Asking the Right Questions

Lawrence C. George
Florida State University College of Law
Professor George analyzes what he sees as Professor Brilmayer's major thesis: that neither modern choice of law nor equal protection principles provide a sound basis for jurisdictional doctrine. Concluding that she has failed to consider a possible Critical Legal Studies approach to the problems she poses, he suggests one.

Professor Brilmayer asks a tough question when she poses the problem of how “we” should treat “them,” when our legal regime divides “us” from “them” with a term like citizenship, or even residency. She follows the implications of her legal query to the heart of liberal (or as she would have it, “democratic”) political theory. According to Professor Brilmayer, in the law of jurisdiction, that theory has taken two operational forms, both of them flawed by extremism. One form, less familiar to general legal scholarship and political theory, justifies too much state-selfishness; the other form, emphasizing the rights of isolated individuals, justifies too much interference with benign localism. Success in finding the middle ground will depend upon our ability to accept a divorce between political theories of participation in value choice (shaping) and theories of legal obligation (sharing). Dissociation of the two ideas of shaping and sharing is necessary in order to allow for a more principled and persuasive defense of unwanted “sharing” of legal disadvantages by nonshapers.¹

In the following reflections, my intention is to respectfully challenge Professor Brilmayer's fundamental point, because it seems to me she misconceives the nature of the respective appeals of states and of “outside” individuals, through a common rhetoric of

“rights,” to politically rooted conceptions of legal inequality. I find it implausible to suppose our difficulties come from a philosophical error expressed in the idea that both Carolene Products\textsuperscript{2} and choice of law ideology in the era of the Second Restatement of Conflicts share a common fallacy of political theory. Nevertheless, I must agree that there is some kind of mistake or aberration that forces legal discourse to confront a false dilemma, characterized in the “interstate discrimination” cases by vacillations between excessively radical individualism and unprincipled statism.

I. PRELIMINARY OBSERVATIONS

While she makes cogent and telling points against some reductionist understandings of the logic of “interest analysis” which I fully accept, it seems to me that Professor Brilmayer herself misunderstands, in a significant and provocative way, the political antinomies that fuel the ongoing legal debate over long-arming and forum-preferring. The conclusion, dictated by her rejection of what she characterizes as a false dilemma between alternative “all-or-none” rules to govern challenges of forum favoring laws or applications of law, itself appears to me to be ironically “all-or-none.”

Before I turn to my reservations about an imaginative and wide-sweeping argument, I feel obliged to note that challengers of any interstate discrimination on the basis of being “insiders” or “outsiders” are (necessarily) litigious contemporaries. They are people who feel correctly or incorrectly victimized across some moral and geographical boundary by selfish but politically powerful “others.” The arguments of Professor Brilmayer are all premised upon the objectors’ legal obligation to submit to others’ laws, and upon arguments for the legitimacy of rights ascribed to bodies politic.

The limitations imposed by her concern for the merits of specific legal disputations make themselves felt when Professor Brilmayer imports only a portion of relevant political theory in her discussion of states’ rights against “foreign” individuals. Her arguments on both legal and political subjects are synchronous, not diachronous. They do not seek a philosophical understanding of historical changes in thought about legitimacy and fairness, nor do they consider the equities of interstate discriminations that may prejudice the unborn. Professor Brilmayer looks to political theory as a source of answers to jurisdictional questions. The half-light shed

\textsuperscript{2} United States v. Carolene Products Co., 304 U.S. 144 (1938).
by political theory upon the jurisprudence of judicial and legislative jurisdiction is fascinating; but the view it gives us is incomplete, oblique, and therefore distorted. For Professor Brilmayer, the sovereign's right derives from the will of its democratic constituency. It is therefore entitled to at least equal, and probably greater, respect than the "rights" of individuals to be left alone within their properly defined spheres of autonomy. The primacy of the state's right to pursue its chosen ends without (much) regard for nondomestic consequences is an essential element in a structure of justification that is intended to cut objecting individuals down to size.

I question the form of Professor Brilmayer's argument as well. Her approach may be characterized as a "top-down" view of a sovereign's "democratically" justifiable powers. Such a view gives the reader a foreshortened perspective on persons who are not constituents of the lawmaking (or law-applying) power. In Professor Brilmayer's regime, objectors who must suffer disadvantageous legal treatment because of their "outside" status are to be thought of primarily as tourists, or if not tourists, at least as the holders of an implicit and revocable visa. This idea derives from a theme of democratic political theory that does not receive extensive discussion in Professor Brilmayer's article: the theory, or metaphor, of the social contract. In the law of interstate relations, the contract is spoken of in terms such as "taking the burdens along with the benefits," or "purposeful availment" of the forum's laws, institutions, and amenities. As with all political theories organized around this metaphor of existential consent, the "acceptance" of the contract is imputed\(^3\) on the basis of circumstances often reflecting no choice.\(^4\) In the law of interstate jurisdiction, which inspires much of Professor Brilmayer's political theorizing, the fictional character of the social compact has long been recognized, but an ideology of consent strongly affects the more "realistic" talk about long-arming that replaced it.

What makes one an "outsider" for Professor Brilmayer is one's legitimate exclusion from the political processes that dictated a challenged law or law application (shaping). This mode of defini-

\(^3\) For an example of this fiction in jurisdictional law, see Wuchter v. Pizzutti, 276 U.S. 13 (1928).

tion results in a very heterogeneous class of legal persons and interests, who share only the accident of being nonshapers of laws they challenge. Their exclusion generally reflects the mere happenstance of nonmembership in an organic and valuable cultural community, characterized by consensus. "Otherness" is an accident of birth or nomadism. The status of being outside the (politically organized and autonomous) community puts a challenger of its law in a category that has no intrinsic claim to constitutional significance for Professor Brilmayer: tourists are indistinguishable from wetbacks; or if distinguished at all, it is by other considerations subsumed under the term *sharing*.

Once exclusion from law-shaping has been denied any equitable weight in the analysis of boundary-crossing "discriminations," Professor Brilmayer turns her incisive logic upon the political theory, and the actual legal practice, of *sharing*. While struggling to follow the Brilmayer thesis, I could not overcome my difficulties with her treatment of the related, but usefully distinguishable ideas of equal protection of the law (regarded as a constant, or global, norm) and equal protection by some coherent body of law against what nineteenth century jurists unhesitatingly branded as "usurpation."

*5* Having moved since *Pennoyer*6 from the normification of geography to a more functional analysis of state and interstate power, legal doctrine is forced by Professor Brilmayer's discussion to contemplate the certainties it left behind. There is an undercurrent of nostalgia beneath the surface of Brilmayer's text for the certainties of *Pennoyer* or pre-*Pennoyer* discourse. Professor Brilmayer proposes to resolve the mysteries she has unfolded by assigning every legal person to the subjection of various or competing Dantean sovereignties—limiting the circles, however, to three:

1. Members of the forum state (voters, shapers of its law).
2. Children, visitors, denizens, all others who fall within the state's jurisdiction conceived as passive *beneficiaries* of territorial power.7
3. Strangers, "outside the jurisdiction."

