

# JURISDICTIONAL DUE PROCESS AND POLITICAL THEORY

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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. The goal is to add to the agenda an important legal issue that has not captured its fair share of philosophical attention. As this symposium demonstrates, procedural due process analysis has benefited greatly from the attention of legal philosophers. Its foundations are far clearer and more interesting than they would be if left to straight doctrinal analysis. The time has come for legal philosophers, and philosophically inclined lawyers, to shine some comparable light on the foundations of jurisdiction.

We are already familiar with two varieties of due process problems: procedural due process problems and substantive due process problems. This conference focuses on procedural due process. But what is inadequately appreciated is that procedural due process itself contains at least two sorts of inquiries: domestic due process and jurisdictional due process. Domestic due process is the sort of issue that most constitutional theorists think of when they hear the words "due process." Perhaps the usual focus is even narrower. Modern due process scholarship often concentrates on the procedural due process of prob-

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lems inherent in the so-called "new property,"<sup>1</sup> for example, claims against government entitlement programs or claims to government employment. This focus tends to overlook traditional garden variety due process problems, even though they are still purely domestic due process issues. Traditional due process problems include the application of *res judicata* or other preclusion doctrines, which foreclose a litigant from raising claims that may not already have been adequately aired. But even these relatively neglected due process issues are fortunate in comparison to issues of jurisdictional due process.

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. They involve doctrinal questions of legislative authority (choice of law), adjudicatory authority (personal jurisdiction), criminal jurisdiction, jurisdiction to tax, and many others. The link with political theory lies in the argument that such issues should be analyzed in terms of a state's right to exercise coercive power over the individual or dispute. Traditionally, political theory has treated as central the issue of the legitimacy of the state's exercise of coercive power. The state's right to assert authority over its citizens acting within its territory has been subjected to intense critical scrutiny by theorists from Aristotle, Hobbes, and Locke, to Nozick and Rawls.

The justifications suggested by such theorists should shed some light on the issue of coercive power over nonresidents and interstate disputes. These issues of interstate power are far more attenuated than simple justification of the exercise of domestic power. The theoretical questions are, nonetheless, analogous. Does an individual have sufficient contact with a state to entitle the state to assert coercive power? Can an adequate justification for political obligation be found? What theories of political obligation are reflected in our federal Constitution? When does power asserted over interstate cases comport with jurisdictional due process?

Political theory is applicable to jurisdictional issues in the following way. Any justification for the exercise of state power will contain a set of reasons explaining why state coercive power is legitimate. Im-

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1. The articles in the symposium exhibit such a focus; several of them deal explicitly with new property issues. See Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323 (1987); Terrell, *Liberty and Responsibility in the Land of "New Property": Exploring the Limits of Procedural Due Process*, 39 U. FLA. L. REV. 351 (1987).

plicit in such a set of reasons is an explanation of the conditions under which state coercion is justified. Therefore, coercion will be justified in some circumstances while unjustified in others. Justifiable coercion depends upon whether those necessary conditions are satisfied. Cases that are outside the state's jurisdiction, under this view, are cases that are beyond the legitimate exercise of coercive power. A theory of the American law of jurisdiction, in other words, should be based upon a political theory consistent with the norms underlying the American Constitution, and should reflect the criteria of justification that such underlying political norms implicitly incorporate.

### I. TOWARDS A VERTICAL PERSPECTIVE

It might be thought that this is the only or obvious approach to jurisdictional due process. Nothing would be farther from the truth. Indeed, there are at least four other ways to approach the issue of jurisdiction. Each is different from the political rights approach argued here, which is a "vertical" perspective on the interstate allocation of authority.

To see why this is a "vertical" approach, one might contrast it with the first existing alternative, which is the traditional horizontal approach to state sovereignty. States can be conceived as individual actors, concerned to define their powers vis-à-vis other states. Interstate relations are analogous, under this view, to interpersonal relations in that they involve the interactions of formal equals.<sup>2</sup> Such a horizontal perspective contrasts sharply with a vertical emphasis on the relationship between a state and an individual over whom it exercises power. This is a hierarchical relationship, not a relationship of formal equality. Indeed, vertical analysis does not presuppose conflict between competing sovereigns. Problems of vertical authority might arise where a state sought to exercise coercive power over an individual living in Antarctica, even though no other sovereign sought to intervene.<sup>3</sup> They might also arise even if other involved states had no motive to contest the assertion of authority.

A second alternative to the vertical approach is a modern functional approach to jurisdiction. This modern functional approach has won

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2. One description of such a horizontal view, and a criticism of its philosophical weaknesses, can be found in C. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979).

