indeed define the legislator's basic point of view. This is a crucial assumption, but also a legitimate one. As Douglas Laycock has explained in a related context:

[C]hoice of law within the United States is inherently constitutional law. Choice-of-law questions are about the allocation of authority among the several states. Allocation of authority is what constitutions do. . . . It would be an astonishing oversight if our fundamental law did not state general principles allocating authority among states

Laycock, *supra* note 15, at 250 (citations omitted). Similarly, it would be an "astonishing oversight" if the Constitution did not decide whether state legislators should generally advance the well-being of state citizens or of all U.S. citizens. Point of view, like authority, is a defining feature of the state legislator's office and goes to the very nature of our federal system. The very first question that conscientious legislators must ask is: "Whose interests do I serve?" Moreover, the Constitution has various provisions (the Privileges and Immunities Clause of Article IV, the Equal Protection Clause of the Fourteenth Amendment) that arguably address this very question. The best reading of these provisions is that they do address it. If the Constitution speaks to the authority of the states, *see* U.S. CONST. art. I, § 10; U.S. CONST. amend. X; and to the formation of states, *see* U.S. CONST. art. IV, § 3; and to the form of state government, *see* U.S. CONST. art. IV, § 4; and to state citizenship, *see* U.S. CONST. amend. XIV, § 1; then it also speaks to the state legislator's point of view.

If I am wrong, and the Constitution simply leaves open the legitimacy of state parochialism, then the case for impartiality becomes much more difficult. That case, then, is no different from the case against nation-state parochialism. If the Constitution does not define the state legislator's point of view as between in-staters and out-of-staters, then state law does, absent a federal statute or perhaps federal common law. And proving that state law requires an impartial point of view from state legislators is like proving that nation-state law requires an impartial point of view from nation-state legislators.

88. *See generally* ACKERMAN, *supra* note 83, at 165-99; Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1429-66 (1987).

ought to have drafted the document from a common, national point of view. That point of view is at least impartial between United States citizens, just as the state legislator's point of view is at least impartial between state citizens. In other words, the Framers of the Constitution ought to have given equal weight to the well being of all U.S. citizens, *ceteris paribus*, at some level of generality.

This conception of the Constitution, as the product of rational deliberation from a point of view impartial between U.S. citizens, may well have been controversial in 1787 or in 1850,⁸⁹ but it is hardly controversial now. At a minimum it is hardly controversial that the People of the United States create the Constitution, and that their agents (the Framers) should deliberate in a reasoned manner. That the Framers should take a point of view impartial between U.S. citizens is less of a commonplace, but this premise readily flows from the first two. If the Framers are engaged in reasoned deliberation, as they should be, then they need to take a common point of view. Moreover, that point of view should be appropriate to their role as agents for the People of the United States, for the national political community. Thus, the Framers should be at least impartial between all members of that community.⁹⁰

This principle distinguishes the problem of state parochialism from the problem of nation-state parochialism. The state citizen and the out-of-stater are both U.S. citizens. They are both members of the national political community, and it is the agents of *that* community who create the Constitution. A proponent of state parochialism must show why Framers impartial between all U.S. citizens would choose the parochialist model over the model of state impartiality. By contrast, the proponent of nation-state parochialism need not contend with a world political community, and show that the Framers of the World Constitution, impartial between all members of the World, would establish a system of nation-state parochialism. It can be supposed that the nation-state is pa-

89. See ELIZABETH BAUER, COMMENTARIES ON THE CONSTITUTION, 1790-1860 (1965); WALTER HARTWELL BENNETT, AMERICAN THEORIES OF FEDERALISM (1964); DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); ALPHEUS THOMAS MASON, THE STATES RIGHTS DEBATES: ANTIFEDERALISM AND THE CONSTITUTION (1964).

90. Modern constitutional theory almost always proceeds from this conception of the Constitution. The conception is implicit in any attempt to justify some putative feature of the Constitution. Modern theorists almost never advance an argument of this form: "the Constitution should be understood to mean *X* because *X* would have resulted from bargaining between the delegates from the various states." Rather, the theorist usually puts forward some normative argument, which implicitly takes account of the well-being of all U.S. citizens, if not all persons. In doing so, the theorist makes the assumption that the Framers themselves should have engaged in this kind of normative reasoning. Otherwise, why would it be helpful in analyzing the Constitution?

rochial all the way down: that the framers of the nation-state constitution will ignore aliens' interests, and that these parochial framers will instruct the nation-state legislator to ignore aliens as well.

On the other hand, the fact that the U.S. Constitution is drafted by Framers who are impartial between all U.S. citizens does not automatically preclude state parochialism. Those Framers did not create a unitary national government. There are good, impartial reasons for federalism. The existence of states arguably enhances the well being of all U.S. citizens.⁹¹ State parochialism might also do so.

Why would an impartial Framer choose the parochialist model over the model of state impartiality? Why would that Framer instruct the state legislator to ignore out-of-state interests with respect to a particular set of legislative decisions, specifically those decisions not covered by federal side constraints? Two conditions must be met for an impartial Framer to adopt the parochialist model. First, the Framer must believe that out-of-state interests are not ultimately determinative to those decisions. As I've already suggested, that belief is thoroughly plausible. In Parts II.A and II.B below, I will more fully canvass the various explanations why out-of-state interests might not determine particular decisions by the state legislator. One explanation is that *Congress* takes care of interstate problems. Another is that the state legislator's *role* — as the elected representative of the state citizenry, or as a member of the thick state community — requires the legislator to give little or no weight to out-of-state interests. A third is that out-of-state interests do not bear upon the decision, *independent of* the legislator's role.

But the Framer must believe more. There needs to be some reason why various propositions of the form "out-of-state interests are irrelevant to these decisions" should be written into *the Constitution*. Under the model of state impartiality, state legislators decide for themselves, in any given case, either that they are democratically obliged to give zero weight to out-of-state interests, or that out-of-staters have no legitimate interest, or that Congress has already satisfied out-of-staters, and so forth. Under this model, the Constitution itself never instructs the legislator that the only determinative interests are indeed in-state. And why should the Constitution contain such an instruction? Without a good answer to this

91. See generally AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, FEDERALISM (1991) (review of federalism literature); THOMAS J. ANTON, AMERICAN FEDERALISM AND PUBLIC POLICY (1989) (same); DAVID C. NICE, FEDERALISM: THE POLITICS OF INTER-GOVERNMENTAL RELATIONS (1987) (same); POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE (Ada W. Finifter ed., 1983) (same).

question, the Framers would choose the model of state impartiality over the model of state parochialism.

