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Article: Legitimacy, Consequentialism, and Conflict of Laws: Lea Brilmayer's Rights-Based Theory *

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TEXT:

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I. Introduction

Lea Brilmayer is among our leading scholars in the field of conflict of laws. n1 In her recent book, *Conflict of Laws: Foundations and Future Directions*, n2 she displays impressive erudition and a serious multidisciplinary sensibility. The book develops a sustained critique of received choice of law doctrine. This critique culminates in a pair of prescriptions appropriate to multistate conflicts. The first prescription, contained in Chapter Four, offers advice to states on how they might best pursue their individual and collective long-term objectives. n3 It derives its conclusions largely from economics and game theory.

The second prescription, on which this essay shall focus, proposes principled limitations

on the pursuit of those same objectives. The prescription is outlined in the final chapter entitled, Rights, Fairness, and Choice of Law. n4 The principles contained therein, Brilmayer claims, are unusual for choice of law scholarship in that they respond to the specific problem of fairness. n5 She seeks principles concerning when it is fair for a given state to apply its own law in a multistate dispute. Brilmayer emphasizes that her proposal derives not from any hypostatization of an imagined "common law of fairness," nor from constitutional principles, n6 but from moral and political theory. n7 As do most conflicts scholars, Brilmayer offers not a restatement of the law, but a vision of how it ought to be, based on what she hopes are plausible normative premises. Brilmayer wants to succeed, however, where she believes past prescriptive efforts have failed: she wants to present a conflicts jurisprudence which actually helps judges decide cases in a systematic and fair fashion, which she believes current approaches fail to do. n8 But she wants to avoid basing her theory on metaphysical premises as dubious as those required by past theories. n9 Joseph Beale's "vested rights" doctrine n10 is commonly recognized to rely on such premises. Brilmayer maintains, however, that the doctrine of governmental interest analysis, which succeeded the Bealean theory, rests on similarly questionable metaphysics and ought to be shunned as well. n11

This essay is built around a critical exegesis of Brilmayer's rights-based theory n12 of choice of law. n13 In the process I question the applicability to choice of law debates of two of the devices which Brilmayer employs to draw out our anti-consequentialist intuitions and thereby to lay the foundation for her project. n14 I also question her argument to the effect that her rights-based theory is burdened by fewer ontological commitments than was Bealean vested-rights theory. n15 I then connect these criticisms to my central argument against Brilmayer's case for "mutuality" as a choice of law principle. n16 In this vein, I proceed to discuss two prominent critiques of Brilmayer by other conflicts theorists, and argue that these critiques find support in my philosophical arguments, and that they complement and extend my arguments as well. n17 I conclude by placing the foregoing analysis in the broader context of political theory. I suggest, in this regard, that Brilmayer's conception of political legitimacy is incomplete, and that her errors, as identified herein, parallel those which communitarians find in certain forms of philosophical liberalism. n18

II. Brilmayer's Case Against Modern Choice of Law

A. The Importance of Rights

Brilmayer begins by observing that modern choice of law scholarship makes scant reference to rights at all. n19 Scholars generally emphasize "'policies,' or 'interests,' or 'functional analysis.'" n20 Brilmayer suggests that the judicial and scholarly avoidance of rights-talk continues to manifest the extent to which, during the rise of legal realism, scholars such as Brainerd Currie n21 and Walter Wheeler Cook n22 discredited Joseph Beale's vested rights theory (exemplified in the First Restatement of Conflicts). n23 This unexamined aversion to the concept of rights, Brilmayer argues, is both unwarranted and unfortunate. n24 [*42]

Contemporary moral and political theorists conceive of a much wider range of rights than merely those which Beale characterized as "vested." n25 Brilmayer proposes to use one of these alternative conceptions of rights, namely "political rights," to guide conflicts adjudication. n26 Political rights differ from Bealean rights in at least two ways. First, political rights are essentially negative rights against certain types of state action, as opposed to positive rights (e.g., against a private actor such as a tortfeasor) for the vindication of which one might properly invoke the state. n27 Secondly, Brilmayer's rights-based analysis does not purport to resolve all conflicts of law, but merely to specify rights which preclude certain judicial responses, leaving others open. n28 After receiving Brilmayer's rights-based treatment, a case may then require the judge to appeal to other concerns (ones not based on rights) to determine the outcome. n29

Brilmayer argues for the general proposition that rights are important to choice of law. More specifically, she argues that the relevant rights for these purposes are the particular set which she identifies--what she calls "political rights." n30 She argues for these conclusions by contrasting her approach with both Beale's theory of vested rights and the interest analysis approach which supplanted the former. n31

Beale's theory relies on the idea that states have authority to enforce laws only within their own territorial limits. n32 A forum, therefore, could not actually enforce the laws created by another state, but at most could enforce "rights" created in individuals in other jurisdictions. n33 Beale's theory, in this sense, is both backward-looking and [*43] deontological; it takes its cues from past events, specifically, from past events concerning the parties' rights. n34

The legal realists attacked the Bealean theory, emphasizing that to imagine that the parties to a conflicts dispute actually have rights prior to the judicial disposition of their case is to credit a fiction. n35 Instead, the realists advocated an instrumental perspective on adjudication. n36 Rather than looking backward and trying to vindicate rights in the plaintiff, judges should look forward, striving to achieve, by means of their decision, some social purpose which transcends rights-oriented assessment. n37 Accordingly, Brilmayer argues, modern choice of law theory has become forward-looking and consequentialist. n38

But the modern theory is a quite specific variant of consequentialism. Interest analysis does not instruct judges to effectuate the most desirable social consequences, simpliciter, as does consequentialism when presented as a general moral or political theory. n39 Rather, an interest-analyst judge plays an intermediate role, promoting those states of affairs which her legislature has identified as most desirable. n40 Generally, [*44] these states of affairs concern only the citizens of that state, as opposed to the world at large. n41 As Brilmayer states:

One might identify the consequentialist component of modern choice of law theory as its principle that if the values in the local statute would be furthered within the state by applying the law, then the state has a policy reason or "interest" in having its law applied. The relevant questions are: Which state will bear the long-range social consequences of

the judicial decision? Will application of a particular statute prevent those consequences (if they are evil) or help to promote them (if they are beneficial)? n42

Brilmayer makes several observations to support her thesis that modern choice of law reasoning is consequentialist. First, she notes that modern judges speak of "policies" being advanced, rather than "principles" being followed, in conflicts matters--a vocabulary evoking consequentialist concerns. n43 Secondly, she observes that modern courts often consider the interests of third persons who are not formal parties to the matter at hand (which considerations would have no place under a strictly rights-based theory). n44 Finally, she notes, modern conflicts law seems to ignore the issue of what the parties in question deserve as a result of their past actions. n45

B. Brilmayer's Rejection of Consequentialism

Until this point, Brilmayer's treatment of consequentialism has been strictly descriptive. n46 She has begun to make her case that modern choice of law theory proceeds from predominantly consequentialist premises. n47 At this point, she makes her first evaluative contention regarding consequentialism, n48 but leaves it underdeveloped. Her dismissal of consequentialism demands careful attention, however, because that [*45] dismissal appears to motivate her entire project. On the rhetorical level, moreover, Brilmayer tries to discredit consequentialism (if not generally, then at least in the choice of law context) by appealing to two scenarios in which consequentialism has especially unsavory implications: 1) the case of the incarcerated innocent, n49 and 2) inequitable pie-expansion. n50 Throughout this essay I shall argue that Brilmayer proceeds from subtle misconceptions concerning the relative virtues and vices of consequentialism versus deontology, both as broad schools of normative thought, and as distillations of our moral intuitions.

Brilmayer is well aware of the complexity of the debate between deontologists and consequentialists, and by no means pretends to have decisively refuted consequentialism, to say nothing of defending deontology. She might object that I hold her to an alien (and inappropriate) intellectual standard when I criticize her perspective on consequentialism. On a similar philosophical matter she remarks that "we cannot afford to be as concerned as professional philosophers about such scruples." n51 But, as I hope to demonstrate, my criticism is no mere philosopher's gambit, but rather expresses a deep critique which is at least implicit in the proposals which other choice of law scholars have made in opposition to her views. n52 However, these theorists tend to mount their counter-proposals in the idiom of choice of law scholarship, and my impression is that Brilmayer sought to outflank them by invoking political theory. In the interests of lively debate, I therefore choose to revisit Brilmayer in her own political-theoretic stratosphere and confront her with philosophical counter-arguments on behalf of her earth-bound adversaries.

I shall begin by assessing Brilmayer's use of the case of the incarcerated innocent. C. The Incarcerated Innocent and Choice of Law

The fact that consequentialist choice of law doctrine ignores what the parties deserve, Brilmayer suggests, is particularly problematic. n53 To [*46] demonstrate this, she invokes a hypothetical which, in various forms, has been widely used to discredit consequentialism. I shall refer to it as "the case of the incarcerated innocent." Suppose the criminal law were to effectuate deterrence by punishing a person who, though known by the government to be innocent, is commonly believed to be guilty. Similarly, imagine a criminal justice system which incarcerated people whenever it predicted that they were going to harm others, even if they had not yet done so. Such regimes would be morally suspect, Brilmayer suggests. n54 But so long as the positive consequences of these policies for human well-being outweighed their negative consequences, consequentialism would seem to authorize such horrific tactics.

Brilmayer thinks consequentialism authorizes similarly unpalatable decisions when applied to conflict of laws. n55 A consequentialist approach to choice of law is "indifferent to what the parties deserve," n56 and is morally questionable in that regard.

Brilmayer's examples of the implications of consequentialist reasoning n57 succeed in shocking the conscience. We have an unmistakable intuition that there is something wrong with a society which would incarcerate an innocent person solely for the purposes of deterrence or preventive incapacitation. Starting with this intuition, Brilmayer's reasoning seems to run as follows:

1. Consequentialism permits or even requires people to be treated in ways which strike us as wrong (e.g., the incarcerated innocent). n58
2. A version of consequentialism informs modern choice of law theory. n59
3. Therefore, modern choice of law is morally suspect, and we should seek a substitute which is not strictly consequentialist. n60

I do not suggest that the initial intuition is in any way foolish or unsophisticated. I simply ask that we scrutinize the sources of the intuition, [*47] and ask ourselves whether the particular inference in (3) is warranted.

Philosophers typically entertain examples such as that of the incarcerated innocent in order to urge wholesale rejection of consequentialism as a moral theory. n61 If consequentialism permits such horrors, they suggest, then something is fundamentally wrong with consequentialism. Brilmayer, by contrast, has no need to commit herself to a position on the general merits and failings of consequentialism. n62 Accordingly, she puts the incarcerated innocent example to a more limited use. From our intuition that such incarceration is wrong, Brilmayer wants us to infer the existence of an individual right, as yet unspecified. n63 But Brilmayer needs to do more than convince us that the incarcerated innocent is being deprived of some right or other. Convincing us of this general point might be enough to cast doubt on consequentialism as a broad moral theory, but this is not her goal. Unless we also agree to her specification of the threatened right, our reaction to the disturbing hypothetical would not by itself imply that consequentialist

choice of law regimes are morally suspect.

It may not be obvious why this is so. One might imagine that any regime which partakes of consequentialism is morally doomed so long as we can conjure at least one hypothetical in which consequentialism, as a general moral theory, would authorize practices which clash with our strongly held moral intuitions.