The first circle is merely contextual; no relevant claim of interstate discrimination can be made against their own forum or legislature by its occupants. Occupants of the second circle are entitled

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6. *Id*.
7. *See* Brilmayer, supra note 1, at 413-14.
to the civil right of equal protection, but in an attenuated sense. The third circle is the arena of a war of each against all, mediated within our national boundaries by unexercised ultimate federal power under the commerce (and perhaps other) constitutional clauses. Problems of fairness arise within each circle, but the most serious problems arise when we seek criteria for assigning persons to their proper circles in the first place.

For Professor Brilmayer, the fundamental right of migration or exit is a great justification of invidious discrepancies in the treatment accorded occupants of the second circle. Visitors are not entitled to tuition equality with resident students, for example. If they don't like it, they can go home. This doctrine of Hobbesian hospitality is probably more deeply embedded in some legal cultures, including our own, than in others. Visiting students in the United Kingdom, for example, are accorded public health benefits along with nationals; and perhaps for practical reasons, the cost of a postage stamp is the same for everyone within every jurisdiction known to this writer. It is also worth noting that an out-of-state student having paid tuition, albeit a higher amount, has purchased some degree of "insider" status, at least to the extent that they are no longer occupants of the outer Dantean circle.

A fundamental axiom for Professor Brilmayer is that visitors to Rome must do as the Romans do, even if their subjection to others' law has more of a flavor of comity to it, or mere prudence, than of political allegiance. The nature of felt political obligation (where such obligation is felt at all) to obey the law is "different" in some respects for aliens, visitors, denizens, green-carders, Indians, minors, felons and all other "nonshapers" or outsiders than it is for shapers—the innermost insiders. Once the task of shaping the law has reached completion, the sharing of its burdens, even when those burdens are imposed across some kind of political boundary (and presumably across temporal boundaries, too) is for Professor Brilmayer a question of power relationships among sovereigns much more than it is a matter of civil or constitutional rights. There is something paradoxical in Professor Brilmayer's use of the term sharing to describe a process that results in subjugation to rules challenged for being invidiously hostile to their disenfranchised challenger.

8. Id. at 414: "[T]he responsibilities of the state to protect such persons are also more limited."
9. Id.
II. EQUAL PROTECTION

Using *Carolene Products* as the epitome of constitutional reasoning that supports a systematic or presumptive doubt of the fairness of classifications based upon "outsideness," Professor Brilmayer undertakes to show that a model of fairness based upon *process* defects harmful to "discrete and insular minorities" has no relevance to problems of "interstate discrimination." To assume otherwise is to oversimplify by confusing or conflating the ideas of participation in lawmaking (*shaping*, in Professor Brilmayer's terminology) and of generality of already-shaped legal categories (*sharing*, in Professor Brilmayer's terminology). Once this fallacy has been exposed, along with its correlative error, we can find a middle ground upon which we can build doctrines that avoid the paranoid suspicion that forum laws favor only living political constituents, or the opposite trap of turning a necessary distinction of democratic political theory into an invidious legal category.

Challengers of invidious localism can claim that the law or the forum they object to has *less* legitimacy on a scale of measurement that gives shapers the greatest obligation of loyalty to norms of their own "choosing." Thus the political legitimacy of legal norms is, after all, determined in Professor Brilmayer's democratic theory by measurement along the axes of some incremental scale of citizen participation.

Take, for example, the United States citizens who reside in the District of Columbia. Professor Brilmayer is apparently confident that they have no just claim to vote in Florida, or Connecticut, or anywhere but the District of Columbia, although they must obey the domestic laws of any state with which they have appropriate connections. The District (perhaps oppressively) is denied by Congress and the Constitution its just measure of political voice in the national legislature, but that is of no consequence if District residents demand a (national or local) voice elsewhere. It would be a flagrant offense to Professor Brilmayer's first principles if the political demands of District of Columbia residents were ultimately resolved by a rule that allowed them randomly or deliberately to make themselves electors, as a group, in one or another of the

10. *Id.* at 391. "[T]he state's power is at its most legitimate when it is dealing with its own citizens, acting within its own territory, and affecting only persons and property that are also local."

11. The principle of "one man, one vote" embodied in *Baker v. Carr*, 369 U.S. 186 (1961), and articulated in *Gray v. Sanders*, 372 U.S. 368, 381 (1963), is the standard of justice most useful, because least controversial, for the purposes of this discussion.
nearly 500 Congressional districts in the United States. Would it be less offensive if individual District of Columbia residents could choose a highly theoretical affiliation for voting purposes with some "foreign" place in the United States? If they were allowed as a group to join one and only one polity or another at each election, District residents would have disproportionate political power because they could credibly threaten to make a decisive difference in a state such as North Carolina, where the emergence of a figure like Senator Helms can only be explained in terms of a delicate local balance of forces.

But what is the legal significance of such political franchise arguments? For Professor Brilmayer, the answer is none—in relation to the problem she calls "interstate discrimination." But the legitimacy of excluding others cannot be deduced from the concept of the state (or other political unit) quite so simply. The terms by which exclusive "communities of shapers" are (self) constituted require a more elaborate justification than is provided by traditional federalistic apologetics for the value of diversity. In any case, the idea that we need political variety in order to make the legal world more interesting and experimental has usually been associated with the legal politics of "states' rights," rather than the individual civil rights exemplified by Carolene Products.

The appeal of "federalist" arguments for localized "control" and group autonomy, even at the level of political theory, is directed to the practical or instrumental efficiency of such arrangements in conducing to some other higher good: a theme that goes back to the Greek polis and to later Enlightenment elaborations of "democracy" as a pure form of social organization. In modern times, the thesis has generated utopias of a dangerous kind—either impractical communes and ashrams, answering to the need for clansized "togetherness," or monolithic, homogenized, fascistic states. Thus the "discrete and insular minorities" of Carolene Products are best understood and defined as persons wrongfully excluded from political bodies to which they rightfully belong. To call their complaint a (mere) "process defect" is to misunderstand the foundations of Carolene Products in political morality. The confusion may be clarified, perhaps, if we compare the solicitude of the Court toward "discrete and insular minorities" who seek recognition for

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12. Professor Brilmayer provides examples of international and largely cultural diversity to support her point about the need for political autonomy at the level of some unspecified ideal group size. Presumably the optimal polis from either a cultural or political viewpoint is closer in size to ancient Athens than to a modern congressional district.
their self-chosen "secession" from the norms chosen by the surrounding body politic. In terms of political ideology, we might say that *Wisconsin v. Yoder*\(^{13}\) shows us the difference between claims for protection from the state, and (equal) protection of or by the state.