A standard explanation why certain principles belong in the Constitution is that "normal politics"⁹² is insufficiently deliberative. Because the legislative process is normally driven by the narrow desires of the electoral majority, because the legislators and their constituents do not normally deliberate about the public good, the process cannot be trusted to honor those principles, or so the story goes.⁹³ But this appeal to the reality of "normal politics" is not open to the proponent of state parochialism. If state legislators go about their task in the "normal" fashion, merely seeking without more to serve the interests of the electorate, then the legislators *will* ignore out-of-staters. The expected "normality" of state politics is not a good reason for the Framers to constitutionalize the principle "out-of-state interests are not determinative to these decisions."

Rather, the proponent of state parochialism must offer this kind of story: "If the Constitution requires impartiality with respect to a particular decision, the legislators who obey this duty will reach the wrong outcome. They will wrongly give substantial weight to out-of-state interests, even though such interests are irrelevant." The parochialist must show why conscientious legislators, who would obey the duty of impartiality, are in this case unfit to assess the relative weight of in-state and out-of-state interests.⁹⁴

92. On the distinction between "normal" and "constitutional" politics, see ACKERMAN, *supra* note 83.

93. This story explains why the Constitution guarantees certain rights for out-of-staters. A "normal" state politician will naturally serve insiders' interests at the expense of outsiders', because the insiders elect the legislator.

94. I mean "unfit" quite broadly. The parochialist must have some reason for allocating the decision to ignore outsiders' interests to the Framers rather than the state legislator. The reason could be that the legislator is a less accurate decisionmaker than the Framers. Or perhaps the two are equally accurate, but it is cheaper for the Framers to make a once-and-for-all decision than for the legislator to evaluate outsiders' interests on a case-by-case basis. Cf. Colin Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 66-79 (1983) (discussing allocation of decisions between rulemaker and subsequent adjudicator).

My argument here bears a family resemblance to John Hart Ely's "representation reinforcement" theory of constitutional law. Ely argues that the Constitution only protects those groups whose interests are not adequately represented in the political process. See ELY, *supra* note 74. Similarly, I am suggesting that the Constitution only addresses those issues that the political process is unfit to resolve. This criterion is importantly different from Ely's. For example, Ely would immediately deny that the Constitution protects in-staters against out-of-staters (because in-staters are the represented class), while I believe that this outcome is theoretically possible, if conscientious state legislators are somehow unfit to evaluate out-of-staters' interests. However, I certainly agree with Ely that the proponent of a constitutional principle must defend its removal from the political process.

The constitutional status of state parochialism involves the allocation of authority between the Framers and the state legislator. Giving zero weight to out-of-state interests may be morally legitimate in certain cases, but the question remains: Who decides, the Framers or the legislator? The parochialist lacks a convincing answer to this question.

A. The Paradigm Case: Distributing the State Fisc

Consider the case of positive rights. As I've already discussed, there is no side-constraint that obliges the state legislator to share the state fisc with out-of-staters. The anti-expropriation side-constraint in *Complete Auto Transit* gives out-of-staters a substantive right to the monies that they have contributed, but the remaining portion of the state fisc can be spent for the sole benefit of in-staters. In other words, the Constitution does not require the state legislator to redistribute resources from in-staters to out-of-staters. The out-of-stater has no right at all—not a right to equal treatment, and surely not a substantive right—to resources that derived from state citizens.⁹⁵

The exclusion of outsiders from the state fisc is a core instance of their differential treatment. Legal scholars, however egalitarian, generally concede that out-of-staters need not receive welfare payments and similar state subsidies.⁹⁶ Thus state spending should also be a core instance of state parochialism. If the Constitution instructs the legislator to ignore out-of-staters, such instruction should at least cover the state fisc. But it does not. The parochialist can provide various reasons why out-of-state interests are not determinative to the state's fiscal decision,⁹⁷ but the parochialist cannot explain why the impartial state legislator would be incompetent to assess these reasons himself.

The simplest explanation why out-of-state interests do not determine fiscal decisions is this: out-of-staters have no legitimate interest in such decisions.⁹⁸ Out-of-staters have no claim to the in-stater's resources, because any redistributive claim is internal to the state political community. Perhaps the exclusion of noncontributing in-staters stigmatizes them as incomplete citizens and thereby hinders their full participa-

95. See *supra* text accompanying notes 23-28.

96. See, e.g., Gergen, *supra* note 24, at 1112-16; Laycock, *supra* note 15, at 271-73; Simson, *supra* note 11, at 397-98; Varat, *supra* note 23, at 522-23.

97. "Fiscal decision" is my shorthand for the state legislator's decision how to spend the portion of the state fisc that in-staters have contributed.

98. This is the paradigmatic "role-independent" reason for the legislator to give zero weight to out-of-state interests. See *infra* text accompanying notes 126-31.

tion in state politics.⁹⁹ Perhaps noncontributing in-staters are members of the same thick community as contributing in-staters, and therefore have some communitarian claim to the contributors' resources.¹⁰⁰ Perhaps the contributors actually want to share with the in-state noncontributors, who are their friends and neighbors. But there is no such reason for redistributing resources from in-staters to out-of-staters, or so the parochialist could assert.

Why, though, should the *Framer* decide whether out-of-staters have a redistributive claim against in-staters? Why aren't conscientious state legislators perfectly qualified to do so themselves? The question, here, is not whether out-of-staters really have a redistributive claim against in-staters, but whether the rule "out-of-staters have no redistributive claim against in-staters" should be written into the Constitution.

Indeed, it is quite clear that the Constitution does not contain this rule. If it did, then Congress's power to redistribute resources from one state to another would be inexplicable. Whatever constraints the Uni-

99. I think that this idea explains the "durational residency" cases, beginning with *Shapiro v. Thompson*, where the Court required states to include new residents in various benefits programs. See *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (civil service employment); *Hooper v. Bernalillo County*, 472 U.S. 612 (1985) (tax exemption); *Zobel v. Williams*, 457 U.S. 55 (1982) (distribution of state surplus); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (medical care); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare)). See generally Cohen, *supra* note 23; Wildenthal, *supra* note 23.

The first two cases in this series, *Shapiro* and *Memorial Hospital*, relied upon the right of interstate travel, and *Soto-Lopez* has revived the right-of-travel argument. But durational residency requirements need not directly "burden" travel: imagine that a New Yorker receives \$100 per month in welfare payments, and would receive \$250 as a new resident of California, where established residents get \$300. Conversely, the Californian's right to travel to New York is "burdened" by an expected \$200 loss in welfare payments, a loss that would occur even if New York treats the Californian as well as established New Yorkers. As the Court admitted in *Zobel*: "[R]ight to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents." 457 U.S. at 60 n.6.