But suppose we can conjure such a hypothetical (e.g., the incarcerated innocent), and agree that it "dooms" consequentialism as a moral theory. This conclusion in no way entails that the consequences of actions and policies are morally irrelevant, nor that they ought not, in many cases, to be the primary moral factor. To conclude that consequences are not always the overriding moral consideration is not to conclude that consequences are never or not usually the most important thing. As John Rawls, perhaps the leading anti-consequentialist of our time, has written: "All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy."⁶⁴ Hence, Brilmayer needs to convince us that modern choice of law doctrine permits outcomes which are actually similar, in the relevant moral respects, to her shocking hypotheticals. This, I shall suggest, is no easy task.⁶⁵

What must be the content of the threatened right if it is to serve Brilmayer's purposes? Brilmayer never specifies its content, so we are forced to reconstruct it, as plausibly as we can. To this end, think first about what the right cannot be. It cannot be, for example, simply a right 1) not to be incarcerated 2) when one has committed no offense. Such a right proves both too narrow and too broad for Brilmayer's purposes. Brilmayer wants to maintain that when a multistate litigant finds himself⁶⁶ burdened by a forum adhering to governmental interest analysis, he is in a position morally comparable to that of the incarcerated innocent. But since civil conflict of law cases do not involve incarceration, the right described above is obviously drawn too narrowly. For the first half of the proposed right let us therefore tentatively substitute a right "not to be physically or financially burdened by the voluntary actions of another agent."⁶⁷

Consider now the second half of the proposed specification: "when one has committed no offense." Such a provision is, first of all, too broad for Brilmayer's aims, no matter how we interpret "offense." At best, on a "realist" construal, the question as to whether or not the multistate defendant has committed an "offense" is the very thing at issue.⁶⁸ At worst, on a "natural law" characterization of "offense," that question may be answerable in the affirmative in the multistate case: legal liability issues aside, the defendant did, after all, cause the accident (breach the contract, or what have you) that is the subject of the case, and may thus have indeed committed an "offense" if we interpret the latter as including any violation of someone else's "natural rights." So, our formulation of the defendant's moral right had best make no reference whatsoever to the commission of an offense.

Moreover, it seems that burdening a party is not always immoral even if we make no assumption regarding whether the party has committed an offense. Any intuition we have to the contrary, I suggest, derives from a tacit supposition that the burdened party is

either a domiciliary of the regime or a foreigner who was not forewarned, even constructively, about the policies of the regime she was entering.

To understand this suggestion, let us ask: why does incarcerating the innocent for the greater good evoke such a strong reaction in us? Perhaps we are in some sense responding empathetically, projecting ourselves into the position of the innocent and reacting to our imagined plight. Whenever we imagine ourselves as someone else, however, we must make a range of assumptions particular to the situation. We must be capable of temporarily ignoring the ways in which we are different from the object of our projection (e.g., the incarcerated innocent) in favor of the ways in which we are similar to him. To that extent, the hypothetical may well pack its punch because we invariably assume that the innocent is, as is each of us, a member of the very society the government of which now proposes to punish him for nothing. We assume that, as such, the individual never chose to enter a society with such a barbaric policy, but simply "finds himself" there, as we "found" ourselves in our own. He is an individual whose own state has forsaken him, against his will, and without offering him due warning or choice. His plight evokes a scenario in which my own government likewise betrays me, without my informed or constructive consent.

Brilmayer would likely object, at this point, that I must be assuming all of us who react negatively to the hypothetical to be unrealistically coldhearted individuals. Surely, she would insist, the parable shocks us simply because the innocent is being unfairly treated, not because we [*50] are tacitly assuming him to be a domiciliary of the regime, who therefore deserves fair treatment from it. Were the innocent in question a foreigner, she might observe, we would be equally shocked by his incarceration.

Brilmayer would be correct in this regard--our hearts go out to the foreigner as to the domestic innocent--but only after we make some significant additional assumptions. Specifically, I suspect we must tacitly assume that the beleaguered foreign individual entered the jurisdiction of our regime either involuntarily or without constructive knowledge of the policy (i.e., under circumstances such that it would not be reasonable to expect her to know that individuals in our regime, foreigners included, are sometimes treated in the relevant burdensome way). The mere fact that the foreigner is human may arouse some prima facie sympathy in all of us, but her humanity alone cannot really justify protecting her against all coercive state acts. Obviously, if the foreigner commits a crime, sister intuitions to those which oppose her incarceration as an innocent would demand her punishment as a criminal. The most our intuitions really insinuate is that the state must not punish foreigners under laws to which those individuals never submitted, both voluntarily and with constructive knowledge. n69

To this extent, I think our empathy for the domiciliary who is unfairly incarcerated derives from our sense that domiciliaries should not be required to leave their home state so as to avoid "substantively unfair" n70 rules. By contrast, our sympathy for the innocent foreigner extends only so far as his submission to local law was not fully informed and volitional. This reflects our counterpart intuition that, however substantively unfair a law may be, foreigners (unlike domiciliaries) cannot expect the state to

change laws favored by its residents, nor to make exceptions on foreigners' accounts. The most foreigners can properly expect is that the existence of the law will be made public for their information, and that no one will force them to affiliate themselves with [*51] the offending state. n71 A foreigner who chooses to enter, e.g., Iowa, knowing full well that Iowa's policy is to use individuals for the common good may find little sympathy with us. n72

D. Natural Rights?

Brilmayer might still insist that we have no trouble feeling that it is wrong to incarcerate an innocent foreigner, and that our reacting in this way does not seem to require that we give even a thought to questions of publicity, knowledge, or volition. Indeed, our reaction seems less reasoned than that. But if this is so, I would argue, it is because we feel that individuals have an absolute right to travel without being subject to barbaric laws such as the infamous incarceration policy. Our intuitions may well intimate that human beings have an exceptionally sacred natural right to liberty of bodily movement, which is to be violated only in the most exigent of circumstances, if ever. n73 The specific policy of incarcerating innocents, we may believe, is simply barbaric, whether people consent to it or not. n74

But where the laws hardly constitute barbaric violations of natural rights, the right to travel without being subject to the law in question--a right which we perceived as absolute in the barbaric hypothetical--may weaken into a qualified right. The financial burden of a civil [*52] judgment in a multistate case, for instance, probably fails to constitute a violation of natural rights sufficient to offend our moral sensibilities in the same unqualified manner as did the incarcerated innocent scenario. Even if we believe that all innocent people have a right to enter Iowa, in full knowledge of Iowan law, without undergoing incarceration, surely we do not believe that everyone holds an absolute right to enter Iowa without submitting to Iowa's laws when those are of a less unconscionable nature.

Of Brilmayer we must therefore ask again: what is the content of the common right which she perceives as being violated both in the case of the incarcerated innocent and in that of the multistate defendant who confronts an adverse judgment from an "interest analysis" forum? It would now seem to be a right not to be financially or physically burdened as a result of the voluntary actions of another agent when I have constructively consented neither to those actions, nor to any system of norms which permits them.

This newly reformulated right is weak in its conditionality, but strong insofar as it covers a wide variety of burdens. It protects the multistate defendant from burdens imposed by regimes to the rule of which she has not consented, but it exposes her to potential liability once she consents to obey the regime in question--by entering its borders, for example.

A moment's reflection suggests why we might expect such a right to extend only this far. n75 In our constitutional democracy citizens have a right, within certain limits, to try to shape the laws of their home state to their preferences. Suppose, in response to

Brilmayer's unflattering portrayal of consequentialism, judges nationwide permit foreign citizens to exempt themselves from laws which the people of the forum state, through their representatives, have selected to advance their general welfare. Suppose, further, that the judges did not draw a distinction between consensual and nonconsensual submission to a regime. We might welcome this special treatment when travelling, but if judges in our home state were similarly lax with visitors, we might curse the lot of them for undermining our attempt to maintain a regime dedicated to furthering our local interests. If the foreigner dislikes the laws of our regime (however "unfair" they may be), he is always free to stay put. We locals, on the other hand, cannot prevent him from crossing into our state, causing trouble, and obtaining special dispensations from our [*53] anti-consequentialist judiciary. Nor can he plausibly respond by advising us to relocate. Not only is this unreasonably inconvenient, but we will find ourselves in the same boat no matter what state we pick, assuming Brilmayer has been widely persuasive. No matter where we elect to relocate we will find foreigners in the adjacent states who can rain on our parade. To this extent, the judiciary would be violating our right to be burden-free in the very process of protecting the same right on behalf of the foreigner. Consistency alone therefore demands that we include the (constructive) consent condition in our formulation of the right.

E. The Nonconsensual Litigant

At this point, Brilmayer would surely complain that I have ignored the actual choice of law scenario with which she concerns herself. Her concern is not, as I have been assuming, a case in which a regime, entered by the defendant freely and with constructive knowledge, threatens to burden him in the interests of a domiciliary. Rather, Brilmayer's fairness concerns arise in response to cases in which the forum in question is one by which the defendant has not consented to be governed. n76 In such cases, Brilmayer could n77 insist, the defendant's fundamental right to be free of nonconsensual burdens is precisely what stands to be violated by a consequentialist judiciary.

Brilmayer uses the example of after-acquired domicile, in which the plaintiff in a tort action relocates following the accident and sues the defendant from his new state of domicile, which has plaintiff-favorable policies, yet with which the defendant has had no contact whatsoever. n78 It is unfair in such cases, Brilmayer suggests, to burden the defendant. n79

Perhaps our intuitions coincide with Brilmayer's concerning the existence of a right in the defendant against such burdens. Perhaps they do not. In any event, she is right about this much: we cannot coherently deny that burdening the defendant in cases of after-acquired domicile [*54] does indeed violate his right, as we have most recently refined it, if such a right exists to begin with. The defendant stands to undergo financial burdens as a combined result of the voluntary actions of two agents: the plaintiff, and the forum which the plaintiff has selected. But the defendant never consented, in any sense whatsoever, to the plaintiff's choice of forum, nor to the consequentialist policies promulgated thereby. To burden him, Brilmayer could insist, constitutes a violation of his rights. Hence, she could conclude, the consequentialist choice of law policy which would do so

is morally invalid.

To reach this conclusion, however, is to see only half the picture. Indeed, the defendant's rights seem in jeopardy here. But before concluding that the solution is to reject the offending policy, we must at least ask whether the alternative ruling is any better, measured by the same deontological standard. I contend that the alternative is, in fact, no better. Suppose the forum declines to burden the defendant, in accordance with Brilmayer's reasoning. In the zero-sum game of litigation, this simply entails that the plaintiff or, more importantly, the residents of her new home state, end up bearing the financial burdens of the delict. n80 For this very reason interest analysts have argued that "if it is likely that only one state will experience the social consequences to which conflicting state rules are addressed, that state's method of dealing with the problem should prevail." n81 The consequences in question are familiar from the interest analysis literature. They include burdens on local taxpayers who finance the welfare system, on local dependents of the plaintiff who suffer financially from an adverse judgment, on medical creditors in the plaintiff's home state, etc. n82 In other words, [*55] the citizens of the state are being subjected to a financial burden as a result of the voluntary actions of agents (the parties to the case, as well as the forum itself) to which they never constructively consented. It is hard to see how a holding for the defendant is any more legitimate than the contrary judgment, given the strong moral right we are assuming to exist. n83

Brilmayer might argue that there is in fact a big moral difference between the situation of the defendant and that of the domiciliaries. The domiciliaries, she might insist, have consented to the regime which proposes to burden them, whereas the defendant, ex hypothesi, has not so consented. Is this not precisely the distinction she needs?

The problem with this response is that it presupposes that the domiciliaries of the forum state have already consented to Brilmayer's proposal. The response tries to maintain, on the basis of one individual's possession of a given right (the right to be free of nonconsensual burdens), that other individuals ought to consent to endure violations of that same right. Of course the domiciliaries could consent to be financially burdened so as to avoid burdening unconsenting foreign defendants. But so could foreign defendants consent to be burdened so as to avoid burdening unconsenting domiciliaries. The domiciliaries did not, after all, ask the plaintiff to relocate to their state any more than the defendant asked for this. Analogously: the fact that I stand to lose my property without my consent does not justify me in taking your property without your consent, no matter what sort of property right we are assuming.

Of course, as a factual matter, there may well be many states the citizens of which do not especially value their ability to maintain their state as a "protective enclave" for domiciliaries, and who would much prefer the right to be treated as a "gentle foreigner" whenever travelling [*56] to or dealing with other states. n84 Perhaps there are no states containing a majority of citizens whose desire for a protective enclave extends so far as to justify consequentialist treatment of foreigners, such as those recommended by modern interest analysis. If Brilmayer's facially philosophical attack on consequentialism were

actually just standing in for an empirical claim such as this, I would have no objection. She presents her case, however, as a principled objection to consequentialism in choice of law. n85 As such, her case is unsatisfactory, for reasons which should be clear by now.