3. In this respect, one might contrast due process, which focuses on the state/individual relationship, with full faith and credit, which by its terms requires credit to the laws of other states. The former is oriented towards the vertical perspective; the latter towards the horizontal perspective.

adherence in several justices' separate opinions in the United States Reports.<sup>4</sup> This approach seeks to analyze jurisdictional due process issues in a manner qualitatively similar to analysis of domestic procedural due process issues. Thus, for instance, personal jurisdiction issues might be analyzed in terms of notice and opportunity to defend. Geographical distances, after all, make it inconvenient to collect and present evidence. If sufficiently substantial, the inconvenience might violate the requirement of an opportunity to defend. Such analysis reduces interstate problems to intrastate problems, setting aside questions of legitimate authority posed by jurisdictional boundaries. Similarly, one might reduce all choice of law problems to questions of whether forum law itself is substantively unfair or idiosyncratic. Only in such situations, it could be argued, would due process be violated, for if the law was unfair or idiosyncratic its application would result in unfair surprise.

This sort of approach sidesteps important issues of political legitimacy. It refuses to analyze whether particular exercises of sovereign authority are appropriate. Moreover, this approach confuses the fairness of a rule or a decision procedure with the fairness of applying it in a particular instance. 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. Although it is an example that would not typically be thought of as jurisdictional, it is conceptually somewhat similar and may be a more obvious illustration of the same point.

The example concerns arbitration. Often, commercial contracts contain arbitration clauses providing a means for settling disputes in the event of a contract disagreement. Each side may get to name one arbitrator, and the two chosen arbitrators will select a third. The location of arbitration and applicable rules of law may be specified. It seems safe to assume that an arbitration process that is set up in this way is, typically, a fair decision process.

It should be clear, however, that fairness of the existing arbitration process is not the only issue. There is also an issue of why it is fair to require a party to submit his or her dispute to arbitration. Typically, a ready answer is that the party agreed to arbitration in advance, through the contract. There may, however, be problems with the

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4. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (Stevens, J., concurring); *World Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) (Brennan, J., dissenting).

effectiveness of the consent. For example, the consent clause may have been in fine print or inserted through the fraud of one of the parties. The point is merely that the issue of the fairness of requiring the parties to arbitrate is different from the issue of the fairness of the arbitration process itself.

The issue of the fairness of the process and the issue of the fairness of the applicability of the process are linked, but conceptually separable. They are linked because both issues seem crucial to the fairness of holding the parties to the end result. Thus, even if the parties agreed in advance to arbitration, this consent might be considered ineffective if the arbitration procedure itself was fundamentally unfair. One might not, under this view, be allowed in advance to bind oneself to an unfair decision process, in the same way that one might not be allowed to sell oneself into slavery. Consent to an unjust institution is ineffective.

Conversely, it is plausible that even a fair procedure may not be invoked unless it is fair to apply it to the protesting party. If one wishes to get fanciful, one might imagine lots of procedures that would be fair if agreed to in advance, but unfair if the parties have not consented. While we might agree in advance to flip a coin if we have a contract dispute, this is not a decision procedure that can be imposed unilaterally or after the fact. Nor would it be fair to require submission of the dispute to a rabbinical court, although again we might agree to such an arrangement in advance.

The two issues of fairness of applicability and process fairness are linked in that both can figure into the evaluation of the enforceability of the eventual result. However, they are distinct in that it is entirely plausible to say that defects in process fairness are not cured by fairness of applicability, and defects in fairness of applicability are not cured by process fairness. I am not arguing that the two sorts of fairness can never compensate for one another. It is conceivable that one can consent in advance to a grossly unfair decision process, or that no consent is necessary where the process is truly fair. But the fact that one might compensate for the other does not mean they are the same issue, only that it is controversial what the relationship is between the two separate issues. For this reason, merely showing that the process would be fair if applied domestically does not solve the issue of legitimate authority.

There is a third modern approach to jurisdictional issues that is also distinct from the vertical approach that I am proposing. That approach is to decide jurisdictional disputes on the basis of whether the state in question has an "interest" that would be advanced by asserting authority. This sort of approach is most familiar as a choice of law methodology, although it is also sometimes brought to bear on

issues of adjudicative jurisdiction.<sup>5</sup> 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. I should emphasize that "rights" as the term is used here does not assume any particular definition of rights. Rights might be Kantian, utilitarian, or based upon the will of Allah. But to talk in terms of rights is to phrase things in terms of justification, and simply to point to a state's understandable desire to have its way is not necessarily to justify its use of coercive power.<sup>6</sup>

A fourth approach speaks in terms of rights, but it does so in a rather different way than the political rights theory that I rely upon. Developed by my colleague Professor Perry Dane,<sup>7</sup> it borrows from the earlier "vested rights" approach to choice of law, suggesting that states should view interjurisdictional disputes as being uniquely susceptible to the authority of a single state.<sup>8</sup> It sees the role of courts as being the implementation of the rights that individuals acquire under a state's authority, rather than merely the implementation of the policy preferences that a state has adopted. A reaction to the legal realists' approach to jurisdictional theory, such a vested rights account assumes that individuals have rights to particular results, and that courts should strive to identify and enforce them.