A better explanation for these cases is that the Constitution requires new residents to be full citizens of the state. See, e.g., *Zobel*, 457 U.S. at 69 (Brennan, J., concurring) ("[I]t is significant that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship only with simple residence. That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence.") (footnote omitted). And state discrimination against new residents stigmatizes them as incomplete citizens. See, e.g., *Hooper*, 472 U.S. at 623 ("The New Mexico statute creates two tiers of resident Vietnam veterans, identifying resident veterans who settled in the State after [a particular date], as in a sense 'second-class citizens.'"). The right to travel referred to by the Court in *Shapiro* and *Memorial Hospital* is better understood as a right to change your state citizenship, and durational residency requirements penalize that right indirectly, by creating a stigma that could deter out-of-staters from becoming new citizens.

100. See *supra* note 18. WALZER, *supra* note 18, at 3-30, epitomizes the view that distributive justice is internal to "thick" communities.

formity or Apportionment Clauses might once have imposed,¹⁰¹ it is now absolutely clear that national taxes and expenditures need not be geographically neutral.¹⁰² Congress has the authority to impose progressive national taxes, or to establish progressive spending programs, and thereby to transfer resources from richer states to poorer. The premise behind this kind of transfer is that the poor citizens of the net transferee state do have redistributive claims on the rich citizens of the net transferor state. To be sure, Congress is not required to recognize interstate redistributive claims, and neither is the state legislator, but the Constitution does not rule out the existence of such claims. This supposed explanation for why the state legislator can take a parochial point of view in distributing the state fisc—that out-of-staters have no legitimate interest in the fiscal decision—does not work.

The parochialist's next explanation is that Congress should do the work of interstate redistribution. The parochialist must concede that the Constitution does not rule out interstate redistributive claims, but can argue that the Constitution gives Congress the task of evaluating and satisfying these claims. Indeed, this is precisely the argument advanced by "fiscal federalism," perhaps the most prominent federalism theory in the political science literature.¹⁰³ Under the fiscal federalism theory, Congress uses taxes, block grants, and other fiscal mechanisms to ensure that each state's fisc is the "correct" size as required by corrective and distributive justice. If New Yorkers have made a net contribution of X dollars to the California fisc, and have a net redistributive claim of Y

101. U.S. CONST. art I, § 8, cl. 1 ("[A]ll Duties, Imposts and Excises shall be uniform throughout the United States . . ."); U.S. CONST. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."). See *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) (holding income tax unconstitutional as non-apportioned "direct" tax, and also discussing uniformity problem).

102. See *South Dakota v. Dole*, 483 U.S. 203, 207 n.2 (1987) ("The level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all.") (citing *Buckley v. Valeo*, 424 U.S. 1, 9091 (1976) (per curiam)); *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding federal old-age benefits, as provided by Social Security Act; Congress may deploy spending power in aid of the general welfare, to solve problems of national scope); see also U.S. CONST. amend XVI (federal income tax need not be apportioned among states); *United States v. Ptasynski*, 462 U.S. 74 (1983) (Uniformity Clause does not bar geographically specific tax, where justified by national purpose). See generally *TRIBE*, *supra* note 44, at §§ 5-9 to 5-10.

103. See WALLACE E. OATES, *FISCAL FEDERALISM* (1972); WALLACE E. OATES, *THE POLITICAL ECONOMY OF FISCAL FEDERALISM* (1977); PAUL E. PETERSON & KENNETH K. WONG, *WHEN FEDERALISM WORKS* (1986); HARVEY S. ROSEN, *FISCAL FEDERALISM: QUANTITATIVE STUDIES* (1988); Edward M. Gramlich, *Reforming U.S. Federal Fiscal Arrangements*, in *AMERICAN DOMESTIC PRIORITIES* 34 (John M. Quigley & Daniel L. Rubinfeld eds., 1985).

dollars on Californians, then Congress should transfer $X + Y$ dollars from California to New York. The California legislator need not arrange any additional transfer, but rather should use the California fisc for the sole benefit of Californians—or so the theory goes.

There are a number of crucial flaws in this theory. First, Congress will likely fail to arrange the appropriate transfer. After all, Members of Congress are often parochial. California's Senators and Representatives may ignore New York interests and succeed in blocking the fiscal programs that an impartial Congress would have agreed upon. Moreover, the appropriate transfer depends on factors specific to New York and California, *inter alia* the incidence of New York and California taxes and the relative neediness of New Yorkers and Californians. The nationwide spending, taxing, and block grant programs enacted by an impartial Congress will not fully reflect these factors, just as a nationwide health or education statute would not be finely tuned to local needs.¹⁰⁴

Second, even if an impartial Congress somehow succeeds in arranging an appropriate transfer by its own lights, there will still be room for independent action by California. Imagine that the citizens of California and the citizens of New York disagree with the rest of the country about certain issues of distributive justice. Californians and New Yorkers generally acknowledge a certain kind of redistributive claim, for example, "able-bodied, impoverished persons without children deserve welfare benefits," while U.S. citizens generally do not. Thus, California and New York each engage in internal redistribution, setting up "general assistance" programs for impoverished, able-bodied, childless persons. But Congress does not help fund these programs because the U.S. citizenry believes that the beneficiaries are shirkers. Imagine now that New York runs into budget problems and is on the brink of cancelling its program. Should California provide a "horizontal block grant" to New York? The answer may be no, but the reason for a negative answer cannot be the fiscal federalist's. It cannot be that Congress has taken care of interstate redistribution.

Any transfer between New York and California should take account of redistributive norms that New York and California recognize, even if the rest of the United States does not. This is a simple extension of the idea that California's internal redistribution programs should take account of redistributive norms that Californians recognize, even if other U.S. citizens do not, which in turn is an application of the basic principle

104. The idea that state statutes more accurately reflect "local factors"—legislative facts that vary from state to state—is a classic justification for federalism. See sources cited *supra* note 91.

that decentralization enhances democratic responsiveness: *ceteris paribus* governmental action in state *X* should reflect state *X* norms rather than national norms.¹⁰⁵ Nor is it unusual for this principle to be extended to the two-state or multi-state case: *ceteris paribus* governmental action as between states *X*, *Y* and *Z* should reflect the common norms of *X*, *Y* and *Z* rather than national norms. This is a familiar feature of choice of law. If two states share a particular version of tort law, T_1 , while the remaining states have T_2 , T_1 may well govern a tort suit between the citizens of those two states.¹⁰⁶ T_1 is more likely than T_2 to reflect the judgments and beliefs of the affected parties.