Brilmayer's objection, as thus far developed, rests implicitly on something like the right described earlier: the right to be free of nonconsensual burdens. But even as she seeks to respect this individual right, she would preempt, on strictly moral grounds, the right of a state's citizenry to decide for themselves which they cherish more--the "protective enclave" ideal or the chance to discourage (by example) or prevent (by national decree) other states from forming such enclaves. n86 Which of these options a given populace will prefer is simply not as obvious as Brilmayer's parable of the "incarcerated innocent" would lead us to believe. It is certainly not the sort of choice which philosophers can make on the people's behalf. n87 Yet this is just what an approach responsive to the incarcerated innocent analogy threatens to do. Such an approach suggests that there is a moral reason not to burden the multistate defendant, a reason which overrides the self-interest of the residents of the forum state. But, as we have seen, consistency alone demands that a right strong enough to protect the defendant from unconsented financial burdens must equally protect the residents of the [*57] forum state from such burdens. n88 Hence, we are not justified in drawing, from the premise that such a right exists, n89 any conclusions about what is morally required, or even advisable, in a choice of law regime.

III. Political Rights Against Uncompensated Burdens

The right to be free of unconsented burdens is, therefore, too broad for Brilmayer's purposes. For the moment, however, let us put aside my criticism of Brilmayer's anti-consequentialist appeal. We shall further develop these themes as we continue to discuss her positive program. The next question is: where should Brilmayer turn for a rights-sensitive alternative to consequentialism, one which avoids the pitfalls already discussed? Obviously, she might opt to revert blindly to Bealean theory. n90 But we moderns want a theory which respects the parties' rights without requiring us, in question-begging Bealean fashion, first to identify the applicable law to determine what rights they have. Brilmayer hopes to accomplish just this. She proposes a choice of law theory based on rights which the parties have, not against one another, nor against agents in general, but against unjustified coercive acts by a government. n91 These, she emphasizes, are not constitutional rights, but pre-constitutional ones: political rights possessed by every member of civil society. n92 They are, to that extent, like the moral right we explored, without success, in the previous section. n93 A judge can comfortably recognize these rights despite their non-constitutional, nonstatutory status, Brilmayer suggests, because legislatures issue so little explicit guidance on choice of law adjudication. n94 The gaps are there to be filled, and deontological theories fit the bill. n95

They fit the bill especially well, she argues, because consequentialism is problematic as applied to choice of law. n96 Consequentialists typically justify laws which advance the common good at the expense of an individual by noting that the individual was permitted

to participate on an equal basis in the representative process which produced the [*58] rule in question. n97 In multistate cases, she observes, this justification is simply not available: the multistate litigant has no voice in the legislative process of the state which proposes to coerce her. n98 As Brilmayer succinctly puts it:

It is one thing to defend consequentialism on the theory that when the pie is enlarged, each person's share is likely to be more generous. It would be quite another to expand the pie at the expense of someone who is not entitled to demand a piece at all. n99

A. Inequitable Pie-Expansion

As did the image of the incarcerated innocent, n100 the image of expanding the social pie n101 at the expense of a nonbeneficiary draws our sympathy, but misleads. In isolation, the idea of such inequitable pie-expansion seems intolerable. But by introducing this image early in her discussion, Brilmayer risks distorting our perspective when we turn to choice of law itself, leading us to ignore the ways in which choice of law is distinguishable from the "expanding pie" scenario.

Brilmayer here appeals, in effect, to a political right against uncompensated expropriations. n102 But the expanding pie scenario is set up to collapse the ex ante and ex post perspectives on the legitimacy of the expropriation: the victim was never given the option of joining the pie- [*59] beneficiaries, but simply "finds herself" as a non-member of that group, being burdened for the members' benefit. A close analogy would be slavery. Picture, by contrast, the multistate litigant. Ex post, this litigant is "not entitled to demand a piece," just as the victim of the expanding pie was not. But unlike her hypothetical counterpart, the multistate litigant has received a piece of a pie. n103 It is a different pie, to be sure--it is a pie consisting of the benefits of being domiciled in her home state. As a citizen of her own state, she has, for whatever period, received whatever benefits she and her fellow citizens voted to provide for themselves. In principle, these benefits could have included even choice of law rules comparable to those which now burden her--rules favoring domiciliaries at the expense of outsiders. The same moral principles which presently permit the forum state to expand its "pie" at her expense have also allowed her, in her capacity as a domiciliary of her home state, to expand her "pie" at the expense of others. n104

Of course, Brilmayer might object, the litigant's home state may not offer benefits comparable to those which the instant state chooses to "extract" from outsiders. Would this fact not leave us still with unfairness? n105 It would, we can reply, only if the multistate litigant was prohibited from influencing the political process in her own state, and/or barred from relocating whenever her political efforts met defeat. So long as the litigant had these options, she was always free to "demand her piece" at home, or to relocate to a state which offered "pieces" large enough to suit her. In the United States, everyone has these options, n106 so Brilmayer risks eliciting inapposite intuitions when she purposely restricts our focus to a scenario in which the victim lacks these ex ante alternatives (or so the example leads us to suppose). [*60]

As in her example of the incarcerated innocent, n107 Brilmayer introduces an image in which our intuitions favoring the existence of an absolute right in the burdened party are at their most salient. As in the earlier case, the burdened litigant in fact has enjoyed benefits and/or options which the hypothetical in question excludes from consideration. Once again, the example works to obscure the fact that, if we jurists consistently bestow on the multistate litigant an absolute right against "illegitimate" coercion, we thereby in effect deprive those same individuals of the facially coequal right to decide for themselves, in their capacity as voters in their home states, how to strike the balance between state protectionism and deferential treatment of foreigners. Afforded the choice, people might favor their own rights as travellers and, banking on the expectation of interstate reciprocity, opt for choice of law rules which avoid burdening those who lack substantial connections to the state. n108 But they might equally decide to play it safe, reasoning that, since they can never be certain that any other state will protect their interests as litigants, they would best adopt self-favoring rules in the one state with policies they can control. Their home state is also, and not coincidentally, the jurisdiction in which they will doubtless spend the vast bulk of their time.

B. Legitimacy and Political Rights

We shall return to this critique of Brilmayer's appeal to inequitable pie-expansion. For now, let us simply recognize that, for Brilmayer, political rights in the choice of law context derive from the fact that the state has finite legitimate authority. n109 I do not reject this proposition as a general matter. I merely question Brilmayer's narrow view of the sources and scope of that albeit finite legitimacy, which leads me to question the character of the political rights derived therefrom. n110 For now, we should continue with Brilmayer's reasoning.

When a judge decides a choice of law question, Brilmayer suggests, he simultaneously decides (tacitly, we expect) that certain criteria of legitimacy and "obligation to obey" are satisfied. n111 The state must have legitimate grounds to exercise its authority and the individuals over whom it will exercise that authority must be legitimately obligated [*61] to obey. n112 Both legitimacy and obligation, she emphasizes, may derive from sources other than the fact that the individual in question was given the opportunity to participate in the political process, although prior participation is one obvious source for them. n113 Absent legitimacy and obligation to obey, however, individuals have a negative political right to be left alone. n114

These rights, Brilmayer explains, differ from Bealean vested rights in two regards. First, they are "vertical" rights wielded by individuals against the state, not "horizontal" rights of individuals against other individuals. n115 Secondly, as noted, they are primarily negative rights, not positive rights such as those specified by Beale. n116 To this extent, Brilmayer notes, situations can arise in which more than one state has legitimate authority over a litigant, and can claim her obedience to its laws. n117 A rights-based theory of choice of law simply provides a threshold fairness test for decisions--it will not always determine a unique outcome.

C. Modest Ontological Commitments

On the other hand, Brilmayer emphasizes that, as compared to Beale, who needed a full-fledged theory of positive rights, "a political rights model makes a more modest ontological commitment, for it specifies only that persons have rights to be left alone." n118 Although this contention is not central to Brilmayer's argument, I think it merits concern, because it offers insight into a tension internal to Brilmayer's project. Her positivistic intention to eschew heavyweight ontological commitments runs counter to her obvious admiration for the rigidity of deontological concepts: once we have assumed these concepts to track something real, they seem to boast the decisive power to rule out certain results as immoral. n119 [*62]

But this power comes at a price which Brilmayer may not recognize. Despite her avowed concern with "fairness," by restricting herself to the modest ontological commitment of negative "political" rights she implicitly gives priority to the values of rigidity and clarity over that of fairness construed more substantively, and with the national system in full view. n120 Perhaps she has failed to appreciate that the problem with Bealean rights was not just the metaphysical dubiousness ridiculed by legal realists. n121 There is a deeper dilemma underlying the suspicion that rights--positive or negative--are problematic sources for choice of law jurisprudence. On the one hand, if rights are just creatures of law then they cannot be used to determine law--not even judge-made law, as the Bealean would have it. n122 This Brilmayer acknowledges. But if rights as a class are not just creatures of law, as Brilmayer would agree, n123 then there must be positive rights among them. Otherwise, I would argue, law itself becomes illegitimate, for the following reasons. The acts which law seeks to remedy and prevent are most often private acts by one individual against another, not acts by other governments. If individuals have, at a minimum, a default negative right against governmental coercion, then it follows that only a private positive right on the part of another individual could override that negative right. Such positive rights in others, on this non-positivist theory, are what justify governmental coercion in the first place against those who commit delicts. To this extent, a legal theory which propounds only a deflated class of negative rights against the government must either inflate on examination, or collapse altogether. n124

Among these positive rights (which the political rights theorist must grudgingly accept) may very well be a prima facie positive right to shape one's own government, and to make one's state a protective enclave, to some degree. At least, Brilmayer does not offer an argument opposing the existence of such rights. And as we have observed, once you abandon positivist minimalism about "preinstitutional" rights, your ontological commitments become more presumptuous, not more modest--now you face a range of positive rights undergirding government [*63] itself, each begging for substantive characterization. n125

D. Domicile, Affiliation, and Political Rights

Brilmayer seems aware of this problem, in a weaker and less problematic incarnation.

She recognizes that, whatever the political rights theory can do, it can do it only after someone specifies our actual rights. n126 She simply fails to appreciate the full range of positive rights which would demand specification. For her, defining the relevant rights just involves identifying the circumstances under which the state is justified in coercing someone. n127 This is a difficult task for political theory, but Brilmayer confronts it. The first two justifications which she considers are 1) express consent n128 and 2) domicile of the party who is to be coerced. n129 Courts recognize the former when they enforce contractual choice of law clauses. n130 As for the latter, Brilmayer remarks that "the paradigm case of legitimate political authority . . . has been the obligation of the citizen to his or her own government." n131 This legitimacy stems from the right of the citizen to participate in political processes. n132 Corporations, although they cannot vote, likewise submit "to the law of the state of their incorporation." n133

Brilmayer refers to incorporation and domicile as "domiciliary connections" which function as additional justifications for state coercion, above and beyond express consent. n134 In interest analysis, for instance, domiciliary factors are generally considered when they indicate that a party who possesses them will benefit from the application of the law [*64] of the respective state. n135 Vested rights theory, by contrast, considers the scope of a law to be territorial, not domiciliary. n136 Bealean theory is "jurisdiction-selecting"--it determines which law applies without regard to the contents of the laws in question. n137

The political rights approach to conflicts employs domiciliary factors, as does interest analysis, but it differs from both the latter and Bealean theory in its treatment of those factors. n138 Under Brilmayer's method, the presence of domiciliary factors favors applying the law of the respective state only if doing so will burden the connected party, never if it will benefit her. n139 As does the interest analyst, Brilmayer would inquire into the content of the law in question. n140 But whereas interest analysts apply pro-plaintiff laws only if the domiciliary is the plaintiff, and pro-defendant laws only if she is the defendant, political rights methodology dictates just the opposite applications. n141

Interest analysis, Brilmayer maintains, is forward-looking in that it seeks to bestow benefits on local parties. n142 Political rights, by contrast, is a backward-looking method which strives to avoid imposing burdens unfairly on parties over whom the state has no proper authority. n143 To this end, the political rights theorist divides cases into true conflicts, false conflicts, and unprovided-for cases. n144 These are the interest analyst's familiar categories, but political rights theory has different classificatory criteria. A false conflict, for political rights analysis, occurs when the parties either share domiciliary connections to a common state, or to states with identical substantive laws. n145 These are false conflicts because, regardless of which party is disadvantaged by the application of the relevant law, that party has sufficient domiciliary connections to a state which enforces that very law--the disadvantaged party is not unfairly burdened by its application. n146 [*65] In other cases, the litigants hail from different states with different substantive laws, and each would benefit from the application of her own law. This is a true conflict for the interest analyst because each state has an interest, and these conflict. It is also a true conflict for Brilmayer, but for an opposing reason--neither party

has the requisite domiciliary connections to the state which proposes to burden her.

