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COMMENTARY ON BRILMAYER: JURISDICTION, FAIRNESS AND RIGHTS

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Professor Lea Brilmayer has delivered an article exceptionally creative in its originality and rich in its legal and philosophical implications. Its thesis is that jurisdictional due process depends essentially upon political theory. I will make no attempt to refute her because I find her argument thoroughly convincing. Instead, I will reformulate a few of her insights and use them as a basis for some of my own, more speculative suggestions. We learn at the very start that "This paper is about the link between due process and political theory, and more specifically, about the link between a particular sort of due process issue and political theory."[1] It seems entirely appropriate, therefore, for a philosophical commentator to begin by asking two questions: What is this "particular sort" of due process issue? And what is "the link" between this sort of due process issue and political theory?

Precisely what is jurisdictional due process? It is clear that Professor Brilmayer defines jurisdictional due process in terms of a particular sort of legal issue. What remains unclear is what is at issue in the cases she has in mind. Let us examine, in turn, the two generalizations I find in her article.

First, she suggests that the legal issue is whether a state has the right to assert political authority over a nonresident or an interstate dispute. "Jurisdictional due process issues concern the right of a state to assert adjudicatory or legislative authority over interstate disputes or over residents of other states who claim to have insufficient contact with the forum court attempting to exercise authority."[2] This definition of jurisdictional due process does cover some cases of the relevant sort, for example, *International Shoe Co. v. Washington*,[3] in which the appellant was a nonresident corporation insisting that the State of Washington lacked the authority to require it to contribute to its unemployment fund.

In many other jurisdictional due process cases, as Brilmayer recognizes, the court is not seeking to exercise authority over a nonresident

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1. Brilmayer, *Political Theory and Jurisdictional Due Process*, 39 U. FLA. L. REV. 293 (1987).

2. *Id.* at 294.

3. 326 U.S. 310 (1945).

at all. Consider the way in which the Court formulates the legal issue in *Lawrence v. State Tax Commission.*[4]

> Appellant, a citizen and resident of Mississippi, brought the present suit to set aside the assessment of a tax upon so much of his net income for 1929 as arose from the construction by him of public highways in the state of Tennessee. The taxing statute was challenged on the ground that in so far as it imposes a tax on income derived wholly from activities carried on outside the state, it deprived appellant of property without due process of law . . . .[5]

Here the problem is not to justify the authority of the state over some nonresident, but to justify the state's authority to tax income earned outside its territorial jurisdiction.

Presumably this case is covered by Professor Brilmayer's first generalization because this is an interstate dispute. But precisely what is an interstate dispute? This is certainly not a case in which the two parties are different states. It was not the State of Tennessee that brought suit against the Tax Commission of the State of Mississippi. This does seem to be a case in which there is some conflict, actual or potential, between the jurisdictions of two states. But Professor Brilmayer seems to reject the suggestion that all jurisdictional due process issues concerning nonresidents involve such conflicts. She reminds us that problems of authority might arise where a state sought to exercise power over an individual living in Antarctica, "even though no other sovereign sought to intervene."[6] This first generalization appears, therefore, to be either incomplete or at least incompletely explained, for it does not seem to cover all of the issues raised by jurisdictional due process cases.

Moreover, it does not tell the entire story regarding the cases that it does cover. No doubt political authority is at issue in such cases, but not every doubt about the right to assert authority arising out of questions of jurisdiction raises an issue of due process. Let me remind you of what was at issue in *International Shoe*: "Appellant in each of these courts assailed the statute as applied, as a violation of the due process clause of the fourteenth amendment, and as imposing a constitutionally prohibited burden on interstate commerce."[7] Thus, the

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4. 286 U.S. 276 (1931).
5. *Id.* at 279.
6. Brilmayer, *supra* note 1, at 295.
7. 326 U.S. at 313.

authority of the State of Washington to require foreign corporations to contribute to its unemployment fund can be challenged by an interstate commerce argument, presupposing a conflict between federal and state jurisdictions, independent of any due process issue.