In short, the Framers would not direct the state legislator to ignore out-of-staters' redistributive claims, simply because Congress has the authority to address those claims. The fact that Congress can and will promulgate certain redistributive programs does not mean that Congress will "solve the problem" of interstate redistribution and leave no room for supplemental action by the state legislator.¹⁰⁷

The next possibility is that the state legislators' role as "representatives," their democratic obligation to the state electorate, precludes them from redistributing resources to out-of-staters. Indeed, state legislators

105. Again, this is a classic justification for federalism: state statutes will more accurately reflect "local values," normative views that are held by the citizens of some states but not by the citizens of every state. See sources cited *supra* note 91.

106. For example, Vermont's guest statute may be applied to preclude suit by a Vermont passenger against a Vermont driver for a car accident in Alabama, even though Alabama has no guest statute. See *Dym v. Gordon*, 16 N.Y.2d 120 (1965); *Babcock v. Jackson*, 12 N.Y.2d 473 (1963).

What if California recognizes a particular distributive norm while New York does not? Should California nonetheless transfer resources to New York pursuant to that norm? This is a conflict-of-laws problem. It is a difficult question whether California or New York tort law should govern the interaction between Californians and New Yorkers if the two tort laws are different. Similarly, it is a difficult question whether California's or New York's distributive norm should govern the allocation of resources between Californians and New Yorkers if the two states recognize different distributive norms. I do not have an answer to these questions. The example in the text illustrates a much easier case—where two states recognize the same norm. This is analogous to the no-conflicts case in torts, where a New Yorker sues a Californian for a tort in California or New York, and California and New York have the same version of tort law.

107. This point can be rephrased in terms of preemption doctrine. As a general matter, congressional action on a particular subject does not preempt state action. See generally Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69 (1988); Comment, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959); Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978). For example, both Congress and the states have regulated pollution and criminalized drug offenses. Similarly, both Congress and the states can redistribute resources interstate. To be sure, Congressional redistribution may preempt particular kinds of state redistribution in particular cases. But state redistribution is not universally preempted, which is what the parochialist proposes.

may well have a democratic obligation to eschew redistribution, even where out-of-staters have valid redistributive claims that Congress has failed to satisfy. For the impartial legislator, such obligation may constitute a valid reason to attribute zero weight to outsiders' interests. But legislators must themselves decide that democracy precludes redistribution. That possibility does not justify the Framers in choosing the model of state parochialism over the model of impartiality.

The state legislator's democratic obligation is a general concept, which admits of different conceptions.¹⁰⁸ One kind of conception (call it "non-pluralist") permits the legislator to deviate from the electorate's interests. Under a "non-pluralist" conception, the legislator is obliged in some measure to do what the electorate would approve.¹⁰⁹ And the voters might approve an outcome that misserves their own tangible interests—such as the redistribution of resources out-of-state. The voters might themselves take an impartial point of view.

By contrast, under a "pluralist" conception, the legislator has a democratic obligation to advance the electorate's interests, even if the electorate would choose a different course.¹¹⁰ The pluralist conception necessarily precludes redistribution by the state legislator, because redistribution serves outsiders at the expense of in-staters. The non-pluralist conception does so only contingently, depending on whether the electorate would disapprove.

If the Framers adopt a non-pluralist conception of the democratic obligation, they do not yet have a good reason to require fiscal parochialism. The Constitution, then, simply contains some form of the rule "the state legislator should elicit the state electorate's approval." Hypothetically, the Framers could also *predict* that the state electorate would not approve redistribution and for that reason require parochialism, but this hypothesis is wholly implausible. It is the state legislator, and not the Framers, who is best suited to decide what the state electorate would

108. See generally JAMES ROLAND PENNOCK, *DEMOCRATIC POLITICAL THEORY* (1979) (discussing various conceptions of democracy); JAMES ROLAND PENNOCK AND JOHN WILLIAM CHAPMAN, *PARTICIPATION IN POLITICS* (1975) (same).

109. Perhaps the legislator is required to do what a majority of voters would approve if they were fully rational and informed—or perhaps what the majority actually approves if they do so with sufficient intensity.

110. Cass Sunstein has discussed and criticized pluralism at length. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1988); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *COLUM. L. REV.* 1689 (1984).

approve.¹¹¹

By contrast, if the Constitution enacts a pluralist conception of democracy, then the Constitution also requires state parochialism. If pluralism holds true, then the state legislator should ignore out-of-staters' interests, even if in-staters themselves disapprove that course of action. But this is surely paradoxical. Where the electorate itself takes an impartial point of view, why is it more "democratic" for the legislator to ignore outsiders? In such a case, parochialism is surely anti-democratic.

Moreover, pluralism is much too blunt a weapon for the parochialist. Pluralism not only precludes interstate redistribution by the state legislator, but also intrastate redistribution by the legislator and interstate redistribution by Congress. More specifically, it precludes intrastate redistribution from a majority of voters to a minority and interstate redistribution by Congress from a majority of states to a minority. A state welfare program, which benefits the poor minority of state citizens, may well misserve the narrowly defined interests of the rich majority; therefore, a pluralist state legislator would be obliged to reject this program, even if the rich majority recognized that the program was morally obligatory. Similarly, a pluralist Member of Congress would be obliged to vote against a national redistributive program such as AFDC or food stamps if that program caused a net transfer of resources away from the Member's state.¹¹² Thus, if a majority of states are net transferrors—if the program's beneficiaries are concentrated in a few poor states—a Congress of pluralist Senators and Representatives could not approve it. A pluralist conception of the democratic obligation would preclude Congress from playing the impartial redistributive role that the "fiscal federalism" theory presupposes.

For similar reasons, the parochialist cannot argue that the legislator's communitarian obligation, as the member of a thick community,¹¹³

111. The same analysis holds true if the Framers do not choose between pluralist and non-pluralist conceptions, but leaves this choice to the state legislator.

The state legislator's relative competence in deciding what the state electorate would approve also explains the *Complete Auto Transit v. Brady* rule, barring redistribution by state *A* from a state *B* citizen to a state *A* citizen. See *supra* text accompanying note 26. The state *B* legislator, and not the state *A* legislator, is best suited to decide whether state *B* citizens would approve this decision, which harms them. By contrast, a reverse-*Complete Auto Transit* rule—precluding redistribution by state *A* from a state *A* citizen to a state *B* citizen—would be silly, because the state *A* legislator is best suited to decide what state *A* citizens would approve. And if state *B* citizens do not want the extra resources, they can send the resources back.