Meaningful political participation as a shaper of legal norms is a scarce and limited commodity. Equality before the law is respected in Professor Brilmayer's political theory, only if the challenger of "foreign" law is either a chooser (a purposeful availer) of that law's burdens and benefits, or can be shown to have a similar, if irrelevant, voice in shaping corresponding norms that would apply through the "fairness" of symmetrical logic, to outsiders forced to litigate in her own forum.

Surely we may hope that the state's legitimate claims for extraterritorial scope of a domestic law can find a more solid foundation than a theory of political representation that invites attack on its own terms, having already so diluted the powers of governed individuals that nearly everyone feels anomic and alienated.\(^{14}\) But the second half of Professor Brilmayer's critique of the *Carolene Products* fallacy is equally problematic. She argues that the burden of the law can generally, indeed, nearly always, be imposed upon (shared with) others who did not shape it, because the disenfranchised "victim" of forum-favoring rules is the beneficiary of other advantages accruing from the forum's existence as the organ of a coherent legal and political authority.

In Brilmayer's theory of the state, persons considered in their capacities as subjects of a single legitimate sovereign, are Hobbesian or Nozickian political atoms, behaving through their representatives in a parochial or self-favoring manner (such is the nature of us sinners). Directly and indirectly, we get away with as much as we can, but we must not think of this aspect of the human condition as intrinsically unjust, selfish, or wasteful. Injustice is a label reserved for those occasions when the state explicitly favors locals

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14. Perhaps the dilution of "voice" and "control" should be reversed, under the logic of Professor Brilmayer's thesis, because modern mass democracies have already conceded too much shaping to too many people for their several or collective good. Butting in where you have no business is a sin less likely to be committed by a fraudulent tourist than by the multitudes who fought for a franchise that their successors are too ignorant or indifferent to exercise responsibly as Burkean "value-choosers." I do not suggest that Professor Brilmayer subscribes to such elitist politics, but its historical association with the arguments she adopts as central cannot pass without remark.
This practice violates the caselaw principles of inter-state jurisdiction, and Kantian principles of political morality. On the caselaw side, the "right" to impose local law is derived from the benefits conferred by (presumably other) local law. On the side of political morality, the enactment of any law transforms its political character from a tool of interested coalitions pursuing their own advantage into a "value choice" of the entire community of shapers. Values, as opposed to interests or persons, have no temporal, personal, or geographical constraints; they are limited at most by principles of accommodation with other values. Hence, Professor Brilmayer can argue that however controversial the scope of a statute's application may be, it is never permissible to construe it as confined by its politically instrumental raison d'etre to the purposes of those who secured its enactment (including the outvoted opposition).

The importance of law-as-value for Professor Brilmayer's arguments is also exemplified in her dismissal of "economic" analysis of "interstate discrimination." The law and economics dialect of legal discourse frames questions of boundary-crossing fairness in terms of "externalities." A particular legal norm is chosen in a legitimate way, in legal economics, if all costs and all benefits are reckoned fairly in a computation of its instrumental worth. No fair reckoning can be made or expected if the costs are not billed to the same account as the benefits. If some flaw in the overall system allows me to rationally maximize my parochial welfare by sending the bills to you, I have (perhaps) been wasteful to the extent that your "cost" may exceed my "benefit." Rules are therefore arguably needed to keep the ledgers straight.

This familiar line of reasoning is confuted by simply ignoring the difference between "me" and "you" in the above outline. It may be true that my gain is at your expense, but if that counted against my pursuit of my own advantage, then you would "gain" exemption from my costful choice at my "expense" in having an otherwise open option foreclosed. Gains and losses may be generalized and the accounting metaphor pursued to its bitter end to show that these double entries axiomatically result in an even balance.

15. Professor Brilmayer has a curiously oblique way of stating this point, which may have caused this reader to misunderstand her. See Brilmayer, supra note 1, at 409: "But refusing to share with outsiders the benefits that the insiders played a special role in creating is not an appropriate way to fulfill the legislative mandate to further the interests of the people . . . ."

16. See Brilmayer, supra note 1, at 411-12.
Thus, the rhetoric of "externalities" is useless in the analysis of interstate discrimination because it conceals an equivocation that is ably demonstrated by Professor Brilmayer, only to reappear in a slightly altered form when she produces her own synthesis of law and political morality. To refute economic efficiency analysis of boundary-crossing legal distinctions, Professor Brilmayer reviews and applies the critical literature on Coase's theorem to demonstrate its neutrality on the issue of interstate discrimination.\(^\text{17}\) Since it is lexically arbitrary to say that my aggrandizement (through legitimately vicarious participation in my sovereign's law-making) is your "externality," the "economic" evaluation of the competing claims for long-arm jurisdiction or forum-favoring choice of law teaches us that the tough "interstate discrimination" issues are, by definition, the stakes in a zero-sum game.

I am inclined to accept most of Professor Brilmayer's argument, up to this point. But the rhetoric of sharing suffers from a similar logical vulnerability. The difficulty would be more apparent had Professor Brilmayer digressed for a moment to more fully define her concept of *sharing* in terms of her idea of interstate discrimination. The idea of discrimination appears in the Brilmayer argument in two guises: sometimes the challenger is imagined to be complaining about unfair exclusion from the benefits of *forum* law, and sometimes from the unfair exclusion from the benefits of his or her *domestic* (or any other-than-forum) law through the application of *forum* law.\(^\text{18}\)

These ideas are not synonymous. Nor are they particularly "intuitive." What is intuitive is the idea that Professor Brilmayer sets out to trash—that there is something ethically suspicious in having the "home court advantage" for the litigation game. "Neutral" courts have costs of their own in the moral accounting of Professor Brilmayer's political economy. There is no escaping from choice (of law or forum or both), and choice is necessarily invidious. The same point may be raised if we ask whether the unfairness of discrimination is the consequence of the sharing of a "benefit" to which a claimant is not justly entitled (an "unjust enrichment" kind of discrimination) or from the sharing of a "burden" imposed by the chosen law, speaking as it always does in the imperative, present and universal voice. I shall call this latter form of legal reification "sand-trap positivism," since it invites an analogy to the

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17. *Id.* at 403-06.
18. *Id.* at 412-13.
game of golf. Individuals go out on the open fairway of life, pursuing their lifeplan until they “hole out” at the end, hoping not to fall into the legal roughs and bunkers set in their way as obstacles, justified by the “lay of the land” and minimization of the interference effects of an unstructured liberty.