Since due process has traditionally been interpreted by the courts in terms of fairness, Professor Brilmayer's second characterization is more helpful in this regard. "An illustration will show how there might be issues of fairness of the applicability of a process, quite aside from the considerations of the fairness of the process that is being applied."[8] Thus, jurisdictional due process cases are those in which the fairness of applying some judicial or legislative process, rather than the fairness of the process itself, is at issue.

But can one always distinguish the two issues Brilmayer describes as different? In *St. Clair v. Cox*[9] the two issues seem to merge. The Court described the central issue in this case in the following words: "If the court had not acquired jurisdiction over the company, the judgment established nothing as to its liability, beyond the amount which the proceeds of the property discharged. There was no appearance of the company in the action, and judgment against it was rendered for $6,450 by default."[10] *St. Clair* is a paradigm case of jurisdictional due process since it involves a suit against a foreign corporation. In *St. Clair*, the foreign corporation challenged the process employed by the Michigan court to establish jurisdiction. Therefore, *St. Clair* is also a case in which the fairness of applying a process hinges on the fairness *of the process as applied.* Thus, the fairness of the process being applied and the fairness of applying the process are indistinguishably united.

More generally, the courts have held that the requirements of procedural due process vary from context to context. For example, disciplinary action by a college or university against a student does not need to include all the procedural safeguards required in a criminal trial. In this way, the fairness of the process is legally tied to the fairness of its application to the case at issue.

Even if one can and should distinguish the fairness of the process from the fairness of its applicability, this second generalization is at best incomplete. This formulation might explain why the issue is one of due process. It does not, however, make explicit the jurisdictional aspect of the relevant cases.

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8. Brilmayer, *supra* note 1, at 296.
9. 106 U.S. 350 (1882).
10. *Id.* at 352.

I do not find any of Professor Brilmayer's definitions of jurisdictional due process singularly adequate. However, I am happy to report that collectively they appear to be sufficient. Perhaps we can sum them up in this way. Jurisdictional due process cases involve the essential legal issue of whether some act of legislation or some judicial procedure violates the due process clause because of the limits of the jurisdiction (political and legal authority) of the legislating or adjudicating state.

Now that I have attempted to define the nature of jurisdictional due process, it is time to turn to the other question I promised to address. What is the link between jurisdictional due process and political theory? How can one best explain the relevance of political theory to cases hinging on a jurisdictional due process issue? As before, let us begin with answers we find in Professor Brilmayer's article.

One suggestion is that political theory is relevant to jurisdictional due process cases because political authority is at issue in such cases.

> While these cases fail to establish clearly a specific political theory of legal jurisdiction, it is striking how they reflect the traditional themes of justification in the literature of political philosophy. But even if striking, it should not be surprising. A court facing a question of its authority over an individual, insisting that he or she is not subject to that authority, can hardly approach the issue any other way.[11]

Certainly, the particular sort of due process issue under discussion involves a challenge to the political authority of some state, but not every such challenge poses an issue of due process. Accordingly, this proposed link tempts one to look in the wrong place or in the wrong way to find the relevance of political theory. Traditionally, political theory has posed the problem of political authority in terms of the right of a state to enact and enforce rules governing its subjects. Correlatively, there exists the obligation of the subject to obey legislation and submit to adjudication. But these traditional theories of political rights and obligations do not focus on and sometimes hardly mention fairness. Yet it is the fairness of some judicial procedure or legislative act that is central in any due process case, including jurisdictional due process cases. Any proposed link must explain this in some explicit and reasonable manner.

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11. Brilmayer, *supra* note 1, at 307-08.

Professor Brilmayer's other suggestion, although somewhat enigmatic, is much more promising in this respect. In the course of explaining her own vertical perspective on issues of jurisdiction, she remarks: "The difference between such an approach to jurisdictional issues and the vertical perspective is that the inquiry is not phrased in terms of the protesting parties' *rights*, but in terms of what would advance the policies of the involved states."[12] Thus, what is at issue in any jurisdictional due process case is the way in which the exercise of state jurisdiction threatens the rights of some individual. This reminds us that what triggers the due process clause is some deprivation of rights. Here is the beginning, but only the beginning, of an explanation of how political theory bears on such cases.