Finally, there are cases in which each of two differently domiciled litigants wishes to apply the law of the other litigant's home state. This is an unprovided-for case for the interest analyst because neither state has domiciliary connections to the party whom its laws would benefit. n147 For the political rights theorist, by contrast, these cases are unprovided-for because each of the two states has connections with the party whom the application of the state's own law would burden. n148

The hardest cases for both interest analysis and the political rights approach, however, remain true conflicts. The interest analyst confronts the daunting task of assessing the two states' respective interests in benefitting their own litigant. n149 But Brilmayer's method offers a default position for handling these cases which follows from her normative premises themselves: where neither state is justified to impose a burden on anyone, both must keep their hands off the litigants altogether. n150

In addition to this default position, Brilmayer proposes to use territoriality as a means of resolving true conflicts. n151 "There can be little doubt," she asserts, "that territoriality plays some role in a state's right to exercise coercive authority." n152 She considers various arguments for this proposition, including those based on (1) the "tacit consent" of the coerced party to be governed, n153 (2) the party's voluntary behavior associating herself with the state, n154 and (3) the benefits which the party stands to receive from the state in question. n155 Each of these arguments she finds ultimately wanting, however, and concludes that "it is almost impossible for some entity with no preexisting authority to justify assertions of political authority over an individual." n156 Nevertheless, she insists, we must take territoriality as axiomatic for choice of law. n157 State law itself, and choice of law in particular, simply make no sense without some territorial assumptions. n158

The question, then, is not whether to employ territoriality but how to employ it. Brilmayer emphasizes, for instance, that her use of territoriality will not rely upon Bealean fictions such as the notion that rights "vest" at a particular location. n159 Instead, she develops the implications of territoriality for her political rights model. n160 This distinguishes her method also from the use which interest analysis makes of territoriality. The interest analyst considers how to maximize benefits within the territory of a given state. n161 Political rights theory asks whether an individual is connected with the state in ways which authorize it to impose burdens on her. n162 In this regard, Brilmayer considers relevant the degree to which the burdened individual's submission to the burdening state was volitional. n163 A domiciliary typically has strong connections in this regard, insofar as she can participate in the state's political processes and actually influence the rules which might burden her. Less politically efficacious types of volitional association, we presume, would receive commensurately less weight. Brilmayer emphasizes that this political/volitional use of territoriality avoids the unfairness endemic to, e.g., the Bealean system, under which a buyer could travel to a pro-buyer state and mail his letter of acceptance, thereby preemptively burdening the seller without the latter's consent, and despite the fact that the seller lacked any

association with the state which would burden him. n164

Brilmayer acknowledges, however, that neither the consent and domicile criteria nor the territoriality test will determine unique answers in every case. n165 Together these tests may narrow the field, but further criteria are needed. Brilmayer suggests that we ask of a given policy, not simply whether the burdened party has sufficient connections to the burdening state, but whether the policy is "actuarially fair"--fair, that is, [*67] over the course of multiple applications. n166 Rules which systematically advantage the local person at the expense of the foreigner, for example, are actuarially unfair, even if they never require burdening anyone who lacks adequate connections to the forum. Such rules visit burdens on individuals who normally do not expect ever to receive the corresponding benefits of the policy. In purely domestic cases, by contrast, the same individual can expect to find herself on either side of the issue with equal frequency.

Neither interest analysis nor the political rights theory (as developed heretofore) is actuarially fair, however. They burden local parties systematically, without affording them corresponding benefits. n167 Such burdens are not as illegitimate in the case of political rights theory as in the case of interest analysis, because under the former theory the burdened parties had input into the political process which produced the policy. n168 Nevertheless, Brilmayer advises, courts should hesitate before choosing policies which redistribute from locals to outsiders in this manner. n169 To guard against this, she proposes a principle of mutuality:

Mutuality would require that the substantive rule not be applied to an individual's detriment unless the individual would be eligible to receive the benefits if the tables were turned. . . . Mutuality prohibits obviously unbalanced rules such as "choose the law that favors the local party." More subtly, it requires a judge to inquire into whether the law could fairly be applied to both parties, rather than simply whether it can fairly be applied to the aggrieved individual. n170

Brilmayer observes that, in earlier times, vested rights theory may very well have inadvertently satisfied the mutuality test in many cases, in that transactions tended to be face-to-face. n171 The rights which arise out of such transactions typically "vest" in a state to which both parties have connections, so systematic unfairness could be avoided and mutuality satisfied. More surprisingly, she observes, modern interest analysis often satisfies the mutuality test. n172 Under Currie's interest analysis, forum law will apply unless both parties are from a state with a different rule. n173 So even though forum law itself systematically favors the [*68] local party when it is applied, whether forum law gets applied in the first place or not turns on a more random factor. It turns on whether one has transacted with an individual whose state has the same law. n174

Brilmayer's chief dissatisfaction with Beale and Currie, therefore, is not that their theories rarely satisfy her normative criteria, but that they do so in an unplanned, unsystematic way. n175 Presumably, by not focusing on fairness per se, these theories let many opportunities to effectuate fairness slip through the cracks, fulfilling the demands of fairness (when they do) only by coincidence. n176 This Brilmayer would like to change:

"Rights" should not be allowed to slip into choice of law obscurity. The obligation to treat litigants fairly--to protect rights--is an obligation of state judges formulating state law as well as judges faced with constitutional challenges. Our jurisprudential traditions of insistence on fairness to the parties is important even in this postrealist world. n177

IV. Assessing Brilmayer's Argument for Mutuality

Brilmayer's book neglects to develop fully the implications of her method for actual judicial decisionmaking. Such development would, in fact, be premature. First, we need to evaluate Brilmayer's political rights theory on its own terms--as an attempt to articulate consistent, plausible normative principles for a choice of law jurisprudence. Brilmayer herself acknowledges that her theory does not resolve all conflicts of law. n178 In this Part I shall explore whether political rights can accomplish even what Brilmayer expects of them.

We have already begun this task in our criticisms of Brilmayer's use of the incarcerated innocent n179 and pie-expansion victim, n180 and in our discussion of her preference for ontological minimalism. n181 I now propose to extend the themes addressed in those earlier criticisms to the final, and critical, stage of Brilmayer's program: her argument for the mutuality principle. n182

Recall that Brilmayer proposes the mutuality principle as a consideration supplementary to the political rights method, by means of which [*69] she hopes to render "actuarially fair" the decisions made thereby. n183 The principle dictates that a substantive rule not be applied to burden an individual unless that same individual would be accorded the benefits were she in the position of her opponent. n184 Brilmayer also believes that adhering to mutuality, as to fairness generally in choice of law, promotes desirable interstate cooperation: "States should prefer to behave fairly to encourage other states to behave fairly in response. Fairness towards outsiders thus potentially results in fair treatment for your own people." n185

This last suggestion, however, presents a problematic hybrid of prescription and description, which exposes a tension pervading Brilmayer's project. A major advantage of the political rights theory, of course, is its effort to preserve the legitimacy of judicial decisions to choose and apply law. n186 But, as we have already observed, it is not so obvious as Brilmayer implies that respecting political rights in her strict sense is necessary to preserve that legitimacy. n187 Given the guaranteed ability to relocate and to vote in one's home state, n188 there may be other ways in which a choice of law decision might acquire legitimacy, ways which do not require respecting Brilmayer's version of political rights. Perhaps all that Brilmayer can prove is that respecting political rights is sufficient for legitimacy to obtain. This would amount to claiming that, if the people of Iowa vote to adopt the political rights theory (with or without the mutuality provision), then they need not take seriously any complaints from a fellow Iowan who, thereafter, finds herself disadvantaged by her own state tribunal when she opposes a foreign litigant before it. As Brilmayer asserts, "a state's choice to redistribute wealth

away from its own people is not automatically illegitimate." n189 But if this is all Brilmayer is saying, these are disappointingly weak conclusions from what promised to be a normative discussion. n190 It would probably also be "legitimate" in this restricted sense for the people of Iowa to vote to tax themselves into poverty. After all, doing so would conceivably not burden anyone who did not have fair [*70] input into the Iowan political process. The question is, rather, should they do so? Likewise, that is the question for Brilmayer: should we endorse a political rights choice of law methodology? To reply that we should do so because our regime would be politically legitimate if we did so is to beg the important question. n191

To answer this question, I think, we need to proceed to a deeper level of analysis. We need to know whether there is anything for a plebiscite voter to say to Brilmayer after she has told him that he really ought to vote for the political rights method of choice of law, because that method is politically legitimate as to foreigners, and we all want our judiciary to act legitimately. What, if anything, might the voter say in response?

On several earlier occasions, I argued that Brilmayer's evocative examples and ontological predispositions jointly produce a conception of political legitimacy which, in its excessive stringency, tends to cast consequentialist choice of law theories in a misleadingly unfavorable light. n192 Now I shall argue that her conception of legitimacy is in fact so stringent that, once the plebiscite voter understands it, he will be able to construct on its basis an argument to the effect that it would be politically illegitimate as to him for his own state to adopt Brilmayer's proposal.

The argument is quite simple. Recall Brilmayer's assertion that consequentialism is suspect whenever it authorizes "expanding the pie at the expense of someone who is not entitled to demand a piece." n193 On learning that Brilmayer holds this view, our plebiscite voter might well demand that she tell him how her proposal will expand the pie in his state, and what his "piece" will be. n194

In response, Brilmayer would probably direct the voter to the likelihood that, over a long period of time, the Prisoner's Dilemma will [*71] iterate until all other states have adopted the political rights theory. n195 As that moment approaches, domiciliaries of the voter's state, as will those of other states, will enjoy increasing freedom to travel without the fear of discriminatory treatment in alien fora. Hence, the pie enlarges.

The voter might still ask what constitutes his piece of that pie. It might take generations for other states to fall into line. His great-grandchildren might enjoy the brave new world, to be sure, but Brilmayer's conception of political legitimacy appears to be individual-centered, not descendant-based. Expanding the pie at the expense of an individual seems no better when that individual's descendants benefit than when the beneficiaries are complete strangers. n196

Even if we assume that the process of universal adoption occurred within a single generation, it is not clear that the political rights theory retains legitimacy as to any given domiciliary of an adopting state. Not every individual wants to have extensive out-of-

state dealings, even in our modern world. Even those who do desire such dealings might prefer to retain the protective enclave at home and simply watch their step when venturing outside their state's borders. To assume otherwise is to impose preferences on individuals in a manner which, if we accept Brilmayer's notion of legitimacy, is just as lamentable as that in which consequentialist choice theories coerce multistate litigants. n197 [*72]

The voter need not argue, therefore, that Brilmayer's theory offers him no piece of the expanded pie. He need only argue that the stringent conception of legitimacy which animates Brilmayer's own prescriptions empowers the individual to such a degree that the coercive authority of the state becomes problematic even with respect to fully enfranchised domiciliaries whenever the same are forced to submit to laws of which they disapprove.

Brilmayer might object that her conception of legitimacy is not so demanding as that. She merely wishes to distinguish roughly between individuals who are coerced by state laws which they never had the opportunity to influence or to benefit from, and those who are coerced by their own state. Surely I must agree that, although there may be legitimacy problems in both cases, those problems are more pronounced in the former.

The problem for Brilmayer, I think, is that drawing this distinction at all for the purposes of choice of law requires her to ignore the reality that the states are all part of a system n198 --a national system in which everyone is guaranteed (formally speaking) equal political access to a single state of their choice. n199 Any conception of political legitimacy which fails to respond to this reality is bound to be excessively narrow. Ignoring this national reality may lead us to believe that the multistate litigant needs more protection than she actually does. Ex post, her plight may seem dire indeed, but ex ante she has the same ability as her ex post adversary to avail herself of resident-favoring state policies.

A conception of political legitimacy, I suggest, should attend not only to the individual's relation to the government which proposes to coerce her, but also to that individual's relation to her own government and to the national government. n200 The principle of mutuality in fact reflects this concern--by attending to the contents of the litigant's own state law--but it fails to go far enough. Even if the litigant's own state would not have afforded her the benefits corresponding to the burdens [*73] she is now asked to bear, she always had the option of promoting more self-serving rules in her own state, or of moving to a state with such rules. n201

None of this means that mutuality may not, in fact, be an advisable principle for state courts to follow. But if this is so, the justification can only be the advancement of the long-term interests of the domiciliaries of the forum state. The rationale has nothing to do with the protection of rights, political or otherwise. Unless Brilmayer can offer us a principled reason to ignore the full range of the litigant's ex ante political options, there is no reason to conclude as a matter of principle that we violate the same individual's political rights whenever our local laws burden her.