To pursue this facetious metaphor, the question not clearly resolved by Professor Brilmayer is whether we all play on the same course, or on contiguous courses. It may be wise to leave the course design to manageable groups of “regular” players. Shaping is one thing, as Professor Brilmayer ably argues, but is it true that anyone may be made to share the hazards? Only if there is some sense in which all the courses are indeed contiguous, can we begin to say that we know how to map the fairways. May the same hazard serve two different courses? Certainly; but then there will be arguments about which course was being played. Perhaps the same lie is “easy” with reference to the domestic course on which I thought myself playing, and impossibly difficult if it is considered part of the opponent’s course.

Sand-trap positivism invites sandbox conceptions of fairness: “[R]efusing to share with outsiders the benefits that the insiders played a special role in creating is not an appropriate way to . . . further the interests of the people . . . .”

Professor Brilmayer is very conscious of the fallacy of arguments that would support interstate discrimination in a sense that triggers equal protection concerns. But having rejected “process-oriented” principles of limitation, she is left with the “limitation” of self-dealing or self-aggrandizement exemplified by an example of insurance legislation, enacted for politically suspect or parochial purposes, but thereafter existing as an “equal” hazard for insured and uninsured players, insiders and outsiders, alike. In other words, the very generality and universality of the legal norms of expression gives it some kind of Kantian legitimacy which at the same time limits instrumental interpretations that would very rationally restrict “benefits” to the group (insurers) the law was intended to benefit. Pursuing this philosophical theme into the actualities of jurisdictional caselaw, Professor Brilmayer finds the law

20. See Brilmayer, supra note 1, at 409.
21. It is nevertheless curious that the constitutional applicability of equal protection analysis to “interstate discrimination” receives only the negative notice of Professor Brilmayer’s rejection of Carolene Products reasoning.
"very clear" that a quid pro quo is necessary, in the form of demonstrated "advantages" given by the forum which presently proposes to exact the price, of submission to a disadvantageous forum or to the application of disadvantageous local law.

If that Shoe fits, we should be happy to wear it; but it does not, if we look at the history and critique of the "tradeoff" rationale in courts and commentaries. The problem is that the linkage between absentees and foreign sovereigns originally proposed by International Shoe, and reiterated in subsequent attempts to specify the limits of extraterritorial power, is too "theoretical" and therefore too broad. The Court has found itself driven from political philosophizing about the social compact to a lawyer's demand for the actual writing—from "justice and fair play" to a tangled web of "contacts," "contracts," and other circumstances comprised in the idea of specific jurisdiction. Any attempt to chronicle accurately, or currently portray the "reach" of a domestic law beyond purely domestic disputes is beyond the compass of this essay, but we must at least acknowledge that in its personal jurisdiction decisions, the Court has long been trying without success, and without deliberate resort either to Carolene Products or to modern interest-analysis choice of law theory, to "balance" the claims of "outsiders" to stay outside the reach of forum law, with countervailing and legitimately "global" value choices expressed in forum law.

In my estimation, the Court has been far more sensitive than Professor Brilmayer would approve of, to the fact that local courts and legislators are primarily or even overwhelmingly responsive to the "special" interests of powerful but relatively ephemeral local constituencies. The caselaw through which this sensitivity is manifested does not however appear in any obvious way to be an extended gloss on Carolene Products.

22. Id. at 411.
24. See von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121 (1966). The authors' analysis has had a powerful influence on jurisdictional thought, along with Hanson v. Denkla, 357 U.S. 235 (1958), so that the latest formulation of the constitutional limits of the long-arm, Asahi Metal Ind., Ltd. v. Superior Court, 107 S. Ct. 1026 (1987), establishes "an act of the defendant purposefully directed toward the forum state" (emphasis in original) as an essential element of personal jurisdiction. The purposeful availment slogan overlaps the even narrower conception that the subject matter of the controversy must have specific connections to the forum state, but in the cited case, and many others, the action is by a locally injured plaintiff against a foreign manufacturer for injuries caused by defects in goods brought to the plaintiff by the "stream of commerce."
III. Interest Analysis

The logic of her very good argument against not only economic metaphors, but also all other utilitarian calculations of comparative value when pursuit of local interests impinges on the legitimate agendas of other localities and their inhabitants, drives Professor Brilmayer to resolve the "externality" question by rejecting both the parochiality of modern "interest analysis" and an equally unappealing resort to intuitions from a higher sovereign about when localism becomes "unfair." The global impacts and aspirations of parochial law are always presumed under Professor Brilmayer's analysis to be "fair," or fairly pedigreed in a positivist sense, but this objectivity, or outreach—the sharing implied by the sheer (convenient or inconvenient) existence of law as a thing, an artifact—in itself justifies no particular instance of discrimination against outsiders. The "right" Professor Brilmayer is concerned with is the right of organized polities to seek their autonomously chosen goals, wherever they may lead. This "right" of sovereignty is largely pursued through definitions of private substantive rights and liabilities, and the assignment of jurisdiction to the state's judicial system, all in accordance with the lawmaker's policy agenda. It is not Professor Brilmayer's chief concern either to defend or to derive from political philosophy the defendant's civil right to sanctuary from the long-arm of imperialistic others. Tobago has as much right, or as little, in the Hobbesian chaos, than Delaware, or the United States themselves, to "rule the world." For Professor Brilmayer insists that:

1. A forum's refusal to apply its own law is an application of its own law.25

2. When the refusal is in deference to the complainer's own law, there is never just cause for complaint (shaping is a kind of moral estoppel).26

3. A forum's choice to apply its own law despite complaints of discrimination is justified if nonshaping is the only basis for complaint.

4. One forum's gain, in succeeding with jurisdictional or choice of law claims, is the corresponding forum's loss (the zero-sum thesis).

25. This important insight goes back at least as far as the brilliant Professor W.W. Cook. See generally W.W. Cook, The Logical and Legal Bases of the Conflict of Laws (1942).

26. Brilmayer, supra note 1, at 412.
5. The combination of these axioms results in a “heads I win, tails you lose” unfairness, from the standpoint of an outsider who is denied his own or the forum’s law, for the sake of giving preference to the local interest.

Most of these theorems had their origins in legal realism, not democratic theory. Professor Brilmayer’s critique proceeds by showing that taken together, they invite a normative heresy—the treatment of the facts of legislative and judicial behavior as values. It is never an independent or decisive reason to “choose” one’s own law, or to “borrow” another’s, or to hale a stranger before a local court, simply to assert that such a course would serve or disserve forum interests. A prominent body of opinion in current choice of law theory asserts the contrary.27 We may agree with Professor Brilmayer that it is a mistake to confuse faithful political representation of local electors with the universal values embodied in their self-serving preferences. But perhaps it is also needlessly confusing to read either unintended generality or unintended localism into legislation (or caselaw) that simply reflects the logrolling and expediency of democratic political processes.