The similarity to the vertical theory adopted here lies in the emphasis on rights. But the rights are of a different sort. They are rights in the Dworkinian sense,<sup>9</sup> rights to a particular result in a lawsuit. It

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5. The seminal choice of law authority for analysis of governmental interests is B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963). With regard to personal jurisdiction, see *World Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) (Brennan, J., dissenting) (state has a legitimate interest in enforcing highway laws).

6. It might be thought that utilitarian "rights" are not really "rights" but merely policies, which the state is not free to employ to trump the claims of individuals. *Cf.* R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (contrasting rights-based adjudication based on principles with decision based on policies). Yet in the broader sense in which I use the term, utilitarian rights can exist. Utilitarianism, after all, counts into the equation the preferences of the coerced individual, according those preferences an equal weight to the preferences of others. The policy-based analysis criticized in the text accords no such weight to the needs of the out-of-stater. It merely asks whether the application of local law would further the democratically expressed preferences of the citizens of the forum.

7. Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 *YALE L.J.* 1193 (1987).

8. Joseph Beale developed the original vested rights theory in the *RESTATEMENT (FIRST) OF CONFLICT OF LAWS* (1934).

9. See generally R. DWORKIN, *supra* note 6.

is assumed under such a theory that right answers exist. The vertical political rights approach that I am proposing does not make this assumption. One might claim, for instance, that Florida has no right to regulate one's conduct without simultaneously insisting that the proper law is the law of some other state. For instance, I might concede that either New York or Connecticut has political authority over my actions, so that either law might properly apply. Dane's and Dworkin's rights are rights to a particular result.

## II. JURISDICTIONAL DUE PROCESS: THE DOCTRINE

Although a vertical political theory perspective is rather different from the approaches that most scholars have taken to the subject, it finds surprising case law support. Tucked here and there in the case reports are intimations that when judges are faced with jurisdictional issues they turn, almost instinctively, to theorizing about the proper scope of a state's political authority. These intimations are found in the various areas of jurisdictional doctrine.

One such doctrinal context is the problem of adjudicative jurisdiction. If you travel from your domicile in Connecticut to Florida for a conference, and while there you defame a conference participant from Missouri, then Florida has a right to require you to return to defend a defamation action in that state. The offended participant may choose, in the alternative, to sue you in Connecticut. What the defamed person probably cannot do, however, is return home to Missouri and require you to come there to defend. The doctrinal question is posed in terms of "minimum contacts";<sup>10</sup> whether there exists sufficient connection with the forum such that it is fair to be required to travel to that jurisdiction to litigate. Florida would have such contacts, as the site of the defamation. Connecticut would have sufficient minimum contacts because it has authority by virtue of residence or domicile.

Another problem along these lines concerns the right of a state to apply its own law to the controversy.<sup>11</sup> Again, in the defamation case, the most likely alternatives are Florida and Connecticut. These are the states that seem to have the most legitimate claims to tell you what to do. And once again, the question can easily be phrased as a problem of political theory. What are the connections that one might

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10. For a general account of the "minimum contacts" theory, see Brilmayer, *How Contacts Count*, 1980 SUP. CT. REV. 66.

11. For a general account of choice of law theory, see L. BRILMAYER, *AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM* (1986).

have with a state, or foreign nation, that would give it a right to tell you what to do in such circumstances?

A closely related issue concerns the problem of jurisdiction to tax.<sup>12</sup> As with the other two examples, this is an issue of the state's right to exercise coercive power. Even if one concedes that states in general have rights to tax persons against their will (the extent of the right to tax for public purposes being, of course, philosophically controversial) this does not mean that all states have a right to tax some particular individual. To whom does Smith owe her taxes? All states may be equally fair; all may put tax revenues to equally good purposes. But this does not mean that they all have equal rights to tax poor Smith, who would be utterly impoverished if they all chose to do so.

In cases discussing the forum's right to adjudicate a dispute, to apply its law, or to impose a tax, the Supreme Court has relied on rather unsophisticated versions of familiar arguments about political obligation. Some of these arguments are territorial in nature while others arise out of the relationship between a citizen and the government. When pushed to explain why such things should matter, the Court has drawn upon theories of receiving benefits from either doing business in a state or being a member of the community. Another way to justify assertion of sovereign authority is through explicit or tacit consent. All of these arguments are familiar, of course, in the literature of political theory.

#### A. *Territorialism*

In *Pennoy v. Neff*,<sup>13</sup> the Supreme Court adopted a territorial theory of jurisdiction:

Every state owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens . . . .<sup>14</sup>

While *Pennoy* was a dispute over judicial jurisdiction, the territorial principle was also followed in *American Banana Co. v. United Fruit Co.*,<sup>15</sup> dealing with applicability of American law:

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12. See generally *id.*

13. 95 U.S. 714 (1878).

14. *Id.* at 723.

15. 213 U.S. 347 (1908).