112. The Member of Congress, like the state legislator, owes a democratic obligation to the state electorate. Although there might be some reason why the Constitution would instruct state legislators but not Members of Congress to serve the narrow self-interest of their electorates, I cannot imagine what that reason could be.

113. See *supra* note 19.

would lead the Framers to require fiscal parochialism. Assume that the fellow members of a thick community owe each other a duty of loyalty as do friends or relatives. Assume, too, that the state is a thick community. When state legislators redistribute resources from in-staters to out-of-staters, are the legislators thereby disloyal to their fellow citizens? This depends on the conception of "loyalty." State legislators may decide, themselves, that "loyalty" or some other communitarian obligation precludes interstate redistribution. But surely the Constitution does not dictate that the states must be thick communities, let alone that the states must adopt a narrowly self-interested conception of the communitarian obligation.

In short, the out-of-stater may well have redistributive claims against in-staters, claims that Congress may not have satisfied and that democratic and communitarian norms permit the legislator to recognize. But there is still the possibility that the dynamics of the multi-state system preclude redistribution by the state legislator. This possibility is regularly discussed by legal scholars and political scientists.¹¹⁴ Where one state adopts a generous interstate policy, other decisionmakers may react in a selfish fashion with untoward results. For example, if a state were to include out-of-staters in its welfare programs, other states would "free ride" on this generous policy by reducing their own programs. Selfish in-staters would try to reduce their tax burdens by migrating to the less generous states. And selfish out-of-staters would try to collect welfare benefits in more than one state.

But what legal scholars have failed to notice is that the impartial legislator can take account of "free rider" effects, migration effects, and other dynamic effects caused by the multi-state system. The impartial legislator can deliberate as follows: "Out-of-staters have a prima facie redistributive claim, but redistribution will harm other persons' legitimate interests, because selfish citizens will emigrate, selfish outsiders will claim double benefits, and parochial states will reduce their own programs. Therefore, on balance, I decide against redistribution." Dynamic effects are simply another potentially relevant factor for the impartial legislator.¹¹⁵

114. See Gergen, *supra* note 24, at 1112; Laycock, *supra* note 15, at 271-73; Varat, *supra* note 23, at 522-23; sources cited *supra* note 103 (fiscal federalism literature).

115. Cf. *Western & So. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981) (upholding "retaliatory tax" by California on out-of-state insurance companies, imposed where company's home state taxes California insurance companies at higher rate than California would otherwise tax out-of-state companies) (Court affirms that state *A* can consider and seek to influence state *B* policies in treating out-of-stater from state *B*).

Nor is the Framers better suited to evaluate this factor. The decision that dynamic effects “trump” the out-of-stater’s redistributive claim is contingent on normative and empirical premises. The empirical premise is that states and citizens will, in fact, react to redistribution in a certain way. The normative premise is that the legitimate interests harmed by this reaction are weightier than the out-of-stater’s redistributive claim. Whether these premises hold true is a policy decision, a decision left to the legislator by the Constitution. The parochialist has no good explanation why the Framers should bother calculating migration effects, free rider effects, and the like, when the impartial legislator can do a better job.¹¹⁶

Once again, the intrastate example illustrates my point. If New York sets up an intrastate welfare program, then some rich New Yorkers may emigrate; some poor out-of-staters may immigrate; and some other states may “free ride” on New York’s efforts by reducing their own programs, in the hope that their own needy will leave. For these very reasons, certain fiscal federalists have argued against redistributive state spending programs, such as state welfare.¹¹⁷ But surely the fiscal federalist’s argument is a policy argument. Surely the Constitution does not decide for the New York legislators that they should eschew intrastate redistribution. Similarly, the Constitution does not require fiscal parochialism simply because a state program of interstate redistribution would cause dynamic effects.

The parochialist has one final argument.

By not requiring state lawmakers to be always looking over their shoulders for foreign interests and always calculating the proportionate incidence of benefits and burdens, we make legislation a possible task for lawmakers with less expertise and less administrative support available to them than Congress has.¹¹⁸

This particular defense of state parochialism operates at a higher level of generality than the others discussed here. It points to the very process of impartial decisionmaking and argues that this process itself is costly, independent of the outcome. Until now, I have discussed various reasons (dynamic effects and democratic obligations, for example) that might

116. To be sure, the state legislator might not be impartial. But this possibility does not help the parochialist, as I tried to explain above, *see supra* text accompanying notes 96-98. Assume that an impartial legislator would be more competent in evaluating migration effects, free rider effects, and the like. If so, doesn’t the Framers have good reason to create a duty of impartiality with respect to fiscal decisions, in the hopes that the state legislator will abide by this duty? Why is the possibility that the legislator will ignore the duty a reason to require fiscal parochialism?

117. *See* sources cited *supra* note 103.

118. Regan, *supra* note 1, at 1165-66.

preclude a particular outcome: redistribution. But certain reasons (process costs) might preclude the state legislator from even considering redistribution. The weighing of outsiders' redistributive claims might be a difficult and expensive task, and this expense might not be justified.

At this point, it is important to remember my definition of "impartiality." The "impartial" legislator gives equal weight to outsiders' interests, *ceteris paribus*, at some level of generality.¹¹⁹ In other words, "impartiality" means this:

- a) giving equal weight to the well-being of out-of-staters *ceteris paribus*, or
- b) adopting a different decision procedure only if you first decide to do *that* by giving equal weight to the well-being of out-of-staters, *ceteris paribus*.

The legislator's primary decision is whether the state should take a certain course of action, for example, to share the fisc with out-of-staters. The impartial legislator can ignore out-of-state interests in making certain primary decisions if the legislator makes an impartial meta-decision that this decision procedure is justified for these particular kinds of primary decisions (or an impartial meta-meta-decision that a different meta-decision procedure is justified, and so forth). Process costs and the like are simply reasons that are relevant to the legislator's meta-decision, "Should I resolve this particular primary decision by giving equal weight, *ceteris paribus*, to out-of-state interests?"