More orthodox thinkers may hope that interpretive choice, as well as the choice of what is to be interpreted, can be subsumed under a more general theory of interstate accommodation on lines of “comity” and general political expediency among equals who find themselves in a “state of nature.” But such lines of argument appear to be distasteful to Professor Brilmayer, perhaps because they collapse law into politics, or perhaps because they never manage to make the transition from politics to law in the first place.28

To bring “values” and universal maxims into her philosophical framework, Professor Brilmayer finds it necessary to repaint the line between facts and values, law and politics. In her view, the fact of local favoritism can be both explained and defended by dismissing (as a false problem) the issue of systematic parochialism which arises when law is seen as a purely political phenomenon. The question of whether “we” are doing anything at all to “them,”

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28. Political philosophers may be divided into two camps by the labels “atomists” (classic liberals as described in R. Unger, Knowledge and Politics (1984)) and “pluralists” (loosely associated with Marxist, European, or critical thinking). The distinction may be useful to the general reader, since it points up Professor Brilmayer’s philosophical tradition of liberal thought. This Commentary, on the other hand, is largely inspired by critical thought.
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with which these reflections began, turns out to be the wrong question. The right question is the question generally associated by political theorists with Kant: whether our chosen values, embodied in our positive law, “happen” to entail preferences or interpretations that require us to draw distinctions between ourselves and others. So long as we can say that our long-arming, or borrowing, or refusing to borrow is not a matter of partisan choice between “insiders” and “outsiders” but is instead an expression of that general will (expressed as a global and timeless imperative, or maxim of conduct) which makes us a political body, we are perfectly within our sovereign “rights” when we impose our law, or our forum upon nonshapers. If the exercise of those rights looks to the disinterested realist or the interested litigant like local favoritism, they simply misconceive the nature of politics, or the political legitimacy of maxims chosen to be laws without deliberate regard to time, person or place.

The radical dichotomy between tool and value as conceptions of “law” is polemically useful but less philosophically persuasive, when it is deployed against some versions of modern choice of law theory. Values are realized in law as principles of choice. It will not do to equivocate between instrumental understandings of legislation and of adjudication, and understandings based upon conceptions of group rights (values). Professor Brilmayer does a service for all critics of current conflicts doctrine. She draws attention to the fallacy of those formalisms of modern choice of law theory that dissolve questions of value into issues of interest, only to find its formal validity to be a certificate of a law’s universal scope. She has also directed attention to our intuition that it cannot be (politically) right to regard the chosen norm itself as sensitive to whether its objects are shapers or nonshapers. That kind of instrumentalism would be a form of Carolene Products discrimination, as well as violating Professor Brilmayer’s jurisprudential postulates.

But that leaves Professor Brilmayer and her readers with the right questions left almost unasked, and certainly unanswered. How do we determine the scope of rules adopted for domestic purposes, with domestic advantage in mind? When, if ever, is it legitimate to close the door of local courts to disputes that arose elsewhere? Upon what principles may we justify the imposition of nonresident tuition upon some inhabitants while indiscriminately allowing them the right to use our public parks? How do we ourselves decide who is “out of reach” of locals who wish to litigate
here? When will others say we have overreached in arriving at that
decision, and upon what principles? The catalog could be extended
by simply adding further topical references to the contents of most
casebooks on Civil Procedure or Conflicts of Law. As Professor
Brilmayer well appreciates, each of these questions is “open,” in
the sense that no political or ethical theory has yet produced a
consensus about how to resolve such problems “in principle.”

Professor Brilmayer deals briefly and convincingly with the chief
candidate for a source of legal or political metatheory. She shows
that economically inspired normative systems have little to recom-
 mend them in general, and even less in specific reference to cases
of “interstate discrimination.” However, she has little to say di-
 rectly about the other “usual suspect,” Critical Legal Studies
(CLS). The critical approach, as I understand it, has one point of
important agreement with Professor Brilmayer, which may provide
a basis for better understanding of the situation of contemporary
legal doctrine than Professor Brilmayer’s “three circles.” The point
of agreement is a belief that historical, political and ethical under-
 standing of the dispute over equality, territoriality, and scope is a
necessary precondition for the understanding of the jurisdictional
and choice of law rules we find in force. Political morality is older,
dereeper, more general, and therefore entitled to lexical priority in
the critique of legal doctrine. I shall therefore close these reflec-
tions with a few suggestions for an alternative diagnosis and prog-
nosis for the development of legal discourse on “interstate discrim-
ination,” inspired by readings of critical legal literature.

IV. THE ANTINOMIES OF CHOICE

The critical legal theorist can generally be depended upon to be-
gin with a thesis about human nature that is less Hobbesian or
Nozickian than Professor Brilmayer’s. I shall remain true to form,
and assert that the law of “interstate discrimination” will reflect
the ambivalence of our feelings about society, self and others,
known to critics as the “fundamental contradiction.” We fear and
we depend on others. We fuse to form states, and then fear our
collective might, and form “rights” against each other, but more
importantly, against states. The theme of the contradiction is fu-
sion and fugue. We cannot “go all the way” toward either of these
polarities, and so we express our vacillating needs with indetermi-
nate rules, allowing truces to be formed along uncertain bounda-
ries. Truce lines are fluid, but at any given moment, they appear to
settle the lines of conflict. Therefore, others call them rules, and
invest them with long shadows, universal scope, and an illusory permanence. The rules about crossing real geopolitical boundaries, like other rules, will exemplify our need on the one hand for “sanctuary” or civil protection against others, and on the other for “empire,” or active furtherance of our own group’s agenda against the conflicting aims of others.

As a theoretical matter, therefore, we should not expect to find a single principle, or even a set of principles, that will dictate the limits of the long-arm, nor the calculus of normative choice within a forum, when the impulses toward fusion and fugue pull the decisionmaker in opposite directions. Professor Brilmayer’s quest is “all-or-none” in the sense that she looks to political theory for a replacement of the nineteenth century certainties of territoriality as a criterion for distinguishing legitimate self-interest from usurpation. Legitimacy is conceived as a form of confinement of power within conceptual boundaries. But in contemporary practice, the curious thing about “interstate discrimination” is the doctrinal forms used to express the fundamental contradiction. It is extraordinarily difficult to find a metadoctrinal framework that will provide terms for an adequate description of the forces shaping the contours of a highly irregular decisional field, marked by a surprising divergence\(^\text{29}\) between cases about the legitimate limits of extra-territorial power over absent litigants.