[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done . . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign . . . .<sup>16</sup>

These holdings are reminiscent of John Locke's argument in *The Second Treatise*:

Whoever, therefore, from thenceforth by inheritance, purchase, permission or otherwise, enjoys any part of the land so annexed to, and under the government of that commonwealth, must take it with the condition it is under — that is, of submitting to the government of the commonwealth under whose jurisdiction it is as far forth as any subject of it.

Locke also said that "those who . . . come within the territories belonging to any government" are bound to pay homage to its laws.<sup>17</sup>

#### B. *Membership*

In numerous cases, the Supreme Court has held that membership in a political community is an adequate basis for assertion of coercive authority. *Blackmer v. United States*,<sup>18</sup> for instance, dealt with the power of Congress to subpoena a United States citizen living abroad. In holding that such power existed, the Court explained:

While it appears that the petitioner removed his residence to France in the year 1924, it is undisputed that he was, and continued to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States maintained its authority over him, and he was bound by its laws made applicable to him in a foreign country.<sup>19</sup>

This holding was reiterated in *Old Dominion S.S. Co. v. Gilmore*.<sup>20</sup> The Court in *Old Dominion* held that a state has the power to enforce

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16. *Id.* at 356.

17. J. LOCKE, *SECOND TREATISE ON GOVERNMENT* §§ 119-21 (T. Peardon ed. 1952).

18. 284 U.S. 421 (1932).

19. *Id.* at 436.

20. 207 U.S. 398 (1907).

its law over a citizen domiciled within the state, even when on the high seas. "[T]he bare fact of the parties being outside the territory, in a place belonging to no other sovereign, would not limit the authority of the state . . . ." <sup>21</sup> Similarly, in *Skiriotes v. Florida*,<sup>22</sup> the Court said, "[E]ven if it were assumed that the *locus* of the offense was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from the use of the described divers' equipment at that place."<sup>23</sup>

In *United States v. Bowman*,<sup>24</sup> three Americans and one Briton planned to defraud the United States government while aboard a ship outside of Brazil. The three Americans were apprehended and brought to trial. The Court asserted: "the three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property. Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance."<sup>25</sup> The Court, in contrast, seemed to accept the possibility that the United States Court might have no jurisdiction over the subject of Great Britain when he is brought to trial.

### C. Benefits

These cases that cite the obligation that a citizen has to his or her government do not tell us much about *why* this obligation exists or *on what it is based*. Other decisions do seem to go some distance toward explaining this. In *Milliken v. Meyer*<sup>26</sup> the Court wrote:

[T]he authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the various incidences of state citizenship. The responsibilities of that citizenship arise out of the relationship to the state which domicile creates. That re-

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21. *Id.* at 403.

22. 313 U.S. 69 (1941).

23. *Id.* at 76 (emphasis added).

24. 260 U.S. 94 (1922).

25. *Id.* at 102.

26. 311 U.S. 457 (1940).

lationship is not dissolved by mere absence from the state. The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence in the state.<sup>27</sup>

Under this theory, the privileges and protection the state grants to its citizens continue after they leave the state. Therefore, the state may demand reciprocal duty from an absent citizen.

In *Lawrence v. State Tax Commission*,<sup>28</sup> the Court concluded that a state has power to tax its own citizens on income derived wholly from activities carried on by them outside of the state because of the "rights and privileges incident to . . . domicile in the state."<sup>29</sup> Similarly in *Maguire v. Trefry*,<sup>30</sup> the Court held that the benefits the individual receives from the government bind the individual to support that government by paying income tax, on the theory that "[g]overnment provides for him all the advantages of living in safety and in freedom and of being protected by the law. It gives security to life, liberty and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government . . . ."<sup>31</sup>

In *United States v. Bennett*,<sup>32</sup> the Court held that Congress had the right to levy a tax on the use, by a United States citizen, of a yacht that was never within the territorial jurisdiction of the United States. It was argued that Congress had no power to tax in this case because a government does not have the capacity to confer benefit and afford protection outside of its territory. The Court in *Bennett* responded that this was confused thought:

[T]he confusion of thought exists in mistaking the scope and extent of the sovereign power of the United States as a nation, and its relation to its citizens and their relations to it. It presumes that government does not, by its very nature, benefit the citizen and his property wherever found. Indeed, the argument, while holding on to citizenship, belittles and destroys its advantages and blessings by denying the possession by government of an essential power required to make citizenship completely beneficial.<sup>33</sup>

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27. *Id.* at 463-64 (citations omitted).

28. 286 U.S. 276 (1931).

29. *Id.* at 281.

30. 253 U.S. 12 (1919).

31. *Id.* at 14 (quoting *Maguire v. Tax Comm'r*, 230 Mass. 503, 513, 120 N.E. 162, 166 (1918)).

32. 232 U.S. 299 (1913).

33. *Id.* at 307.

In other words, as explained in *Cook v. Tait*,<sup>34</sup> “[t]he principle was declared that the government by its very nature, benefits the citizen and his property wherever found, and therefore has the power to make the benefit complete.”<sup>35</sup> The *Cook* court declared Congress had the power to tax income received by a native citizen of the United States, domiciled abroad, from property situated abroad, because the citizen owes the government for the benefits that the citizen continues to receive.