The principle that state legislators can meta-decide to ignore out-of-state interests in particular contexts is analogous to the principle that administrative agencies can choose between adjudication and rulemaking. A benefit-conferring agency might determine that persons who lack certain characteristics do not merit benefits as a general rule, and moreover that a case-by-case determination of their merit would be very expensive. Thus the agency promulgates a rule that "these characteristics are a necessary condition for benefits." This is analogous to the state legislator's meta-decision that "I should ignore out-of-state interests in resolving this primary decision." Just as the agency administrator can refuse to adjudicate the benefit-claims of persons who lack certain threshold characteristics, so the legislator can give zero weight to out-of-state interests in choosing the state's course of action — assuming that the administrator and legislator have adopted this decision procedure impartially.¹²⁰

119. See *supra* text accompanying note 7.

120. See JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 206-09, 222-53 (1985); Diver, *supra* note 94, at 66-80; see also JON ELSTER, *ULYSSES AND THE SIRENS*

In short, the impartial legislator can decide against even considering certain kinds of redistribution if there are good reasons for this meta-decision. The legislator must evaluate the costs and benefits of considering redistribution. The costs include process costs; the benefits include accuracy, for out-of-staters may have valid redistributive claims. What the parochialist needs to argue is that the *Framers* have undertaken this cost-benefit meta-analysis and that by their calculation the costs of considering redistribution outweigh the benefits. But this argument, again, is open to my oft-repeated objection. Why would the Framers make the meta-decision, rather than leaving it to the legislator? Isn't this decision a policy decision? The Constitution gives agency administrators the discretion to engage in adjudication rather than rulemaking. Equivalently, the Constitution gives state legislators the discretion to take an impartial point of view in considering redistribution.

B. The Argument in General

Would the Framers choose the parochialist model over the model of state impartiality? Would they draft the rule "state legislators should ignore out-of-state interests absent some federal side constraint"? I have tried to show why the Framers would not draft a core instance of the parochialist rule: "state legislators should ignore out-of-staters' redistributive claims." *A fortiori*, they would not draft the rule.

In the preceding section, I tried to illustrate the different kind of arguments for state parochialism. One is that Congress takes care of interstate problems. The second is that the state legislator's role—as the elected representative of the state citizenry, or as a member of the thick state community—entails a parochial point of view. The third is that out-of-state interests do not ultimately bear on some state decision, independent of the legislator's role.

The first argument supposes that Congress will coordinate and canalize state parochialism. Congress will appropriately constrain the state's decision so that the course of action chosen by a parochial state legislator will redound to the benefit of all U.S. citizens. The "fiscal federalism" theory epitomizes this idea. According to this theory, Congress can ensure that the state's parochial spending decisions will effect the appropriate outcome—appropriate from a national point of view—by enlarging or reducing the state fisc to account for outsiders' redistributive and corrective claims, and by using monetary transfers or direct regulation to internalize the external costs and benefits of the state's spending

(1984) (discussing how individual rationality often involves a meta-decision to ignore certain factors).

programs.¹²¹

This kind of theory neatly accounts for the side-constraint model. It neatly explains why the state legislator should ignore outside interests, absent some specific federal rule. To comply with those rules and no more is just to work within the framework created by Congress (and the Constitution). Congress has fine tuned those rules so that outsiders' interests are brought to bear where they need to be, and nowhere else. Congress sets up the structure on the assumption that state legislators will generally seek to optimize the well-being of in-staters, and this is exactly what legislators should do.

Perhaps the parochialist's view of Congress would be plausible if there were a limited number of "interstate problems," some small group of state decisions that affected out-of-staters. But the modern, post-New Deal view of federalism is that outsiders are (potentially) affected by every state decision. The state has broad authority over outsiders, under the rubric of territorial jurisdiction: it regulates, taxes and adjudicates their in-state activities.¹²² Moreover, the state's exercise of its authority over in-staters may well implicate out-of-state interests. This is the lesson of New Deal cases like *Wickard v. Filburn*,¹²³ which gave Congress virtually unlimited regulatory jurisdiction under the Commerce Clause, and of the parallel cases that expanded congressional taxing and spending authority.¹²⁴ Congress now has the power to promulgate every kind of regulation, including those that were once thought to lie within the state's exclusive "police" power, because every kind of regulatory problem may concern out-of-staters.¹²⁵ Congress now has plenary control

121. See sources cited *supra* note 103.

122. See *supra* note 14.

123. 317 U.S. 111 (1942).

124. See *supra* note 102. See generally *New York v. United States*, 112 S.Ct. 2408, 2419 (1992) (describing "[t]he Court's broad construction of Congress' power under the Commerce and Spending Clauses").

125. The Tenth Amendment still limits Congress's power to restructure state government. See *New York v. United States*, 112 S.Ct. 2408 (1992) (striking down federal statutory provision that compelled states to regulate); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985) (leaving open "what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause"); cf. *Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991) (construing age discrimination statute to exempt state judges and thus to avoid Tenth Amendment problem). But I think it is fair to say that the Tenth Amendment no longer limits Congress's power over private persons. The state's authority, except its authority over itself, is nowhere exclusive of Congress. See, e.g., *New York v. United States*, 112 S.Ct. 2408, 2420 (1992) ("Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws."); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 845 (1976) ("It is one thing to recognize the authority of Congress to enact laws regulating individual businesses It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens,

over in-staters' resources, because outsiders may have the full range of corrective and redistributive claims on those resources. In the modern, post-New Deal period, there is virtually no realm of exclusive state authority; there is virtually no decision that is open to the states but not Congress. This implies that every state decision arguably affects outsiders; for if the decision were clearly "local," then it should not lie within Congress's authority.

Since every state decision potentially affects outsiders, it is wholly implausible that Congress can or will create a comprehensive framework for state parochialism. That task would overwhelm the most conscientious Member of Congress. A conscientious Congress could not hope to coordinate every kind of state decision or to produce a coordinating framework that reflected each state's special features. Nor is there any reason to think that Members of Congress will be conscientious. This is perhaps the most glaring oversight in the "fiscal federalism" theory. The parochialist assumes that state legislators will ignore outsiders because that is the "reality" of politics, but then blithely posits impartial action by Congress.

Finally, as illustrated by the example of interstate redistribution, the idea of Congress authoritatively "solving" interstate problems falsely assumes a normative consensus among U.S. citizens. It falsely assumes that the citizens of the different states agree upon how out-of-state interests should be brought to bear in any particular case. But if some state takes a dissenting view, then impartial state action may usefully supplement action by an impartial Congress. Surely this is true if the out-of-staters involved come from a state that also takes the dissenting view. In that case, independent state action regarding the interstate problem serves a fundamental aim of federalism: it enhances consent.

For all these reasons, the mere existence of Congress does not provide the impartial Framers sufficient ground to choose the parochialist model over the model of state impartiality. This leaves the parochialist two more options. The state legislator's role may oblige her to ignore outsiders' interests; or she may have role-independent reasons for doing so.