To my mind, political theory is relevant to jurisdictional due process because what is at issue in this particular sort of case is the applicability of the due process clause. Hence, the link, or links, between political theory and jurisdictional due process lie in the text of the Constitution. The relevant clause reads "nor [shall any person] be deprived of life, liberty, or property, without due process of law."[13] The expression "due process of law" came through the historical development of English constitutional law to mean fair process of law.

The United States Supreme Court has consistently interpreted "due process of law" to mean fair process of law. Thus, theories of procedural fairness and, more generally, political and legal justice are relevant. I also suggest that it is no accident that the words "life, liberty, or property" recall the three fundamental Lockean rights. Those who formulated the Bill of Rights, and the earlier colonial and state bills of rights, upon which the first ten amendments were modeled, often thought in terms of Locke's political philosophy. Moreover, the United States Supreme Court has held that what triggers the due process clause is some deprivation of a right. Therefore, theories of natural, political, and legal rights are relevant to jurisdictional due process cases. There are, if my hypothesis is correct, two links to political theory — one to theories of fairness and the other to theories of rights — found within the language of the due process clause itself.

Can one go further? Can one discern any theoretical connection between these two links? Just how are fairness and rights interrelated within the due process clause? What perplexes me most is why deprivation of life, liberty, or property is impermissible without due process

12. *Id.* at 298 (emphasis in original).
13. U.S. CONST. amend. V.

but permissible and unobjectionable *with* it. The deprivation of something important to and presumably protected by the rights of the individual is still deprivation. Is the message of the due process clause that it is fair to violate the rights of the individual as long as those rights are violated legally?

One solution to my perplexity may be found in Edward Coke's interpretation of chapter twenty-nine of the Magna Carta.

> For the true sense and exposition of these words, see the Statute of 37 E. 3. cap. 8. where the words, [but] by the law of the Land, are rendered, without due process of Law, for there it is said, though it be contained in the great Charter, that no man be taken, imprisoned, or put out of his freehold without process of the Law, that is, by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by Writ original of the Common Law.[14]

Coke believed the traditional rights of Englishmen recognized in the common law were protected by the judicial procedures required by that same common law. This is no accident, but a necessary consequence of the rationality of the common law. The same reason that makes evident the rights of the individual dictates the reasonable procedures established in the courts of common law.

Another solution to my perplexity may be found in the political philosophy of John Locke.

> [F]or I have truly no property in that which another can by right take from me when he pleases, against my consent. Hence it is a mistake to think that the supreme or legislative power of any commonwealth can do what it will, and dispose of the estates of the subjects arbitrarily, or take any part of them at pleasure.[15]

More generally, it is self-evident to reason that all men have rights to life, liberty, and property. Since these are natural and inalienable rights, they exist independent of the state and cannot be given up by the individuals who enter into the social contract. But by agreeing to form a political society, the individual citizens consent to legislation and adjudication by the lawful authority. It follows that any deprivation of life, liberty, or property by due process of law is no violation

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14. E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND * 50.
15. J. LOCKE, THE SECOND TREATISE OF GOVERNMENT 138, at 79 (T. Peardon ed. 1952).

of individual rights because in consenting to lawful authority the individuals have, to this limited extent, waived their rights.

To us, Coke's theory of traditional rights and legal processes posited by the historical body of legal precedents that make up the common law, and Locke's theory of self-evident natural rights endowed by God, seem worlds apart. But to the authors of our Constitution, educated by Blackstone, they appeared to say much the same thing in different ways. The traditional rights of Englishmen coincide with the natural rights of man because the common law is an expression of reason that evidences the law of nature to political philosophers and common law judges alike. Philosophers, jurists, judges, and citizens today will find it hard to share this faith in the complete, or almost complete, rationality of positive law. Therefore, the relevance of political theory to the due process clause implies for us as many problems in the interpretation of the language of our Constitution as it does grounds for judicial reasoning in deciding jurisdictional due process cases.