In these cases, citizenship seems to imply a benefit to the individual and therefore allegiance and debt to the state. Indeed, in *Luria v. United States*,<sup>36</sup> the Court wrote, “Citizenship is membership in a political society, and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other.”<sup>37</sup> The Court went on to explain why aliens are admitted to this country in these terms.

[I]t was contemplated that his [an alien’s] admission should be mutually beneficial to the government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past.<sup>38</sup>

These cases focus on the benefits of membership as a basis for asserting state authority. However, the territorial rule also can be explained in terms of benefits, the benefits of doing business in the state. Thus even nonmembers might be bound under a benefits theory. The minimum contact test for adjudicative jurisdiction, for example, seems to be based upon a notion of fairness of being obligated to a state from which one receives benefits. A familiar passage from *International Shoe Co. v. Washington*<sup>39</sup> reads:

[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that

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34. 265 U.S. 47 (1923).

35. *Id.* at 56.

36. 231 U.S. 9 (1913).

37. *Id.* at 22.

38. *Id.* at 23.

39. 326 U.S. 310 (1945).

privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.<sup>40</sup>

And in *Helicopteros Nacionales de Colombia v. Hall*,<sup>41</sup> the Court argued similarly that “[a]s active participants in interstate and foreign commerce take advantage of the economic benefits and opportunities offered by the various States, it is only fair and reasonable to subject them to the obligations that may be imposed by those jurisdictions.”<sup>42</sup>

Whether the benefits are thought to flow from membership in a community — as in *Milliken v. Meyer* — or in the conduct of in-state activities — as in *International Shoe* — they find a ready analog in the literature of political obligation. Both Rawls and Hart have analyzed political obligation in terms of reaping the benefits of others’ compliance with a system of laws.<sup>43</sup> Indeed, their reference to this argument as a principle of “fair play” is remarkably reminiscent of the *International Shoe* formula, “fair play and substantial justice.”<sup>44</sup> Again, the Court has instinctively anticipated the arguments of political philosophers, although in a rather unsophisticated way.

#### D. Consent

Other philosophical theories are also reflected in the cases. Loosely linked together are notions of consent, tacit consent, and intentionality. Consent has almost universally been recognized as a basis for jurisdiction. By inserting a clause into a contract, a defendant may agree to be bound by a state’s laws or subject to its adjudicative procedures. In *National Equipment Rental v. Szukhent*,<sup>45</sup> the Supreme Court held that such clauses generally satisfied due process.

Tacit consent is another theory that has been employed. For instance, in *St. Clair v. Cox*,<sup>46</sup> the Supreme Court stated:

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40. *Id.* at 319.

41. 466 U.S. 408 (1984).

42. *Id.* at 423.

43. Hart, *Are There any Natural Rights?*, 64 *Phil. Rev.* 185 (Apr. 1955); Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* (S. Hook ed. 1964).

44. 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

45. 375 U.S. 311 (1964).

46. 106 U.S. 350 (1882).

If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specifically authorized their agents to receive service of the process.<sup>47</sup>

*Hess v. Pawloski*<sup>48</sup> added that "the State may declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served."<sup>49</sup>

The tacit consent theory is a familiar theory in the philosophical literature. I mentioned earlier that some of Locke's arguments support a territorialist view. The rationale underlying Locke's territorialism was tacit consent. Locke argued, for instance, that walking upon the highways or residing in the territory amounted to a consent to the sovereign's authority.<sup>50</sup> Locke, indeed, could have been contemplating the situation in *Hess v. Pawloski* when he penned those words! He anticipated by several centuries the argument that a nonresident motorist entering the state tacitly consents to service of process upon the secretary of state!

In keeping with consent as a basis for assertion of authority, the Court has on numerous occasions emphasized the importance of the defendant's awareness or intent to submit to jurisdiction. In *World Wide Volkswagen v. Woodson*,<sup>51</sup> for instance, the Court stated that due process required that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."<sup>52</sup> The Court has also indicated that under the benefit theory there must be some intention to receive the benefits in question. In *Hanson v. Denckla*,<sup>53</sup> the Court interpreted *International Shoe* to require that "in each case . . . there be some act by which the defendant *purposely avails* itself of the privilege of conduct-

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47. *Id.* at 356.

48. 274 U.S. 352 (1927).

49. *Id.* at 357; *see also* *Washington v. Superior Court*, 289 U.S. 361, 364-65 (1933); *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1856).

50. J. LOCKE, *supra* note 17, § 119.

51. 444 U.S. 286 (1980).

52. *Id.* at 297.