Therefore, I conclude, the political rights theory is internally unstable as a normative program. A conception of political legitimacy strong enough to justify protecting the multistate litigant in the first place proves so strong as to afford the skeptical voter a fatal objection to the legitimacy of the proposal itself.

V. Critiques of Brilmayer

A. Kramer's Critique

With this normative critique on the table, I shall now visit some prominent attacksⁿ²⁰² on proposals, such as Brilmayer's, which counsel courts sometimes to defer to the interests of other states, or the residents thereof. These arguments, which often accompany positive alternative proposals, reflect, on more concrete levels, considerations related to those which my abstract critique develops.

Larry Kramer, for instance, wrote his article *Rethinking Choice of Law*ⁿ²⁰³ shortly after Brilmayer had published, in article form, what became Chapter Five of her book.ⁿ²⁰⁴ In Kramer's eyes, Brilmayer and others err when they "assume that policy-neutral considerations like 'rights,' 'fairness' and 'reasonable expectations' indicate the applicable law in multistate situations."ⁿ²⁰⁵ On the contrary, Kramer asserts that:

There is no theory of "conflicts justice" against which courts can [*74] measure the conflicting laws of different states. Within the broad limits permitted by the Constitution, states are coequal sovereigns, entitled to make their own value judgments. Each state is free to define its own version of the "just" result, and it is axiomatic that there is no perspective from which to judge one version "better" or more just. True conflicts present competing but equally legitimate versions of what is just in a particular case.ⁿ²⁰⁶

Kramer argues, instead, for a methodology which recognizes that choice of law in multistate contexts is but a special case of the general problem of choosing the applicable law which judges confront in domestic contexts every day.ⁿ²⁰⁷ In domestic cases, Kramer observes, judges routinely invoke considerations such as legislative intentⁿ²⁰⁸ and comparative impairmentⁿ²⁰⁹ to choose the law when more than one statute facially applies. In multistate cases, as in domestic ones, he suggests, judges should employ a two-step process.ⁿ²¹⁰ First, the judge should determine whether there is a conflict of laws at all.ⁿ²¹¹ This is to ask whether each of the states' laws applies to the dispute ("prima facie applicability").ⁿ²¹² The judge should turn first to legislative specification as to extraterritoriality.ⁿ²¹³ In most cases, however, a statute will not specify its extraterritorial reach.ⁿ²¹⁴ In that case, the judge should consider the legislative intent behind the substance of the statute (e.g., to regulate conduct, to limit liability, to encourage certain consequences) and should presume to apply the law only when doing so would advance those purposes within the state.ⁿ²¹⁵

The objection that judges are incapable of discerning legislative intent with sufficient

precision, Kramer insists, is not a specific objection to choice of law methodology, but to the inevitable process of statutory construction in general. n216 Theorists simply must recognize that this kind of interpretation calls for judgment. As such, there will always be room for disagreement.

Having adjudged the purposes behind the statute, the second step is for the judge to apply a given law only if those purposes would thereby [*75] be served within the state. n217 This is not, as Brilmayer has elsewhere suggested, a parochial or self-interested policy, n218 Kramer insists. n219 A truly self-serving policy would advise applying one's own law whenever this was constitutionally permitted (which would be often indeed). The "state's interest" test, rather, leaves room for other states' policies sometimes to control, by ensuring that only those policies which the home state "cares most about" will receive preclusive effect. n220

Looking to the effects of the statutes in question relative to the purposes of their respective states, the judge then decides whether neither law, one law, or both laws apply. n221 In the first two cases, the response is obvious. In the latter case ("true conflicts"), Kramer suggests that there are several interests of the state, broadly construed, which judges ought to pursue. n222 First, there are "multistate policies" such as comity, the facilitation of multistate activity, and the provision of a uniform and predictably enforced regime, nationwide. n223 Secondly, there is the general interest in discouraging forum shopping. n224 Finally, since a state cannot be sure that the cases it cares most about will be brought within its jurisdiction, there is the state's interest in encouraging other states sometimes to apply its laws, which it may strive to accomplish by obeying the Golden Rule. n225

In order to advance these broadly conceived local interests, Kramer advises judges to adopt his "canons of construction." n226 Kramer insists that these are not meant to be rigid or formalistic, but are simply a set of "interpretive norms" used to resolve uncertainties. n227 Among these are the Comparative Impairment Canon, under which a law which conflicts with another should be applied if failing to do so would render the former practically ineffective, n228 and the Substance/Procedure Canon, [*76] which favors the substantive law of one state over the procedural law of another, unless the forum's procedural interest is so strong as to warrant dismissal under forum non conveniens. n229 The rationale for both of these canons, of course, is advancing the interests which Kramer imagines are the more important to states generally. n230 Universal adoption of these canons, he supposes, will further states' interests in the aggregate, assuming that repeated plays of the Prisoner's Dilemma naturally guides parties toward the cooperative solution. n231 As Brilmayer also notes, n232 the development of rules for recognizing foreign judgments counsels optimism in this regard. n233 Universal adoption of choice of law canons has not yet occurred, Kramer suggests, because of "the conceptual fog that has enshrouded choice of law with the misguided goal of finding a neutral theory of 'conflicts justice.'" n234 If Kramer is correct, proposals such as Brilmayer's would perpetuate the paralysis.

The tacit premises of Kramer's critique coincide nicely with my abstract criticisms of

Brilmayer. By presenting reciprocity as just one interest of the state amongst many, Kramer implicitly denies, as I do, that anything resembling the political rights of litigants can justify a policy of reciprocity. n235 Before explaining the relationship between Kramer's views and my argument, however, I shall address a more sweeping critique, one which, interestingly, aims at both Brilmayer and Kramer, and which complements my arguments even more directly than does Kramer's theory.

B. Weinberg's Critique

Critics such as Louise Weinberg n236 argue that comity is simply in- advisable, whether supported by abstract concepts such as Brilmayer's [*77] rights and fairness, or by more concrete rules such as Kramer's n237 can- ons.

Weinberg observes that, unlike their predecessors in the comity camp, "new" comity theorists such as Brilmayer and Kramer emphasize the importance of reciprocity--the fact that policy optimization occurs only if all, or many, states participate. n238 Weinberg argues, however, that even perfectly reciprocated comity has serious problems. n239 She makes a number of points in this regard. n240 First, she contends, theo- rists such as Kramer wrongly suggest that foreign law is generally "structurally equivalent" to forum law, such that opting for the former works no systematic injustice. n241 On the contrary, Weinberg claims, the defendant is typically the party arguing for comity, and when he does so, he is motivated by his perception that the foreign law favors him more than forum law. n242 Hence, comity carries a systematic de- fense bias. n243 By the same token, Kramer's supposedly "neutral" can- ons systematically favor defendants. n244 Given the universality of long arm statutes, plaintiffs have generally chosen the forum to begin with, often precisely to avoid a hostile law in another jurisdiction, and there- fore present no need to invoke such canons. n245

Once we recognize this, Weinberg argues, we will see that neutral canons and reciprocal comity not only engender a defense bias, they threaten us ultimately with "widespread lawlessness." n246 When a choice of law issue resolves in favor of the defendant (as will typically occur when foreign law is applied), the effect is to leave the law--the forum law--unenforced. n247 The more comity we have, according to Wein- berg, the greater the national (and global) erosion of the rule of law: "[The comity theorists'] thinking, carried to its logical conclusion, is that enforcement has no special value to commend it over nonenforce- ment." n248 [*78]

When a forum declines to apply its own law, Weinberg argues, it risks several kinds of what she calls "local dysfunction." n249 One type of dysfunction is irrational and discriminatory classification of litigants who are otherwise equally entitled to forum law. n250 Consider choice rules such as the rule applied by the New York court in *Schultz v. Boy Scouts of America* n251 to favor a New Jersey immunity law over the *lex loci* (the law of New York). The Schultz court reasoned that the pur- pose of the immunity defense in that case was cost-allocation, and that only the state of joint domicile (New Jersey) had any interest in allocat- ing the costs of this injury. n252 Such rules are irrational, Weinberg points out, because New York cannot make its territory safe for New York

residents without making it equally safe for New Jersey residents such as the molested Scouts in that case. n253 "Thus, the Schultz court created an irrational classification between residents and nonresi- dents" n254

Secondly, Weinberg argues, dysfunction threatens us whenever a forum departs from its own law on the grounds that the state's policy interest in that particular law is not so strong, or is less strong than some other interest or right (e.g., the other state's interest or the "right" of the multistate litigant not to be burdened by the forum). n255 Wein- berg suggests that it becomes "awkward for a forum to apply a rule it previously excepted in a conflicts case." n256

The "weakness," express or implied, of the policy in question cannot but serve as precedent for subsequent litigants to invoke when it serves [*79] their interests, as it often will outside the conflicts arena. n257 Weinberg speculates that, every time the forum departs from its own law, it con- tributes to the progressive erosion of that law, in domestic and multistate cases alike. n258

The problem is more pronounced when the forum departs from its own rule on the grounds that the foreign law is "better law." n259 There- after, the forum finds itself in the unenviable position of having either to apply explicitly disfavored law, or else to distinguish the previous case on other grounds. n260 In the long run, in fact, the entire process of ignoring forum law in favor of "better" foreign law may in fact under- mine the improvement of forum law itself. n261

C. Synthesis

I shall now explain the extent to which the critiques of both Kramer and Weinberg, different as they are from one another, complement and cohere with my own reasoning. It helps to view the issue as the prob- lem of striking a balance between the ideal of reciprocity (which we hope promotes national uniformity) and the desire which the citizens of a given state might properly have to form a protective enclave for themselves. My critique of Brilmayer sought to demonstrate that, by taking political rights too seriously, she ironically ends up depriving state citizens of their political right to decide where, in their state, they wish to strike that balance. n262

My critique, however, was largely formal. I never went into any detail concerning why, as a substantive matter, citizens might plausibly favor one proportion of reciprocity to protectionism over another. Critics such as Kramer n263 and Weinberg n264 fill this gap, but they do so in [*80] different ways. We can view Kramer's solution as resting on his desire to compromise. n265 Although he recognizes that reciprocity is a value, he also wants fora to give weight at least to those policies which are most important to the state. n266 This desire for compromise leads him to propose a method which effectuates reciprocity in the very process of advancing the state's most important interests. n267 This he attempts via canons such as Comparative Impairment and Substance/Procedure. n268 He selected these canons to be both universalizable and reinforcing of states' individual priorities. n269 Kramer agrees with Brilmayer that unifor- mity through

reciprocity is a vital and attainable goal. n270 But he breaks with her, and agrees with my position, when he denies that the ideal of reciprocity follows from such foundational premises as the political rights of multistate litigants. n271 Accordingly, he denies that reciprocity must take lexical priority over the local, narrowly self-interested preferences of state domiciliaries. n272 Instead, he seeks to show how we might pursue both goals at once, each to a lesser degree than might otherwise be possible. n273

To the extent that my critique succeeds, it provides the theoretical underpinnings of departures from Brilmayer such as Kramer mounts. n274 Kramer's proposal, in turn, lends plausibility to my contention that people might, in fact, prefer something other than a strictly litigant-centered reciprocity regime such as Brilmayer recommends.

If Brilmayer sits at the "pro-reciprocity" end of the spectrum and Kramer in the middle, then Weinberg sits at the "pro-protectionism" end. We might imagine Weinberg as exhorting voters to appreciate that however "legitimate" a reciprocity regime might be, its hazards simply outweigh its benefits. Consider her argument that declining to apply forum law results in various types of "local dysfunction." n275 If this proves true it would amount to a powerful extension of my argument that any policy is illegitimate, under Brilmayer's own standards, if it [*81] compels an individual to forgo part of his protective enclave in favor, for example, of imagined benefits to the national system years after he is dead. This, I claimed, constitutes illegitimate pie-expansion. n276 Weinberg's arguments n277 add an interesting dimension. If sound, they suggest that more than the protective enclave is at stake. The rule of law itself might be threatened by systematic refusals to enforce forum law. Accordingly, the population enlarges which might plausibly object to reciprocity--whereas before that population may have contained only a few self-interested or shortsighted naysayers, Weinberg's arguments suggest it may actually include anyone who wants to live in a society of laws. n278 Admittedly, this is a histrionic conclusion, but the basic point remains: the wider the range of social values which reciprocity threatens to undermine, the more likely it becomes that even the most devout believer in the sanctity of negative political rights will admit that those rights must bow to the aggregate loss of legal legitimacy which might result from excessive disparagement of forum law at the hands of "reciprocity-happy" courts.