For the true outsider, looking at American federalism as a less-than-ideal observer, the salient feature of our caselaw is the dichotomy between choice of law cases and long-arm cases. The supreme arbiter has decreed that the terms of argument over challenges to “personal jurisdiction” shall be voiced defensively, and in the rhetoric of the civil right to “due process of law.” That right guaranteed by the fourteenth amendment is denied whenever a constantly revised description of the appropriate (social-contractual) nexus between individual defendant and foreign sovereign does not “fit” the verbal formula of the day. Judgments entered without a proper basis in social contractarian theory are not enforceable through our full faith and credit clause.

When jurisdiction over the “absent” person is justified by the right “connections,” however, the constitutional principle that dic-

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29. This divergence was the target of a forceful attack by the late Professor Martin of The University of Michigan. See Martin, Constitutional Limitations on Choice of Law, 61 CORNELL L. REV. 185, 221 (1976). His work is carried on, in important ways, by Brilmayer’s critique of Carolene Products and “interest analysis,” insofar as the logic of her far-reaching argument extends to both judicial and legislative “jurisdiction.”
tates the rule of decision is very close to a simple statement that "anything goes." The Court tolerates a very broad range of choices within a forum concerning the applicability of its own or of another's law. The reason for that is not hard to discern. The forum's choice of law is the forum's choice—a matter of internal, not external significance in a federally organized hierarchy of power relations. Thus the question of limits for extraterritorial outreach is framed as a question of individual civil rights, and the question normalization, or harmonization of "conflicting" norms of differing but significantly connected sovereigns is virtually ignored at the level of constitutional theory. To have power to say the law (=juris-diction) is to have the power to say anything you like.

This is a curious state of doctrine. One might have expected instead to see "conflicts" between differing political authorities with real interests in providing the rule (or the forum) of decision defined as political theory would define them: as collisions between state and state, not individual and state. But that straightforward way of conceiving the problem is "closed" pending practical constitutional repairs, because it would entail frequent invocation of the original jurisdiction of the Supreme Court. On the other hand, individuals might "embody" (or be vested with) a set of rights and immunities valid against states other than their own by virtue of an "outsideness," defined not by their exclusion from the challenged forum's "shaping" processes, but by their inclusion as shapers of valid and applicable rules within their own state. It is their own state's "right" to be able to protect its citizens' interest that might be decisive in this formulation of due process law, and not any direct or intuitive sense of serious injustice to the individual (takings, forfeitures, error-prone procedures) that elsewhere predominates in fourteenth amendment jurisprudence. This would account for most of the "venue equities" ritualistically invoked to demonstrate the deficiency of "contacts" in long-arm cases.

Expressing the limit of state-state power through rules vindicating individuals who challenge another state's "right" to dictate the forum or rule of decision is further complicated however, by yet


31. The terms of the argument, as Professor Brilmayer well understands, are vulnerable to the same kind of refutation she deploys against "externalities," unless the "equal and opposite" venue equities of local plaintiffs are weighed by the same measure against the assertions of inconvenience, etc., of the defendant.
another constitutional constraint. The diversity jurisdiction of federal courts is limited by the eleventh amendment. Parties to private litigation may not directly or aggressively challenge the power of a "usurping" forum ab initio, as if a federal writ of prohibition were allowed. The solution that we observe is a variant on the theme of Ex parte Young. The limits of interstate power are defined by processes allowing defensive use of "due process" immunity to determine the scope of foreign judgments or to quash foreign long-arm process. A framework of civil rights talk is thereby abused to encode a debate about federalism, in federalism's most dangerous form: conflicting efforts to control the same conduct by competing and politically equal regimes.

In sum, the essentials of American state-state power relations respecting citizens must be analyzed within a four-sided structure that pays serious attention to "due process"; to "full faith and credit" (used here as shorthand for a regime of intrastate choice of law laissez faire); to the closure of "original jurisdiction" as a source of substantive law; and finally, to the eleventh amendment, both literally and as an expression of a more general principle forbidding the equation of personal rights (against states) with the rights of sovereign states inter se. "Interstate discrimination" belongs within the structure thus framed more as a label than as a principle of political equality. From the standpoint of critical thought, little is added to Professor Brilmayer's critique by her "concentric spheres," however charming their resemblance to the categories of classic legal thought as described by Professor Duncan Kennedy.

This is not to deny the importance of the jurisprudence of equal protection, endogenously considered. Persons assigned by Professor Brilmayer's scheme to the second sphere do have a multitude of equities and arguments recognized by a richly developed canon of caselaw (epitomized by Carolene Products) for contending that any given instance of discrepant treatment based upon their being

32. U.S. Const. amend. XI states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or executed against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

33. 209 U.S. 123 (1908).

political "outsiders" is constitutionally impermissible. But Professor Brilmayer is correct in maintaining that those arguments are not properly grounded on "process defects" at all. They are instead arguments about a sort of "religious" tolerance, given the universality of the effects and pretensions of localized political processes. Perhaps it would be even more accurate to characterize them as arguments about the limits of instrumental limitation, since that form of the CLS paradox comes closest to Professor Brilmayer's own rejection of apologetics for the use of an inside/outside distinction to dictate choice of law, if not restrictions of forum.

By the same token, critical methodology would find no place in its box for the analysis of "rights," either of states or of their citizens. Rights cannot serve as either the source or the instantiation of the dynamic which keeps the field of "interstate discrimination" so interestingly unsettled. When we look at the relevant caselaw, of course, "rights talk" is found in abundance, particularly when the limits of personal jurisdiction are litigated. We should expect to see rights invoked, since due process has been designated as the dialect of disputation between local and "foreign" interests. But the prominence of rights language is often a sign that the fundamental contradiction is pushing toward consciousness. The invocation of "rights" is a symptom, rather than a resolution of the underlying conflict between fusion and fugue. This is particularly evident in the varieties of discourse over "interstate discrimination." For the next "critical" question is: When rights are conceived as trumps in the litigation game, from whence came the right, and what are its limits?

"From the constitutional guarantee of due process, enforceable against the states," begs rather than answers the critic's query, which is not meant to be at all rhetorical. Unpacking the implicit meanings of the stock answer, we must say that the civil right of a wrongfully long-armed defendant is very elaborately and problematically comprised in the principles and holdings of all previous caselaw in the area of personal jurisdiction.35 We cannot begin to describe it except by litigating it (uninteresting cases perhaps excepted). But the right is established to clarify limits of alien hegemony and to prevent litigation. Never mind; the more important point (as we have seen above) is that orthodox theory holds that

35. It is noteworthy that not even Pennoyer v. Neff has been explicitly overruled—indeed, it is cited from time to time for the proposition that "territoriality still matters." See, e.g., Worldwide Volkswagen v. Woodson, 444 U.S. 286 (1980); Asahi Metal, 107 S. Ct. at 1026.
the source of the right is the supreme federal sovereign, the possessor of the right is a defendant, and the right is a shield protecting its possessor against the incursions of another "sovereign" not his or her own. Moreover the defendant who is "given" the right is, in an important sense, a proxy for his "proper" sovereign who "owns" the disputed jurisdiction over him.