53. 357 U.S. 235 (1958).

ing activities within the forum State, thus invoking the benefits and protections of its laws."<sup>54</sup>

Language in *World-Wide Volkswagen*<sup>55</sup> also suggests that a key issue of jurisdiction is whether the party actually intended to gain benefits from the State in question. The decision tells us that when a defendant "purposely avails"<sup>56</sup> himself or herself of benefits, there is "clear notice"<sup>57</sup> of being subject to suit. Thus, connections with the state can be severed if the risks are too great. Continued dealing, furthermore, seems to show an intention to take the risks and benefits involved.

[I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States . . . .<sup>58</sup>

There seems in these cases to be an effort to show that the manufacturer's continued service in the state implies a determination that the benefits outweigh the costs. Recall Robert Nozick's argument in *Anarchy State and Utopia*<sup>59</sup> that "[a]t the very least one wants to build into the principle of fairness the condition that the benefits to a person from the actions of others are greater than the costs of doing his share."<sup>60</sup> Nozick said that such a principle could not be formulated "without obviating the need for other persons' *consenting* to cooperate and limit their own activities."<sup>61</sup> In keeping with these suggestions is the insistence that political coercion be predicated upon deliberate, purposeful acts; that responsibilities be a matter of "obligation" and not mere "duties."<sup>62</sup>

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

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54. *Id.* at 253 (emphasis added).

55. 444 U.S. at 297.

56. 357 U.S. at 253.

57. 444 U.S. at 297.

58. *Id.*

59. R. NOZICK, *ANARCHY STATE AND UTOPIA* (1974).

60. *Id.* at 94.

61. *Id.* at 95 (emphasis added).

62. A. SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979).

of its own authority over an individual, insisting that he or she is not subject to that authority, can hardly approach the issue any other way. The tools that most readily come to hand are consent and tacit consent, receipt of benefits, political membership, and presence within the territory.

### III. PHILOSOPHICAL PROBLEMS

While the cases speak in language reminiscent of political philosophy, the rationales that they offer are deeply unsatisfying. Of course, United States Reports is hardly an adequate forum for philosophical debate. But even if bolstered by arguments from the philosophical literature, closer examination shows that today we still lack an adequate account of political obligation.

Consider first the most simplistic alternative, naked territoriality. The defects in this theory are rather obvious. It is not, in fact, a theory at all, but merely a statement of a conclusion. The state has a right to apply its law, or otherwise assert coercive authority, because it has a right to regulate what goes on within its territory. But why? The rationale seems to beg the very question that it tries to answer, namely, the source of its own authority. Unless supported by some sort of additional reasoning it is theoretically inadequate.

The Supreme Court has no more stopped with such an explanation, however, than have philosophers. *Pennoyer v. Neff*, and the simple territorialism it represented, are generally conceded to have been ousted by later developments such as *International Shoe*.<sup>63</sup> Locke, as we have seen, did not stop with naked territorialism either, but justified territorial obligation by a theory of tacit consent. We must therefore examine these explanations of territoriality — tacit consent, benefits, membership, and so forth — in our search for a more complete rationale.

What we find, however, is that they are flawed for almost the same reasons that flaw territoriality. Indeed, on closer examination they seem merely to be variations on a territorial theme. For example, consider tacit consent. How does one supposedly tacitly consent to the authority of the State of Florida? By using the Florida highways, entering into Florida to transact business, or something of that sort. Florida might not, for instance, declare that attending a conference in Chicago amounted to tacit consent to the application of Florida law

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63. For a historical account of personal jurisdiction, see L. BRILMAYER, *supra* note 11, at 24-26.



or to subjection to Florida adjudicatory authority. In this respect, tacit consent is derivative of a theory of territoriality. It is only with regard to in-state activities that Florida might attach conditions. Therefore, the tacit consent argument turns on prior notions that a state has a right to regulate within its own boundaries.

The problem cannot be solved, as might be thought, by emphasizing notice. The notice argument would suggest that the reason Florida cannot treat going to a Chicago convention as tacit consent is because persons would not know that going to Chicago counted as consent. The notice argument is unpersuasive, however, because even if Florida notified people in advance what it considered tacit consent, Florida still could not treat going to Chicago as a basis for jurisdiction. For instance, if Florida placed television ads warning of the consequences of visiting Chicago, its case for asserting authority would not be improved. Conversely, entering Florida is taken as notice that Florida law will be applied only because it is safe to assume that most people would recognize application of Florida law as a reasonable consequence of entering the state. People are on notice because they would themselves realize that such application is fair. Florida need not specifically communicate to visitors the consequences of entering Florida; but this returns us once more to the question of what is fair.

For similar reasons, the argument based upon membership is highly problematic. Obligations based upon membership might be explained in terms of a member's right to vote. The right to vote is a benefit that justifies, under such a theory, the obligation to obey. But surely this is too simple. Assume that Florida decides to extend to Gorbachev the right to vote in Florida elections, and notifies him of this fact. Gorbachev is not for that reason obligated to obey Florida law. The "right to participate gives rise to obligation to obey" argument makes sense only with regard to persons who already stand in the appropriate authority relationship to the government in question. The government must have some right to foist this trade upon the individual for the individual to be thus obliged. Typically, the group of persons so obliged is delimited territorially to persons residing in the territory. Again, we need some theory of territoriality prior to a more sophisticated concept such as membership.