If our federal system lacked decentralized political communities, if it were composed of "territorial agencies" instead of states, then the agency administrators would only have role-independent reasons to distinguish between residents and nonresidents. Imagine an administrative subdivision with territorial boundaries and the same territorial jurisdiction as a

but to the States as States."), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

state, but where the administrator is appointed by the President rather than elected by the agency residents, and no "political community" is connected to the territory. Would the Framers require territorial-agency parochialism? Would they instruct the territorial administrator, "Ignore nonresidents' interests with respect to these particular decisions"? Perhaps the Framers would. Perhaps it is quite clear that nonresidents do not have a legitimate interest in the decisions, and moreover that the Framers are best suited to assess the legitimacy of nonresidents' interests. The fact that nonresidents have no legitimate interest in the decisions would then be a role-independent reason for parochialism. It would hold true despite the absence of an agency community in which the administrator has some role. But the Framers could not have any role-dependent reasons for legitimating agency parochialism just because the Constitution does not create such a community. The Framers could not decide that the administrator owes a democratic obligation to the residents *qua* electors or a communitarian obligation to the residents *qua* fellow members of a "thick" community.

The notion of territorial-agency parochialism is counterintuitive. Our intuition is that state parochialism proceeds from the legislator's role in the state political community, and this intuition helps explain the side-constraint model. Under that model, the Constitution does not contain a piecemeal parochialist rule: "ignore out-of-state interests with respect to decisions D_1, D_2, \dots ." Rather, the rule is much more sweeping: "ignore out-of-state interests, absent some federal side constraint." But the Framers would not promulgate such a rule for the territorial administrator. Such a rule presupposes that the legislator has a parochial role, or that Congress has fully accounted for out-of-state interests, and not merely that out-of-state interests are irrelevant to certain particular decisions facing the legislator.

In Part II.A, I tried to show why the Framers would not have role-dependent reasons for choosing the parochialist model. In my view, the Constitution does not enact a narrow conception of the legislator's role. The legislator does not by virtue of the Constitution have a democratic or communitarian obligation to advance the citizens' narrowly defined interests even if the citizens are themselves impartial. Such an obligation would be quite paradoxical because it would preclude a democratic community from consenting to moral action. The legislator may have a contingent democratic obligation to advance the citizens' interests, contingent on certain political facts, for example, a vehement demand by the state citizenry. But the Constitution does not decide for the legislator that these political facts indeed obtain, nor does it instruct the legislator

to ignore outsiders regardless of the political facts. There is a crucial gap between the legislator's democratic or communitarian obligations and the parochialist rule. What creates this gap is the possibility that state citizens will approve and acknowledge the legitimate interests of outsiders.

The parochialist's final, and I think least intuitive, argument is that the Framers have role-independent reasons for framing a parochial rule—reasons that are tied to particular legislative decisions and not to the legislator's role. The simplest role-independent reason for requiring parochialism with respect to a particular decision is that out-of-staters have no legitimate interest in that decision. For example, as I discussed above, the parochialist might argue that out-of-staters have no legitimate interest in the state's fiscal decision where in-staters have contributed the underlying funds.¹²⁶ If out-of-staters have no legitimate interest in the decision, if their well-being takes no legitimate weight, then the state legislator will reach an appropriate outcome by ignoring outsiders. And if the Framers are more competent in evaluating out-of-state interests than the conscientious legislator, the Framers should perhaps guarantee that outcome by requiring the legislator to take a parochial point of view with respect to the decision.

There are various other kinds of role-independent reasons. First, there are more complex explanations why legislators will reach an accurate outcome if they ignore out-of-staters. In-staters' legitimate interests may outweigh the out-of-staters'. In-staters may virtually represent out-of-staters.¹²⁷ State parochialism may constitute a hidden hand pro-

126. More precisely, out-of-staters have no legitimate interest in the choice between spending programs that do not otherwise implicate their interests. If the state legislator is choosing between a welfare program and a public works project that will spew pollution out-of-state, then the out-of-stater is legitimately interested in this choice.

127. In-staters virtually represent out-of-staters with respect to some decision by the state legislator if the two groups have the same pattern of interests in that decision. If so, legislators will reach the same outcome whether they consider the interests of all U.S. citizens or only the interests of in-staters.

Virtual representation is quite contingent. It is not sufficient that out-of-staters and in-staters divide into the same categories. These categories must represent the same percentages of the two populations, and the intensity of their legitimate claims also must be identical. If the categories are linked to residency, as is often the case, then virtual representation is unlikely, and the legislator will reach a more accurate outcome by considering out-of-state interests. For example, the decision to require safety devices in state factories implicates the interests of factory owners, workers, and consumers. Unless residents and nonresidents divide equally among all three categories, or unless the legislator makes the normative decision to ignore those categories where the proportions are different, the parochial outcome will overrepresent the workers' interests and underrepresent the consumers' interests.

John Hart Ely and other "representation reinforcement" theorists exaggerate the importance of virtual representation. They tend to assume that a group is "virtually represented" if

cess.¹²⁸ The dynamics of the interstate system may preclude a generous outcome. Second, there are higher-level reasons against an impartial decision procedure, such as the process costs of evaluating outsiders' interests.

But role-independent reasons would at best support the piecemeal rule "ignore out-of-state interests with respect to decisions D_1, D_2, \dots ," and not the general rule "ignore out-of-state interests absent some federal side-constraint." Unless you believe the fiscal federalism theory, the mere absence of federal side constraints does not in itself mean that the state legislator will reach a better outcome by ignoring out-of-state interests or that higher-order reasons require a parochial point of view. In short, role-independent reasons cannot account for the side-constraint model.

Moreover, role-independent reasons would not simply entail state parochialism. They would also entail territorial-agency parochialism and what might be called state pseudo-parochialism. If the Framers are best suited to decide whether out-of-state interests determine some decision by the state legislator, they are also probably best suited to decide

the legislator does not discriminate against that group. But as the safety-regulation example demonstrates, out-of-staters and in-staters need not be symmetrically situated with respect to the state legislator's choice between two nondiscriminatory statutes. See Brilmayer, *Carolene, Conflicts and the Fate of the "Insider-Outsider"*, *supra* note 66, at 1310-15 (criticizing Ely on these grounds).