As this string of abstractions unfolds, the same logic dictates in strict Hohfeldian terms that another individual, a "foreign plaintiff" has a correlative no-right to her chosen forum. She, too, is a proxy, for the legitimate aspirations of her sovereign to further her interests and those of all its citizens similarly situated. The end of this line is reached when one realizes that whatever is determined to be the right of one or the other of the various rights-givers and rights-holders in any particular contest will only mark a truce line for that small segment of the field of ongoing battle. The indeterminacy of our motives and the symmetries of the "externality" argument will undetermine the contours of extraterritorial power. The fundamental contradiction will continue to generate new battles and new truces. It is a mistake, almost as fundamental as the fundamental contradiction itself, to conclude that the outcome of any skirmish, whether it is clear victory for a plaintiff or a defendant, establishes a general mapping of the limits of "interstate discrimination."

The disparagement of "rights" as analytical tools does not imply that they will be or should be abandoned as the cudgels of legal disputation. But a usefully critical diagnosis of the "interstate discrimination" crisis would aspire to provide not only insight, but helpful pointers leading in the direction of practical reform. There are several conclusions implicit in my critical formulation of the problem of interstate discrimination as the vectors of the fundamental contradiction exerting its polarizing forces within a four-sided doctrinal box. First, some remodelling is in order, along lines suggested by such very respectable traditional scholars as Professor Brilmayer and Professor Martin.

Choice of law and personal jurisdiction should be seen and analyzed as complementary aspects of a single problem. There is no good reason to leave the subject of "conflicts of law" unconstitutinalized. It remains an area of "lawyers' law" and of esoteric

36. Unless, of course, the prevailing doctrine reflects processes that are not importantly "broken" and therefore do not need to be "fixed." The extraordinarily prolific and passionate literature generated by recent cases like Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981), is powerful evidence, however, that theory, if not practice, is significantly "broken."
academic theory, largely because no constitutional theorist has come up with a good framework for rationalizing federal intrusion into the states’ self-favoring practices in choosing their rules of decision. The long shadow of the *Erie* doctrine has too long conspired with the felt awkwardness of “due process” as a constitutional rubric for interstate disputation, to prevent any major conceptual breakthroughs.

Harmonization of the two major categories of “interstate discrimination” identified by Brilmayer, Martin, and others could, of course, run in the other direction, without surprising a critical observer. The law of personal jurisdiction could be deconstitutionalized, or at least reformulated on some basis other than fourteenth amendment due process. Then, both choice of law and long-arm rules might be dictated by the several states pretty much at their pleasure. Provision of either the forum or the rule of decision for any particular dispute would depend upon races to the courthouse, punctuated by occasional interventions by the federal judiciary in accordance with a constitutional norm that gave more realistic attention to the kinds of “interest analysis” which supplanted vested rights and territoriality in the revolutionary interval between the First and Second Restatements of Conflicts of Law. Either way, from the critical perspective, the puzzle is to devise a more politically candid doctrinal embodiment of the fundamental contradiction (at a constitutional or international level) than the vapid and inchoate “interest” categories used by the Second Restatement as “factors” in “choosing” to stay local or go elsewhere for a rule of decision. I suspect that no responsible solon would wish to see any of the principal contemporary schools of choice of law theory imposed from above upon competing states as principles of priority in their struggle of each against all. The reason for summarily dismissing such fixes is simple: choice of law ideology is currently devoted to enlarging the discretion of the forum judges to decide which foreign elements “count” and for how much, in determining

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38. This paper is not the place to defend that agenda, which the writer fully supports. My point is that analysis of “what to choose” or “when to choose,” the central topics of conflicts doctrine, is radically different from the analysis of the limits of choice. If choice
the appropriate rule of decision. The constitutional task is to do
the opposite: to restrict discretion and limit choice (and reach), on
a principled basis.

The needed innovation is a protocol of jurisdictional priorities
established by a common law (necessarily federal) of centering.
Current choice of law talk with its factors and interests (and cen-
tering) is a step in the right direction, but is curiously inside-out.
Court-watchers are well advised to pay careful heed to the curious
and tentative deference given to parochial choice of law theory in
the more recent and nuanced formulations of "contacts" that will
be counted for personal jurisdiction. The strength of a forum’s the-
oretic claim to provide the rule of decision is one factor in the as-
sessment of long-arm claims. But the Court has flatly rejected pro-
posals to reverse the direction of analysis. I would explain the
Court’s aversion toward constitutionalizing the Second Restate-
ment of Conflicts as a systematic method for resolving interstate
collisions of power vis a vis private litigants as a healthy judicial
reaction to the intuition that the Second Restatement mediates a
denial of conflict through the enlargement of choice; the recogni-
tion of real cross-purposes entails the restriction of local choice by
constructing a hard-edged protocol of priorities. Therefore, I would
predict that when a better conflicts doctrine is built, the Court will
impose it upon the states.39

The same "democratic theory" that inspires Professor
Brilmayer’s search for a new foundation of "interstate discrimina-
tion" doctrine thus appears to this CLS-sympathizer as an embo-
diment of everything that obstructs a simplification and moderate
improvement of the terms of doctrinal discourse in the field rather
awkwardly called "interstate discrimination." While Professor
Brilmayer celebrates the innocence of outreach, her states appear
to exercise their "rights" in a modified state of nature. They can
capture foreign assets through local judgments validated by the
long-arm test of the moment, and they can be whimsical in the
extreme with theories about recognition of claims based upon law
shaped by others. Perhaps the four-sided box would be marginally
improved if the long overdue collapse of choice and reach were ac-
complished by transposing the current domination of "jursdic-


should be entirely "free" for the choosing authority, the legal status quo would need no
fixing at all.

39. See Phillips Petroleum v. Shutts, 472 U.S. 797 (1985). This is a sign that the Court is
now beginning to "close the gap" by restricting a forum’s choices of law when dealing with
the rights of outsiders.
tion" over "choice of law." By imagining such a reversal, we can see that the length of the long-arm would be constitutionally limited only by the presently permissive options to choose forum law. As constitutional permission to "go local" for the rule of decision is presently almost limitless, the reach of the long-arm would be dramatically extended. The equal and opposite equities of local plaintiffs and distant defendants would then have to be resolved through a conceptual exercise of "centering" the disputed event or transaction, possibly in a third jurisdiction.