A.J. Simmons has made a somewhat similar point with regard to benefits theory and territoriality.<sup>64</sup> He notes that it might benefit Canadians that Americans abide by their own laws, but this does not

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64. *Simmons, supra* note 62, at 122.

compel Canadians to adhere to American law. None of what I have said in the last few pages proves that an adequate justification for territoriality could not be developed, although for reasons I develop elsewhere, I am somewhat skeptical.<sup>65</sup> But it is clear at a minimum that no such justification currently exists. An adequate account of jurisdictional due process requires that efforts in this direction be undertaken.

#### IV. JURISDICTIONAL AND DOMESTIC DUE PROCESS COMPARED

It is somewhat curious that the political theory overtones of domestic due process have been recognized while jurisdictional due process has not been subject to similar theoretical analysis. Jurisdictional due process is in some respects more obviously amenable to political analysis, in that certain difficulties with making political theory arguments in the domestic setting are not serious problems with due process issues in the jurisdictional setting. Domestic procedural due process is problematic in ways that jurisdictional due process is not.

The first domestic due process issue that jurisdictional due process manages to escape concerns the separation between the substantive and procedural aspects of an entitlement. To show that there is a deprivation of due process, the complaining party must show that there is a deprivation of life, liberty, or property. Often this threshold issue is clear, but problems can arise when nontraditional entitlements are involved. Assume, for instance, that a new federal employee is hired for a probationary period. At the end of the probationary period, the employee is laid off with no excuse, and no opportunity to present evidence about his competence at the job. Is this a violation of due process?

One might reply that there is no violation of due process because the employee was only hired for the probationary period. Therefore, the employee had no right to expect to continue employment. In other words, the employee was deprived of no property interest, because the only property interest granted was a job during the probationary term. This argument is problematic, however, because it can be carried to extremes. It seems that the government might structure its entitlement programs to incorporate the procedure for termination into the substantive entitlement.

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65. L. Brilmayer, *Jurisdictional Boundaries and the Limits of Political Theory* (1987) (unpublished manuscript).

Under this line of reasoning a welfare recipient might be promised benefits only at the continued whim of the welfare agency. The agency might, for no reason, discontinue benefits without an evidentiary hearing. If a due process complaint was raised, the agency could defend on the ground that it had deprived no one of any property, because the only property interest that was granted was a right to welfare at the whim of the welfare agency. If the objectionable procedure for termination of property interests is built in to the definition of the property interest, then when that objectionable procedure is invoked there is no deprivation. The result is a "swiss cheese entitlement."<sup>66</sup>

Whatever the difficulties posed by an inability to separate the procedural holes from the substantive cheese in such swiss cheese entitlements, they are unlikely to pose a problem in the context of jurisdictional due process. Typically, in such instances, one state is engaged in enforcing or destroying the property interests created by another state. The state is not taking away with one hand what it gave with the other; it is taking away with one hand what was granted by a different state. Therefore, in the multistate context there will be few situations in which the deprivation can be explained as a procedural qualification that was built into the right itself. The problem simply does not arise.

The second problem that is far less bothersome in the multijurisdictional context is the so-called countermajoritarian difficulty. This difficulty always seems to crop up when courts are engaged in the judicial review of the actions of the elected branches. It has been particularly troublesome in the due process area, perhaps because the courts' substantive due process cases are so tenuously linked to the constitutional text,<sup>67</sup> and perhaps because even with regard to procedural due process the words are so vague as to make the judicial mandate unclear.

I am not particularly bothered with the countermajoritarian difficulty, even in the domestic due process context.<sup>68</sup> Regarding limitations written into the Constitution, it does not seem to make much difference which branch of government is making the decision. If the courts invalidate legislation, it is true that they are counteracting the

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66. *Arnett v. Kennedy*, 416 U.S. 134 (1974) (plurality opinion); see also Terrell, "Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis, 70 *GEO. L.J.* 861, 890-91 (1982).

67. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

68. Brilmayer, *Judicial Review, Justiciability, and the Limits of the Common Law Method*, 57 *B.U.L. REV.* 807, 817 (1977).

wishes of the majority. But if Congress fails to enact a popular measure because some members believe that it violates the Bill of Rights, then Congress too is acting in a countermajoritarian fashion. The same can be said if the Executive disagrees with the populace. Countermajoritarianism is simply part of the business of respecting constitutional limitations. The fact that countermajoritarianism is engaged in by appointed rather than elected officials seems rather beside the point.

A different response in the present context, however, would pertain even if the countermajoritarian argument were generally sound. Even if the objection were convincing in the domestic context, it would be unconvincing in the multijurisdictional arena. The argument seems to suggest that someone who cannot prevail in the political processes is being a sore loser when the challenge is reinstated in the courts. Decisionmaking, it is argued, should proceed in a democratic manner. The challenger should stick with his or her role in the political processes, as being the proper way to amend an unpalatable decision.