VI. Conclusion: Conflict of Laws and the Critique of Liberalism

I shall conclude by observing the sense in which, in analyzing Brilmayer, we have worked through a specific manifestation of one of the recurring dynamics of modern political theory. Over the last twenty years, so-called "communitarians" have offered a critique of the liberal notion that "the first virtues of social institutions" are justice and the protection of fundamental rights. n279 Since the publication of *Conflict of Laws: Foundations and Future Directions*, Brilmayer herself has discussed the implications of the liberal/communitarian debate for conflict of laws, and vice versa. n280 But the connection may not be obvious, so I shall elaborate.

The very existence and stability of the federal system reflects many deep assumptions of our political culture. It suggests, for one, an assumption that an undivided nation,

without states, could not adequately satisfy human desires in a vast republic such as ours. More importantly, it suggests that a nation of fifty isolated states, without the freedoms of travel and relocation, would likewise fail to promote the general welfare. The unspoken assumption of the federal system itself is that we need what we have, and nothing less.

To this extent, we flout the presuppositions of the system when we refuse to see the United States as comprising one national community and fifty subcommunities. According to a certain communitarian perspective, whatever rights we have must derive from our membership in at least one of these communities. But different rights follow from our membership in each, and it is often far from obvious just which these are. As members of the national community, for example, we have a positive right to travel and relocate. Perhaps, as Brilmayer argues, we also have some kind of negative political right to be left alone.ⁿ²⁸¹ But it is hard to take that negative right as seriously as Brilmayer wants us to take it, once we recognize the undeniable positive right to travel which others enjoy as equal members of our national community. The domiciliaries of Iowa just cannot prevent a fellow American from relocating into their state and burdening them in various ways. This is part [*83] of what it means to be a member of the national community: you have no negative political right to be "left alone" by other members of the same.

This might be a lamentable situation indeed, one which threatened the local "community" of Iowa, were it not for the fact that the Iowans also belong to the national community. This latter membership arguably supplies them with a positive political right of their own, to "compensate" them, as it were, for bearing the burdens that follow from multistate litigants' positive rights to travel and relocate. I propose that we conceptualize the "compensatory" political right which the Iowans enjoy as precisely the right to shape their state government, including a certain right to institute a protective enclave, if they so choose, and thereby to hold reluctant multistate litigants liable.

The foregoing suggestions rely on the notion of a "national community" as the source of certain rights. But such a notion just does not figure in Brilmayer's picture. Under a conception of legitimacy such as Brilmayer's, it is indeed difficult to see where the Iowans get the right to burden a litigant who never affiliated himself with Iowa in any way. But on that conception of legitimacy, it is equally difficult to see where anyone gets the right to affiliate himself with Iowa in the first place. A plausible answer to both questions is that both rights--the Iowans' right to burden multistate parties and the traveller's right to affiliate himself with Iowa--derive from their coequal membership in the national community.ⁿ²⁸²

Brilmayer, by contrast, implicitly de-emphasizes that each of us has a home state, and that we can each decide, within limits, how hospitable we wish our state regime to be toward outsiders.ⁿ²⁸³ She treats each state as though it were an isolated sovereign, the subjects of which were equally isolated from those of other states.ⁿ²⁸⁴ In doing so, Brilmayer effectively cuts us off from some of the unspoken national principles which unify us and define the nation as a community.ⁿ²⁸⁵ [*84] Among these national principles is the proposition that the degree to which a state isolates itself from other

states is neither fully specified in advance, nor completely determined by local political processes. No national law dictates the extent to which states shall burden multistate litigants. Nor, as Brilmayer suggests, do litigants' preinstitutional "rights" specify the appropriate degree of this burden. n286 But neither do state governments have the unqualified right to bar U.S. citizens from affiliating and reaffiliating themselves with different states. Perhaps this precarious arrangement remains socio-politically stable only because virtually all of us have both a right to a state of domicile and a right to travel and relocate: as we receive the benefits of a federal system, so we bear its burdens. To make "negative" political rights, rather than these positive rights, the foundational ones, as Brilmayer does, n287 may even be to circumvent the system's sustaining mechanism and court disaster, issues of philosophical justification aside.

To this extent, Brilmayer (and any conflicts theorist similarly inclined) might heed the communitarian's litany. The communitarian claims that the more rigid forms of liberalism betray their own insight when, by taking certain individual rights too seriously, they frustrate the attainment of the very goals which those rights might otherwise free us all to pursue. n288

FOOTNOTES:

n1 In addition to the book which is the subject of this essay, Brilmayer has authored numerous influential articles in the field and a casebook in the conflict of laws. See, e.g., Lea Brilmayer & James A. Martin, *Conflict of Laws: Cases and Materials* (3d ed. 1990); Lea Brilmayer, *The Other State's Interests*, 24 *Cornell Int'l L.J.* 233 (1991); Lea Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 *Fla. St. U. L. Rev.* 389 (1987); Lea Brilmayer & Ronald D. Lee, *State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws*, 60 *Notre Dame L. Rev.* 833 (1985); Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 *Ohio St. L.J.* 459 (1985); Lea Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 *Mercer L. Rev.* 555 (1984); Lea Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 *Mich. L. Rev.* 1315 (1981); Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 *Mich. L. Rev.* 392 (1980).

n2 Lea Brilmayer, *Conflict of Laws: Foundations and Future Directions* (1991). It has come to the attention of the author that a second edition of this book has been released very recently. This article addresses the first edition only.

n3 *Id.* at 145-89.

n4 *Id.* at 191-230. Originally published in slightly different form at 98 *Yale L.J.* 1277 (1989).

n5 Brilmayer, *supra* note 2, at 192-93.

n6 See *id.* at 111-42.

n7 *Id.* at 192-93.

n8 See *id.*

n9 See *id.*

n10 See generally 1 Joseph H. Beale, *A Treatise on the Conflict of Laws* (1935);
Restatement (First) of Conflict of Laws (1934).

n11 See Brilmayer, *supra* note 2, at 191-93. See generally Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963).

n12 I shall often refer to Brilmayer as having a "rights-based theory." By this I simply mean to refer to her proffered set of rights-based constraints on the pursuit of state policy objectives. I never intend to imply that she wishes to base conflicts jurisprudence in its entirety on rights, for she does not.

n13 See *infra* parts II-IV.

n14 See *infra* parts II.C-III.

n15 See *infra* part III.C.

n16 See *infra* part IV.

n17 See *infra* part V.

n18 See *infra* part VI.

n19 Brilmayer, *supra* note 2, at 193.

n20 *Id.*

n21 See generally Currie, *supra* note 11.

n22 See generally Walter W. Cook, *The Logical and Legal Basis of the Conflict of Laws* (1942).

n23 Brilmayer, *supra* note 2, at 194.

n24 *Id.*

n25 Id.

n26 Id. at 195.

n27 Id. The former amount to "rights to be left alone," while the latter consist in rights to have the state act on one's behalf. For a discussion of negative and positive rights see Jan Narveson, Contractarian Rights, in *Utility and Rights* (R. G. Frey ed., 1984), cited in Brilmayer, *supra* note 2, at 208 n.44. A seminal discussion of the closely related distinction between negative and positive liberty is found in Isaiah Berlin, *Two Concepts of Liberty* (1958), cited in Brilmayer, *supra* note 2, at 208 n.44.

n28 Brilmayer, *supra* note 2, at 195.

n29 Id.

n30 Id. at 207.

n31 Id. at 195-210.

n32 See 1 Beale, *supra* note 10, section 1.6. For a general discussion of Beale's theory, see Brilmayer, *supra* note 2, at 18-22.

n33 See 1 Beale, *supra* note 10, section 1.7.

n34 Various definitions of a deontological position have been offered. Some define a deontological position as one according to which at least certain acts are morally obligatory regardless of their consequences for human well-being. Alternatively, one might say that deontological positions are those according to which actions are to be evaluated with respect to their conformity to a moral rule or duty. The latter are necessarily also "backward-looking" in that they require looking "backward" in order to determine whether the action in question was or was not morally right, rather than looking forward to assess its consequences. Deontological views are thus typically opposed to forms of consequentialism, on which see *infra* notes 38-61 and accompanying text. Deontological views were decisively expressed first by Immanuel Kant. See, e.g., Immanuel Kant, *Groundwork of the Metaphysic of Morals* (H.J. Paton trans., Harper & Row 1948) (1785). For a discussion of deontological views in the twentieth century, see generally W.D. Ross, *The Right and the Good* (1930).

n35 Brilmayer, *supra* note 2, at 196.

n36 Id.

n37 Id. at 196-97.

n38 The term "consequentialism" is thought to have originated in G.E.M. Anscombe,

Modern Moral Philosophy, 33 Philosophy 1 (1958). Utilitarianism is the most historically prominent form of consequentialism. The consequences which the utilitarian considers morally optimal are those which maximize human happiness or well-being. See, e.g., *Utilitarianism and Beyond* (Amartya Sen & Bernard Williams eds., 1982). Cf. Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277, 299 (1990) (noting that substantive laws such as that of contract may also be understood as consequentialist).

n39 See, e.g., *Consequentialism and its Critics* (Samuel Scheffler ed., 1988).

n40 Brilmayer, *supra* note 2, at 199.

n41 *Id.* at 200.

n42 *Id.*

n43 *Id.*; see also Ronald Dworkin, *Taking Rights Seriously*, 82, 90-100 (1977) (contrasting "principle-based" considerations with "policy-based"; maintaining that the former reflect deontology, the latter consequentialism), cited in Brilmayer, *supra* note 2, at 200 n.29.

n44 Brilmayer, *supra* note 2, at 200-01. The rights of individuals not parties to the action might enter into a strictly deontological adjudication insofar as the third-party rights in question were moral rights, as opposed to legal rights, and the judge believed that tribunals have some legal duty to consider the moral rights even of non-parties.

n45 *Id.* at 202.

n46 See *supra* part II.A.

n47 See *supra* part II.A.

n48 See *supra* part II.A.

n49 Brilmayer, *supra* note 2, at 202-03; see also *infra* part II.C.

n50 Brilmayer, *supra* note 2, at 205-06; see also *infra* part III.A.

n51 Brilmayer, *supra* note 2, at 211.

n52 See, e.g., Kramer, *supra* note 38; Louise Weinberg, *Against Comity*, 80 Geo. L.J. 53 (1991); Craig Y. Allison, *Book Review*, 90 Mich. L. Rev. 1682 (1992) (reviewing Lea Brilmayer, *Conflict of Laws: Foundations and Future Directions* (1991)); Patrick J. Borchers, *Professor Brilmayer and the Holy Grail*, 1991 Wis. L. Rev. 465 (1991) (same); see also *infra* part V.

n53 Brilmayer, *supra* note 2, at 202.

n54 Id.

n55 Id.

n56 Id.

n57 See id. at 202-03, 205-06.

n58 See Brilmayer, *supra* note 2, at 202-03, 205-06. Specifically, consequentialism strikes us as morally problematic insofar as it ignores considerations of desert. Consequentialism is, by definition, forward-looking; hence, considerations of desert which concern past events, are at most derivatively relevant to consequentialist morality.

n59 See id. at 199.

n60 See id. at 202.

n61 See, e.g., Bruce A. Ackerman, *Social Justice in the Liberal State* 343 (1980) (dismissing arguments offered by utilitarians against the notion that their system requires barbaric violations of individual rights as "gimmicks when used to avoid the awful truth that there is nothing the utilitarian will not countenance in his single-minded search for the collective happiness"); H.J. McCloskey, *A Note on Utilitarian Punishment*, 72 *Mind* 599 (1963) (discussing utilitarian sheriff confronted with option to punish innocent man, widely thought to be guilty, in the interests of deterrence).

n62 Brilmayer, *supra* note 2, at 202-03 n.35.

n63 I shall speak hereafter in terms of rights, rather than deserts. Brilmayer begins by articulating a concern with what the parties "deserve," but then switches to a "rights" vocabulary. This shift has no logical implications for either of our purposes. An individual has a right to be treated as she deserves to be treated. To ignore what she deserves is to violate her rights.

n64 John Rawls, *A Theory of Justice* 30 (1971).

n65 See *supra* part II.C; see also *infra* parts II.D-E.

n66 I use female pronouns throughout this essay except in cases in which clarity dictates otherwise (e.g., in which a different female noun has already been used in the sentence).

n67 Of course, the relevant "agent" in this discussion is a state government. For my purposes any individual or any other legally cognizable entity such as a corporation or a government is an "agent." If anything were thought to turn on the distinctively political character of governmental coercion then we could certainly substitute "government" for

"agent." I prefer the general formulation.