This approach would invite a rationale of an "ideal observer" or Rawlsian chooser to dictate the rule, and hence the judicial reach, of unwelcome burdens (of defense or of substantive obligation) founded upon others’ law. The constitutional arbiter could no longer avoid taking sides within a calculus that gives plaintiffs their due (and reciprocal) measure of concern. Present due process doctrine unfortunately excludes the "venue equities" of local plaintiffs by framing interstate power struggles exclusively as a problem of defendant immunity. Moreover, the process-oriented appeals of both plaintiffs and defendants should ideally be considered in their fullest substantive context.

We might expect the shift from process rhetoric to outright debate over competing substantive values to move like this: When challenged, the Tobago-state (or its private litigant as proxy) would be called upon to plead something more than the fickle comity or infinitely manipulable principles of domestic choice of law to justify its claim of supremacy. On the other hand, the sanctuary state would have to overcome a presumption that its law was part of a discreditable race for the bottom. A period of cynical realism would allow ideal judicial observers to take full and explicit account of interstate "competition" through rules favoring corporate migration, or populistically ample limitation periods, and the like. The politically "free" decision of any particular state to "shape" its laws with a pro-creditor or pro-debtor bias could no longer be ignored or relegated to an extra-legal realm of "politics." Post-cynical discourse would reflect uneasy but empirically "proven" compromises expressed as a combination of modest but uniform "venue" rules, and immodest and nonuniform principles

40. A term used for convenience here to denote any jurisdiction with expansive claims of legislative or judicial jurisdiction.

of priority founded in ideas of "justice" rather than political responsiveness, to limit the conflicting aspirations of competing states.

In broad outline, the utopia sketched above is a composite of critical and traditional scholarship. One attraction of a critical perspective is its demand that we raise the best question of all: How is progress toward a more coherent and plausible system of interstate power sharing stymied by current doctrine? The fundamental contradiction shows its power to elucidate "interstate discrimination" most dramatically in the dilemmas posed by the "merely practical" constraints of the fourth side of the four-sided box.

Original jurisdiction, exercised when state sues state, simply cannot be the source of the utopian order we have outlined. Perhaps no form of federal jurisdiction can be expected to provide our "ideal observer" with the necessary warrant to interfere. The competing states do not sufficiently fear each other to demand the exercise of supreme authority to settle their differences, and litigating individuals are so shrouded in veils of ignorance and the exigencies of trial that they can neither identify nor politically express consistent "interests" in shaping national patterns of interstate law one way or another; nor can they sue states in federal court.

Thus the conflicts of both "law" and "jurisdiction" that beguile Professor Brilmayer's imagination, and this response to it, occupy a middle ground between constitutional controversy and mine-run private binary disputes. The proper forum for such disputes is neither of the interested states (for as rights-owning individuals in Brilmayer's analysis, they would violate the rule of Dr. Bonham's Case if they were judges of their own cause) nor a federal tribunal serving any self-executing forms of constitutional authority. Instead, the diversity clause might be used to justify new jurisdictional legislation empowering the federal courts to generate a unified caselaw of "interstate discrimination" by entertaining suits in the nature of prerogative writs for interlocutory mandates to

42. "[F]ortuitous event[s] . . . should not of [themselves] shape the nature of the ensuing litigation." State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 535 (1967) (accommodating an interest in orderly administration of a limited insurance reserve for mass tort victims with the victims' interest in a convenient forum).

43. 8 Co. Rep. 114, 118 (1610) (It is improper to adjudicate a cause when the court is financially interested in the outcome).

44. See U.S. Const. art. III, § 2.
The federal court could give two kinds of remedy for the sake of avoiding uncertainty in cases with interstate aspects being litigated in state court: It could either order a state forum to transfer the matter to a more appropriate state forum (federalized forum non conveniens on the model of 28 U.S.C. §1404), or it could direct the forum to follow a "foreign" rule of decision at odds with local choice of law rules. Such a federal jurisdictional statute would reverse the holding of *Klaxon Co. v. Stentor Electronic Manufacturing. Co.*, and open up a new common law field of federal choice of law doctrine.

V. Conclusion

Pending that distant day when impending border wars between the states make new orderings politically desirable, the CLS-inspired forecast is for more of the same heavy weather. The current sedarian muddles of choice of law theory are performing their mediating function very well. The law, and even the principles generating the law of the forum about when the law of the forum is really the law of another forum, is open, debatable, manipulable, and therefore accommodating. It allows endless experiments in metatheory and in expressing discretionary outcomes through mystifying generalities.

On the other hand, the federalized half of the problem, due process cases about personal jurisdiction, is in crisis. The task of reform is accordingly beset with more serious difficulties. Existing law embodies a tacit and indefensible bias favoring bigger and more regular players at the expense of local and irregular players. It invites oppressive (or at least unpoliced) manipulations based upon disparate bargaining power and the contractual ideology of "consent" to choice of forum, consent to foreign service of process, and a variety of similar adhesionary devices. The pendular char-

45. This might be accomplished with as little thought or attention to detail as the federal common law provision. See Labor Management Relations Act (Taft Hartley Act), 29 U.S.C. § 85 (1982), that was sustained in *Textile Workers of America v. Lincoln Mills*, 353 U.S. 448 (1957).
46. 313 U.S. 487 (1941).
47. For the kernel of a scenario, see *James v. Grand Trunk Western Rwy.*, 14 Ill.2d 356, 152 N.E.2d 858, cert. denied, 358 U.S. 915 (1958).
49. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (defendant brought to franchisors forum under the terms of a standard franchise); *Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) (cognovit note held valid if its waiver of constitutional rights 'voluntary,
acter of “due process” jurisdictional doctrine has been widely noted, and now that we have experienced two swings (from Pen- noyer to McGee\(^50\) to Worldwide Volkswagen,\(^51\) roughly speaking), it is widely felt that the time has come to redefine the very elements of analysis.

Scholarly debates of the kind initiated by Professor Brilmayer reflect a larger crisis in legal thought. We should be very grateful to her for stimulating genuinely radical re-examination of our postulates, whether we endorse her political theory, a more critical orientation, or some other vision of jurisprudence. Let us hope that our respective ideologies can be assayed as competing oracles prophesying different outcomes for a change long overdue.

Knowing, and intelligently made’); National Equipment Rental v. Szukhent, 375 U.S. 311 (1964) (Michigan farmers held to have consented to jurisdiction by signing form lease naming a New York clerk for plaintiff as their agent for service of process). Arguably, Burger King brings Justice Black's dissenting prophecy in National Equipment, 375 U.S. at 318, that such clauses would become common, to fulfillment. Another interesting and more recent example is Shearson/American Express Inc. v. McMahon, 55 U.S.L.W. 4757 (U.S. June 8, 1987), holding that arbitration agreements in standard brokerage contracts constitute a valid and enforceable “choice” of forum.