This argument cannot be readily made in the multijurisdictional context. The defendant's very claim is that the state has no right to regulate him or her. He or she is very likely someone who has no political participation rights in the political process that made the decision, for as we have seen, jurisdictional due process arguments are frequently made by persons who have no right to participate in the first place. It is for this reason impossible to console the defendant with the observation that there are political methods for protesting the decision. He or she may not be entitled to take part in those processes, and in any event the claim is precisely that this is the wrong process to have made the decision.

To illustrate this argument, return to the example about arbitration. Assume that one of the contracting parties disagrees that arbitration is the proper remedy under the contract. He may admit that the arbitrator is unbiased, willing to hear the evidence, and so forth, but still deny that it is an appropriate dispute for the arbitrator to decide. Now it seems that in such cases it is not an adequate response to tell him to discuss this with the arbitrator. While one might certainly tell him that strategically this would be a good first step — try to convince the arbitrator that he or she should decline to hear the dispute — the mere fact that the arbitrator, after hearing the evidence, decided not to dismiss does not cure the complainant's problem. His very complaint is that he should not be subjected to arbitration at all, and on this issue one would think that the arbitrator's decision as to his or her own jurisdiction should be subject to review by a court.

Jurisdiction, similarly, concerns the identification of processes to which one is appropriately subject. Jurisdictional due process, in other

words, forms the limits within which the countermajoritarian argument can plausibly be made. Where the particular majority in question is actually entitled to decide a particular issue, then it may be problematic for a court to overturn its decision. But this depends upon jurisdiction having already been established. If the particular majority in question had no right to address the issue and to exercise its coercive powers, then the fact that this is invalidated as a violation of procedural due process is not problematic at all.

Thus we see two issues that plague domestic procedural due process that do not plague jurisdictional due process to nearly as great a degree. One final issue, with which jurisdictional due process has as much difficulty as domestic procedural due process, deserves attention. That issue is the legitimacy of relying upon natural law arguments that may or may not be found in the constitutional text.

The political theory arguments I have outlined above can, with some plausibility, be attributed to the constitutional text. "Due process" is, after all, a rather vague phrase. Given the assumptions during the Constitution's framing about the territorial limitations on states, it is not difficult to impute such arguments to the fifth and fourteenth amendments or the full faith and credit clause. Therefore, it is unnecessary to turn explicitly to natural law to define the political theory limitations on what a state may do in the multijurisdictional context. It is reasonable to treat political theory as historically embedded in the constitutional language. The Court has, along these lines, attributed such reasoning to the due process clauses without any hesitations.

A problem would arise, however, if the Constitution could not be plausibly read to contain such limitations. What if there were no due process clause, or if the Constitution were amended to make clear that due process did not apply to jurisdictional issues? What if, for instance, Congress decided that it wanted to make American regulatory laws applicable to disputes arising all over the world? If the due process clause were amended so as to remove any obstacles to such application, what should a judge do?

The way I have set up the political theory interpretation of jurisdictional due process, it seems there would still be serious problems with application of American law in such cases. If the United States has no right to regulate some dispute, the fact that it has amended its Constitution to remove any impediment to regulation does not seem to solve the issue. Why, after all, should the American Constitution define the rights of Europeans? The political theory objections that I have been describing sound in natural law and not positive law. A mere change in American positive law cannot make that law more widely applicable, in the face of the objection that application of that positive law is fundamentally unfair.

This argument is not the issue of countermajoritarianism, already discussed. The problem is not merely that a judge is acting in a countermajoritarian fashion. After all, if the judge were to go ahead and apply American law to the dispute, that would not be very democratic either, given that the complaining party is not subject to American democratic processes. Majoritarian principles do not tell us whether or not to apply the law. But while countermajoritarianism is not the sticking point, there may still be an argument that judges are not supposed to turn to natural law. The argument is the judge's obligation to interpret the positive law they have been appointed to enforce. This is an argument that could be made in a monarchy or a dictatorship; it is not an issue of democratic principles.

This difficulty is similar to the problem that arises whenever a judge is faced with a law that is morally repugnant. Judges are understandably torn in such cases between their sense of personal morality and their views of their official role. In the same way, a pre-civil war judge would have conflicting obligations arising out of the moral repugnance of slavery and the positive duty to enforce fugitive slave laws. I bring this up merely to point out that solving the countermajoritarian difficulty does not cure all of the legitimacy issues that reside in the institution of judicial review. The problem in the jurisdictional due process context is similar to the judge's other crises of conscience, and is just as difficult to resolve.

Practically, for the time being, this is not something about which we have to worry. The due process clause offers ample room for jurisdictional due process, both in the expansiveness of its language and in the details of its historical tradition. We will probably never have to face life without the due process clause. This is fortunate, because within its scope we find our most important guarantees of both domestic and jurisdictional procedural legitimacy.