Sometimes, of course, we are physically or financially burdened by natural events, rather than the voluntary behavior in others. In such cases we typically do not think of our rights as having been violated. My arguments do not turn on this distinction.

n68 Notice how this problem mirrors the complaint lodged by the realists against vested rights theory, discussed in Brilmayer, *supra* note 2, at 35-37.

n69 Cf. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 *Harv. L. Rev.* 616 (1949) (debating legal and moral implications of consenting to a barbaric "policy" of cannibalism for the sake of the common good).

n70 In referring to such rules as "substantively unfair," I mean to evoke the possibility that they violate individuals' natural rights, which may well be our intuition. See *infra* part II.D. I invoke the notion of substantive unfairness not because I actually accept it, but because Brilmayer seems to need such a notion, and I wish to give her arguments their fairest possible hearing.

n71 Where the law in question has not been made public, or the foreigner has been forced to affiliate, obviously, she can legitimately expect an exception in her case.

n72 So long as we continue to assume that the foreigner is fully (or constructively) informed prior to entry, our intuition that no unfairness has transpired may persist even if the policy in question is to "make examples" of foreigners or otherwise to discriminate against them. To the exclusive benefit of domiciliaries, out-of-staters are regularly subjected to disparate burdens in their use of public facilities such as universities and recreational services. See, e.g., *Vlandis v. Kline*, 412 U.S. 441, 452-53 (1973) ("A state has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend state institutions on a preferential tuition basis."); *Education Comm'n of the States, Summary of State Regulations*, 6 *Higher Educ. in the States* 125, 125-39 (1978) (complete survey of state regulations concerning resident/nonresident status in higher education). As to recreational services see *Baldwin v. Fish and Game Comm'n*, 436 U.S. 371, 388 (1978) (upholding residence-based discrimination in issuance of elk hunting license).

n73 See, e.g., H.L.A. Hart, *Are There Any Natural Rights?*, 64 *Phil. Rev.* 175, 183 (1955). See generally John Finnis, *Natural Law and Natural Rights* 225 (1980) ("Exceptionless or absolute human claim-right[] . . . not to be condemned on knowingly false charges . . .").

n74 It violates, we might say, an "inalienable" right.

n75 I do not, in fact, think that this right extends even so far as this, but this view of mine is not relevant here.

n76 Brilmayer, *supra* note 2, at 197.

n77 I say "could" because Brilmayer does not, as we shall see, actually argue for a right as strong as the right to be free of nonconsensual burdens, which we have been entertaining. The main purpose of this discussion is to illustrate why, in fact, she could not consistently argue for such a right if she wanted to.

n78 See Brilmayer, *supra* note 2, at 85-86, 202; see also *Clay v. Sun Ins. Office*, 363 U.S. 207, 208 (1960) (plaintiff purchases insurance policy, then moves to forum state, where insured property loss occurs), cited in Brilmayer, *supra* note 2, at 86 n.99.

n79 Brilmayer, *supra* note 2, at 202.

n80 Assuming, of course, that the plaintiff is barred from recovering equally in some other state.

n81 Brilmayer, *supra* note 2, at 80 n.88 (quoting Russell Weintraub, *Interest Analysis in the Conflict of Laws as an Application of Sound Legal Reasoning*, 35 *Mercer L. Rev.* 629, 631 (1984)).

n82 *Id.* at 80. Brilmayer does not deny that these burdens are real. However, she astutely observes that interest analysts cannot, as they have repeatedly attempted to do, make non-circular use of these local burdens to justify a domiciliary preference in conflicts adjudication. For this reason, it is important to distinguish the argumentative use which I am making of these local burdens from the use to which interest analysts typically put them. I am not claiming, in circular fashion, that domiciliary preference is justified by the burdens which would otherwise accrue to other domiciliaries. Rather, I shall maintain that recognizing on behalf of non-domiciliary litigants an individual right against unconsented burdens can come only at the price of violating a coequal individual right on behalf of domiciliaries. See *infra* notes 83- 89 and accompanying text. I am not demanding special concern for local interests, merely equal concern.

n83 Of course, the financial burden to each citizen will be much less, if the defendant wins and the domiciliaries must collectively bear the costs, than it would be to the single defendant were she to lose. But the burden may in that case fall on many people rather than one. If Brilmayer thinks this "spreading" factor is relevant to questions of moral legitimacy, then she needs an explicit argument to that effect. I perceive none in her discussion.

The question of how to weigh relatively small burdens, spread over many individuals, against larger burdens to a single individual, is itself a major part of the issue between consequentialists and their opponents. See, e.g., Derek Parfit, *Reasons and Persons* 75-82 (1984). Brilmayer needs to maintain that if a burden is "spread thinly enough" over many individuals, then imposing it does not constitute a violation of rights. But such an argument will invariably concern not rights as such, but rather the consequences of imposing the burden.

n84 Brilmayer emphasizes, for example, that "friendly relations with outsiders can make excellent business sense." Brilmayer, *supra* note 2, at 80.

n85 *Id.* at 207 (alluding to "principles of political fairness").

n86 See *id.* at 145-89 for discussion of various factors which a state might want to consider in this regard.

n87 *Id.* at 149. Brilmayer is rightly skeptical about the notion of collective preferences, so she might be suspicious of my suggestion that philosophers cannot "tell the people what they want" in this area. *Id.* at 149 n.10 (citing Kenneth Arrow, *Social Choice and Individual Values* 59-60 (1951)).

When I contend that philosophers cannot "make the choice for the people," however, I do not mean to recall a reified "people," or to suggest that they even have a collective preference, as a metaphysical matter. I simply mean that, for the reasons discussed heretofore, we cannot coherently treat as limits on the pursuit of "narrowly self-interested" policies any of the principled philosophical considerations of the sort to which Brilmayer's incarcerated innocent hypothetical draws our attention. See *supra* notes 76-86 and accompanying text.

n88 See *supra* notes 67-87 and accompanying text.

n89 Note, moreover, that I do not believe that such a right as we have been considering even exists. My argument is entirely conditional: even if such a right existed, it could not do much work for us in choice of law.

n90 See Brilmayer, *supra* note 2, at 18-22.

n91 *Id.* at 206.

n92 *Id.* at 207.

n93 See *supra* part II.

n94 See Brilmayer, *supra* note 2, at 207.

n95 *Id.* at 205.

n96 *Id.* at 206.

n97 See *id.* at 204-07.

n98 *Id.* at 206. Furthermore, the litigant often did not choose the forum.

n99 Brilmayer, *supra* note 2, at 206.

n100 See *supra* part II.C.

n101 Different theorists advise expanding different "pies." In the law and economics literature the pie in question is social wealth. In orthodox utilitarianism the pie is utility. But whatever the pie, theorists typically justify expansive policies by arguing that the affected individuals would agree to such policies in anticipation of receiving an enlarged piece. For classic law and economics statements see, e.g., Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 *Hofstra L. Rev.* 487 (1980); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 *J. Leg. Stud.* 103 (1979) (justifying wealth-maximization on basis of *ex ante* compensation, on basis of which consent can be assumed). Cf. Ronald Dworkin, *Is Wealth a Value?*, 9 *J. Leg. Stud.* 191 (1980), reprinted in Ronald Dworkin, *A Matter of Principle* 237 (1985) (criticizing Posner); Ronald Dworkin, *Why Efficiency?*, 8 *Hofstra L. Rev.* 563 (1980), reprinted in *A Matter of Principle*, *supra*, at 267 (same).

In the utilitarian literature see, e.g., John C. Harsanyi, *Morality and the Theory of Rational Behaviour*, in *Utilitarianism and Beyond*, *supra* note 38, at 39, 46-47 (principle of average utility would be chosen as moral principle for society by rational self-interested persons under conditions of ignorance, in anticipation of possibly receiving benefits under that principle).

n102 See Brilmayer, *supra* note 2, at 204-07.

n103 This is so, I shall argue, whether or not she has consented to be governed by the forum.

n104 This is fictionalized, of course. Citizens do not, in any substantive sense, "vote" for choice of law rules. These rules are typically made by judges, who are often not even elected officials. Brilmayer, *supra* note 2, at 205. My point is simply that, *ex ante*, the multistate litigant occupies the same position with respect to the choice rules of her home state as do the citizens of the forum state with respect to their rules.

n105 Indeed, Brilmayer recommends a principle of mutuality for conflicts adjudication to address this problem. See Brilmayer, *supra* note 2, at 224; see also *infra* part III.D.

n106 See, e.g., John Hart Ely, *Democracy and Distrust* 178-79 (1980) (right to relocate as foundational "participation" right, despite Supreme Court's refusal to offer constitutional rationale for it).

n107 See *supra* part II.C.

n108 This is what Brilmayer seems to assume they should prefer. See Brilmayer, *supra* note 2, at 80-81, 155-69.

n109 Id. at 209.

n110 See *infra* part VI.

n111 See Brilmayer, *supra* note 2, at 207.

n112 Id.

n113 Id. at 206-07.

n114 Id. at 207.

n115 Id. at 209.

n116 Brilmayer, *supra* note 2, at 208.

n117 Id.

n118 Id.

n119 Other commentators have noted with apprehension the rigid, absolutist nature of Brilmayer's proposal, which I believe we can trace back to her rigid conception of rights. See, e.g., Weinberg, *supra* note 52, at 70 ("Reciprocity' is simply not as safe an item as 'motherhood' or 'apple pie.' Reciprocal comity is a kind of Kantian imperative, a golden rule, and thus addresses itself more emphatically to all courts than other normative models.").

n120 See *infra* part VI.

n121 See Brilmayer, *supra* note 2, at 22-37.

n122 Id. at 36-37.

n123 See *id.*

n124 Brilmayer never suggests that we possess only negative rights, but her theory makes sense only if we grant these a special priority, as though the only factor to be weighed against them were the mere "interests" of governments, rather than the positive rights of other individuals.

n125 Perhaps this is why critics such as Weinberg try to stay positivists and keep those commitments to a minimum. See *infra* part V.B. They want to restrict the range of foreign precedent to which a litigant might appeal for the construal of an unfavorable statute the policy of which he wants to mitigate. The outside "rights" or principles which "comity theorists" such as Brilmayer propose to introduce into adjudication clutter up the ontological stage, potentially resulting in forms of what Weinberg calls "local

dysfunction." Weinberg, *supra* note 52, at 87.

n126 Brilmayer, *supra* note 2, at 210.

n127 *Id.*

n128 *Id.* at 210-15.

n129 *Id.*

n130 *Id.* at 211.

n131 Brilmayer, *supra* note 2, at 211.

n132 *Id.*

n133 *Id.* at 211-12. Brilmayer never really explains why this should be so. She also observes, but does not address, that "corporations often exercise considerable political clout in states other than the state of incorporation." *Id.* at 212.

n134 *Id.*

n135 *Id.*

n136 Brilmayer, *supra* note 2, at 212.

n137 *Id.* at 212 n.60 (citing David Cavers, *The Choice of Law Process* 9 (1965)).

n138 *Id.* at 213.

n139 *See id.*

n140 *Id.*

n141 Brilmayer, *supra* note 2, at 212-13.

n142 *Id.* at 213-14.

n143 *Id.* at 214.

n144 *Id.*

n145 *Id.* at 214-15.

n146 Brilmayer, *supra* note 2, at 214-15.

n147 Id. at 215.

n148 Id.

n149 Id.

n150 Id. at 215.

n151 Brilmayer, supra note 2, at 216-21.

n152 Id. at 216.

n153 Id. at 216-17.

n154 Id.