128. In a hidden hand process, parochial decisionmaking by every state leads to the outcome that an impartial observer would approve. For example, interstate competition may maximize national efficiency. Possible examples are the "race to the top" in corporate law, where states vie to design the legal code that will maximize corporate profits, see Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974); federal pork-barrel legislation, where interest-bargaining between Members of Congress causes federal projects to be built in those states that the projects will most enrich; and economic rivalry, where each state tries to attract producers, who end up choosing the most profitable location. See generally THOMAS R. DYE, *AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* (1990). The theme of interstate competition is central to the public choice theory of federalism. See Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); LOCAL PROVISION OF PUBLIC SERVICES: THE TIEBOUT MODEL AFTER 25 YEARS (George Zodrow ed. 1983); see also VINCENT OSTROM, *THE MEANING OF AMERICAN FEDERALISM: CONSTITUTING A SELF-GOVERNING SOCIETY* (1991). However, state competition does not necessarily maximize national efficiency, for example, if externalities are not internalized, and the state legislator may decide that some other norm trumps efficiency.

A hidden-hand process can also serve a distributive goal. Imagine that equal sharing is the proper rule for distributing resource R —an impartial legislator would give every U.S. citizen the same amount of R —and moreover the per-capita level of R is pretty much the same in every state. Then, if every state reserves in-state R for state residents, every U.S. citizen will receive the right amount of R . However, many resources are not distributed with the same per-capita level from state to state, and equal sharing may not be the right distributive rule.

whether those interests determine some territorial-agency decision. Yet we intuit that a territorial-agency administrator should be impartial among U.S. citizens, no less so than the real-world administrators whose jurisdiction is defined in terms of subject-matter rather than territory. Moreover, role-independent reasons do not merely distinguish between state residents and nonresidents. They also distinguish between “workers” (those who work in-state, including commuting nonresidents) and “nonworkers” (those who work out-of-state, including commuting residents). Workers may well have a trumping interest in certain regulatory issues (for example, factory safety), as against consumers or business-owners. Yet no one imagines that the Constitution contains the pseudo-parochialist rule, “ignore nonworkers’ interests with respect to decisions D_1, D_2, \dots ”

Why not? Before framing the rule “ignore nonresidents’ interests (or nonworkers’ interests) with respect to decision D_1 ,” the Framers would have to have role-independent reasons why nonresidents’ (or nonworkers’) interests are irrelevant to D_1 as well as a good reason why the impartial legislator is not suited to assess those role-independent reasons. Perhaps these two conditions do hold true in certain special cases. But they do not hold true very often, or so I will argue.

Let us focus again on the simplest kind of role-independent reason: that out-of-staters have no legitimate interest in a particular decision. Equivalently, this decision is “local”: it only implicates the legitimate interests of in-staters. The question, then, is whether the Framers would identify certain decisions as “local.”

*Wickard v. Filburn*¹²⁹ says no. Once more, this point is crucial: under the post-New Deal Constitution, there is virtually no realm of exclusive state authority. Virtually every decision open to the state legislator is also open to Congress. Therefore the Constitution does not define any particular state decision as “local”: if some decision were thus defined, it should lie outside Congress’s power. But the Constitution is no longer understood to restrict congressional authority relative to the states. The Constitution is no longer read to delimit the areas where out-of-staters lack legitimate interests.¹³⁰

129. 317 U.S. 111 (1942).

130. Because the states do retain exclusive authority under the Tenth Amendment to make certain decisions concerning the structure of state government, *see supra* note 125, the Tenth Amendment might be read to embody a rule about the relative priority of in-state and out-of-state interests: “although out-of-staters have an interest in the structure of state government, the in-staters’ interest is weightier.” If so, does the Tenth Amendment require the state legislator to ignore out-of-state interests in structuring state government? Perhaps not. Even if the Framers believe that in-state interests trump out-of-state interests with respect to the structure

This is another crucial difference between states and nation-states. The Constitution does not define “local” issues just because the United States is a political community. The citizens of the various states are all U.S. citizens, and they have the full range of connections that a political community engenders. They belong to a common society and economy and are full participants in a common political system. Each state is integrated with the others in complex ways, and it is therefore a difficult and controversial question whether out-of-staters lack legitimate claims.¹³¹ The legislator (national or state) is better suited than the Framers to answer this question; it should be left to the political process. By contrast, if the United States were simply a confederation, without a national community, society, or economy, the lines of separation between “local” and “interstate” problems might be quite clear. The Framers, then, might be competent to define the range of legitimate interests held by out-of-staters.

If the Framers would not define “local” issues, then, *a fortiori*, they would not rely upon other role-independent reasons for state parochialism. Surely the conscientious legislator is better suited to decide that out-of-staters are “virtually represented,” that state parochialism constitutes a hidden hand process, and so forth. These scenarios are more contingent, more dependent on contingent normative and empirical premises, than the simple case where outsiders lack legitimate interests. I cannot imagine why the existence of a hidden hand or of “process costs” should be a matter of constitutional law even though the existence of a “local” decision is matter of policy.

Conclusion

This Article is addressed to the conscientious state legislator—the state legislator who strives to honor constitutional norms, even those that the federal courts will not enforce. I have argued that this legislator would always give equal weight to the out-of-stater’s well-being, *ceteris paribus*, at some level of generality. The core of my argument is the im-

of state government, the Framers could disable Congress from structuring state government (because Members of Congress are likely to undervalue these in-state interests) without requiring state legislators to take a parochial point of view (because state legislators are not likely to undervalue in-state interests). The state legislator is better suited than the Framers, or the Member of Congress, to decide whether in-state interests indeed take priority.

131. John Rawls’s view in *A Theory of Justice* is that two persons have obligations of distributive justice to each other only if they are involved in some scheme of cooperation. JOHN RAWLS, *A THEORY OF JUSTICE* (1971). Where society *A* and society *B* are wholly separate, an increment in the wealth of some member of society *A* need not benefit the least-well-off member of society *B*. See THOMAS W. POGGE, *REALIZING RAWLS* 240-80 (1989) (discussing and criticizing this aspect of *A Theory of Justice*).

aginative exercise elaborated in Part II. Imagine that the Framers are choosing between the impartiality model and the model of state parochialism where legislators ignore outsiders' interests absent some federal side-constraint. Which option would the Framers choose? I have tried to answer with a concrete example, the example of positive rights, and then to generalize. In brief, my answer is this: it may well be true that out-of-state interests should not determine some decision by the state legislator, but the Framers have no good reason to resolve that issue for the legislator. The Framers should choose the parochialist model only if out-of-state interests are not determinative to various state decisions *and* the state legislator should be thus instructed. But why should the Constitution contain such an instruction? The impartial state legislator will give zero weight to out-of-state interests where that is the weight those interests merit, and the legislator is better suited than the Framers to decide whether the interests are indeed insubstantial.