n155 Id. at 216-18.

n156 Brilmayer, supra note 2, at 218.

n157 Id.

n158 Id. at 218-19.

n159 Id.

n160 Id. at 219.

n161 Brilmayer, supra note 2, at 219.

n162 Id.

n163 Id. at 220.

n164 Id. See Restatement (First) of Conflict of Laws section 326 (1934) (contract rights vest where acceptance letter mailed).

n165 Brilmayer, supra note 2, at 220-22.

n166 Id. at 222.

n167 Id. at 224.

n168 See id. at 224-25.

n169 Id. at 225.

n170 Brilmayer, *supra* note 2, at 225.

n171 *Id.* at 226.

n172 *Id.* at 228-29.

n173 *Id.* at 229.

n174 *Id.* at 229-30.

n175 Brilmayer, *supra* note 2, at 230.

n176 *See id.*

n177 *Id.*

n178 *Id.* at 229.

n179 *See supra* part II.C.

n180 *See supra* part III.A.

n181 *See supra* part III.C.

n182 *See* Brilmayer, *supra* note 2, at 221-27.

n183 *Id.* at 225.

n184 *Id.*

n185 *Id.* at 234; *see also id.* at 145-89; Robert M. Axelrod, *The Evolution of Cooperation* 113-17 (1984).

n186 Brilmayer, *supra* note 2, at 195.

n187 *See supra* part III.A.

n188 *See* Ely, *supra* note 106.

n189 Brilmayer, *supra* note 2, at 224.

n190 *Id.* at 193.

n191 Another way of getting to this point is to recognize that burdening multistate litigants is already legitimate, not because of any special relationship between the litigant

and the forum state, but because all who could feel the effects of the decision are members of a single national community, the (federal) laws of which grant equal authority to every state, and an equal voice to all citizens in the political process of their own states. See *infra* part VI.

n192 See *supra* parts II.C-III.C.

n193 Brilmayer, *supra* note 2, at 206.

n194 Brilmayer might object, right away, that her proposal is morally imperative regardless of its ability (or lack thereof) to expand the social pie, because only her proposal is politically legitimate as to multistate litigants. But to this the voter might respond with the arguments rehearsed earlier against the uniquely legitimate status of the political rights theory.

n195 See Brilmayer, *supra* note 2, at 166-85; see also Axelrod, *supra* note 185, at 169-91.

n196 I am assuming here that Brilmayer would reject a more "communitarian" conception of legitimacy, according to which the relevant unit of moral concern is no longer the individual, but some group of people to whom the individual is or will be connected.

Along communitarian lines, Brilmayer could argue that the relevant unit is something like "the population of the litigant's home state over the next several generations." On this view, a judiciary could legitimately abide by the political rights theory, at the expense of a domiciliary litigant, so long as fellow domiciliaries (even if yet unborn) would someday receive reciprocal benefits from other states.

This rationale, however, opens a new can of worms. Once we expand the basic unit of moral concern from the individual to some larger collectivity, it is hard to know where to draw the boundaries. Why not expand the boundaries spatially as well as temporally, to encompass, for instance, the nation? Yet once we do that, the rationale for recognizing political rights against state governments dissolves: *E pluribus unum*. On related "boundary-drawing" difficulties for communitarianism see Ronald Dworkin, *What Justice Isn't*, *The New York Review of Books* (1983), reprinted in *A Matter of Principle*, *supra* note 101, at 214 (reviewing Michael Walzer, *Spheres of Justice* (1983)).

n197 As noted before, the burdens borne by each individual domiciliary might be lower than they would be to the single non-domiciliary, but they would spread over a commensurately larger population.

n198 James Whitman has suggested to me that this is a problem for any conflicts theory.

n199 Resident aliens to the United States cause problems in this regard. If one accepts as legitimate the exercise of state authority over them, nonetheless, I think one must admit that a state action can be legitimate for reasons unrelated to political participation. Speaking crudely, the entire nation is to the alien what the foreign state is to the

multistate litigant.

n200 See *infra* part VI.

n201 See Albert O. Hirschman, *Exit, Voice, and Loyalty* (1970).

n202 See Kramer, *supra* note 38; Weinberg, *supra* note 52.

n203 Kramer, *supra* note 38.

n204 See Brilmayer, *supra* note 2.

n205 Kramer, *supra* note 38, at 339. Brilmayer makes a similar-sounding critique of theorists who seek "intellectually compelling right answers" to conflicts questions rather than "good compromise solutions." Brilmayer, *supra* note 2, at 189. This is good advice, which Brilmayer has perhaps not taken to heart herself.

n206 Kramer, *supra* note 38, at 339-40 (footnote omitted).

n207 *Id.* at 284-89.

n208 *Id.* at 285.

n209 *Id.* at 287.

n210 *Id.* at 291.

n211 Kramer, *supra* note 38, at 291.

n212 *Id.*

n213 *Id.* at 292-93.

n214 *Id.* at 293.

n215 *Id.* at 289-99.

n216 Kramer, *supra* note 38, at 300.

n217 *Id.* at 312-15.

n218 Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 *Mich. L. Rev.* 392, 408-17 (1980).

n219 Kramer, *supra* note 38, at 302.

n220 Id.

n221 Id. at 311-12.

n222 Id. at 311.

n223 Id. at 313.

n224 Kramer, *supra* note 38, at 313-14.

n225 Id. Cf. Brilmayer, *supra* note 2, at 145-89.

n226 Kramer, *supra* note 38, at 319-22.

n227 Id. at 320.

n228 Id. at 323 (citing *Lilienthal v. Kaufman*, 395 P.2d 543, 547-49 (Or. 1964) (forum's failure to enforce spendthrift law of other state would render that law practically ineffective)).

n229 Id. at 326 (citing *Hobbs v. Hajecate*, 374 S.W.2d 351, 351-52 (Tex. Civ. App. 1964) (foreign state's "substantive" statute of limitations policy ought to outweigh the forum's merely "procedural" interest in its limitations period)).

n230 Id. at 328.

n231 See Brilmayer, *supra* note 2, at 167-89. See generally Axelrod, *supra* note 185.

n232 Brilmayer, *supra* note 2, at 225.

n233 Kramer, *supra* note 38, at 344.

n234 Id. Cf. Brilmayer, *supra* note 2, at 189 (discouraging search for "intellectually compelling right answers").

n235 See Kramer, *supra* note 38, at 339.

n236 Weinberg, *supra* note 52; see also Louise Weinberg, *On Departing from Forum Law*, 35 Mercer L. Rev. 595 (1984).

n237 Weinberg, *supra* note 52, at 54-55.

n238 Id. at 53-54.

n239 Id. at 58-60.

n240 Id.

n241 Id. at 60-61.

n242 Weinberg, *supra* note 52, at 61.

n243 Id. at 62.

n244 Id. at 65.

n245 Id. at 58-67.

n246 Id. at 71.

n247 Weinberg, *supra* note 52, at 71.

n248 Id. at 72.

n249 Id. at 87.

n250 Id. at 87.

n251 *Schultz v. Boy Scouts of Am.*, 480 N.E.2d 679 (N.Y. 1985). The Schultz plaintiffs were New Jersey residents whose two children attended parochial school, taught by teachers from a religious order incorporated in Ohio. *Id.* at 681-82. The school sponsored a Boy Scout troop which the plaintiffs' children joined. *Id.* at 681. One of the teachers, who served as scoutmaster, took the troop on a trip to a New York Boy Scout camp where he sexually abused both of plaintiffs' children. *Id.* When they returned to New Jersey, he continued to abuse one of the children who committed suicide thereafter. *Id.* Plaintiffs filed suit in New York against the Ohio religious order and the Scouts, a New Jersey corporation, alleging negligence on the part of both. *Id.* Under New Jersey law, defendant charities would receive immunity. *Id.* at 682. New York and Ohio laws granted no such immunity. *Id.* The court held that New Jersey law applied. *Id.* at 688-89.

n252 Id. at 683.

n253 Weinberg, *supra* note 52, at 89.

n254 Id. at 89.

n255 Id. at 89-93.

n256 Id. at 89.

n257 See *id.* at 89-93.

n258 Weinberg, *supra* note 52, at 90-93. Perhaps courts could adopt a policy not to give as much precedential weight, in a domestic case, to a prior departure from forum law if said departure occurred in a conflicts case. Weinberg does not consider this suggestion. It is not clear to me whether such a policy would solve more problems than it would cause.

n259 *Id.* at 93.

n260 *Id.*

n261 *Id.* For an analogous position in the constitutional context compare 1 Bruce Ackerman, *We The People: Foundations* 104 (1991) (Supreme Court actually facilitates process of constitutional improvement by defending its existing interpretation, rather than responding to modern developments). But see Guido Calabresi, *A Common Law for the Age of Statutes* 163-66 (1982) (courts should be able to "overrule" obsolete statutes without alleging constitutional violation).

n262 See *supra* parts III, IV.

n263 See *supra* part V.A.

n264 See *supra* part V.B.

n265 See Kramer, *supra* note 38, at 344.

n266 *Id.* at 319.

n267 *Id.* at 324, 328.

n268 *Id.*

n269 *Id.*

n270 See Kramer, *supra* note 38, at 344.

n271 See *id.* at 339.

n272 See *id.*

n273 See *id.* at 319.

n274 See Kramer, *supra* note 38.

n275 Weinberg, *supra* note 52, at 87-94.

n276 See *supra* notes 194-201 and accompanying text.

n277 See Weinberg, *supra* note 52, at 87-94.

n278 See *id.* at 94.

n279 See, e.g., Michael J. Sandel, *Liberalism and the Limits of Justice* 31, 183 (1982). Other figures identified as "communitarian" include Charles Taylor, Michael Walzer, and Alasdair C. MacIntyre. See, e.g., Alasdair C. MacIntyre, *After Virtue* (1981); Charles Taylor, *Hegel and Modern Society* (1979); Michael Walzer, *Spheres of Justice* (1983). Liberal rejoinders to the communitarian critique include Allen E. Buchanan, *Assessing the Communitarian Critique of Liberalism*, 99 *Ethics* 852 (1989); Amy Gutmann, *Communitarian Critics of Liberalism*, 14 *Phil. Pub. Aff.* 308 (1985); Will Kymlicka, *Liberalism and Communitarianism*, 18 *Can. J. Phil.* 181 (1988). These rejoinders have much to recommend them as contributions to general political theory. However, the points they make against communitarianism have dubious relevance to my argument here. For example, liberals question the communitarian contention that a liberal regime undermines valuable forms of community. Happily, I do not rely on this contention.

They also argue that communitarianism provides support for insidious communities (e.g., expressly racist or homophobic ones). This may be so, but my argument does not entail that we validate the norms of such communities. At most, it merely suggests that choice of law doctrine may not be the right way for courts to protect multistate litigants from disfavored local norms. Finally, the critics of communitarianism typically ignore the notion of a national community, to which I implicitly appeal throughout this essay. This is a serious mistake, on their part. I contend, in effect, that the specific scope of authority enjoyed by the smaller community--the state--makes sense only when we recognize that its members also belong, like it or not, to a larger community--the nation.

Even from a simple-minded historical perspective it is surprising that the liberal critics should pay so little attention to the notion of a national community. For Hegel, the proto-communitarian, the central community is precisely the nation-state. See Taylor, *supra*, at 73.

n280 Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 *Duke L.J.* 1 (1991). In that piece Brilmayer specifically identifies herself as a "liberal." *Id.* at 19.

n281 See Brilmayer, *supra* note 2, at 208.

n282 See Brilmayer, *supra* note 280, at 22 n.81 (noting that "'over-arching community' argument is much more plausible" in the context of a federal system than in international context).

n283 See *id.* at 22.

n284 See *id.*

n285 Brilmayer and Mark Tushnet had an exchange on a very closely related issue. See Lea Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 Fla. St. U. L. Rev. 389, 409-13 (1987) (suggesting that basis for a state's coercive power over outsiders should lie in sharing the burdens and benefits of state law); Mark V. Tushnet, *Community and Fairness in Democratic Theory*, 15 Fla. St. U. L. Rev. 417, 429 (1987) (criticizing Brilmayer's failure to deal adequately with citizens' membership in two communities, state and national).

n286 See Brilmayer, *supra* note 2, at 210.

n287 See *id.* at 195.

n288 Cf. Sandel, *supra* note 279, at 183.