CONSTITUTIONAL CONTROL OF EXTRATERRITORIALITY?: A COMMENT ON PROFESSOR BRILMAYER'S APPRAISAL

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I

INTRODUCTION

The gist of Professor Brilmayer's article is that American courts, in applying American law extraterritorially, have fallen into a "methodological trap."[1] Purporting to construe legislation that is silent about its territorial and personal scope, they have invoked a fictitious "congressional intent" and presumptions of their own making to give American regulatory enactments an overly expansive reach. Professor Brilmayer maintains that these excessive assertions of legislative jurisdiction cannot easily be remedied. Since they are ostensibly premised on a legislative intent, judges lack the freedom to take corrective action which they enjoy in dealing with the common law. To curtail extraterritoriality, they would have to substitute their own judgment for that which they have imputed to Congress. In consequence, Professor Brilmayer concludes, U.S. courts now adhere to rigid quasi-statutory approaches that overstate domestic interests and are indifferent to foreign policy concerns. To promote greater flexibility and deference to the interests of other nations, she advocates a greater reliance on the Constitution, more specifically the due process clause of the fifth amendment. Noting similarities to domestic conflicts problems, she argues that the due process clause can help to extricate the judiciary from its self-inflicted dilemma, although—until now—litigants and judges have rarely invoked due process as a constraint on the extraterritorial reach of American regulatory laws.

II

IDENTIFYING A NON-PROBLEM

Professor Brilmayer correctly observes that judicial recourse to an unexpressed legislative intent in determining the reach of domestic law amounts to mere windowdressing. The problem of how far a statute may reach arises precisely because the legislature failed to deal with the issue of

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1. Brilmayer, *Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, LAW & CONTEMP. PROBS., Summer 1987, at 11.

extraterritoriality. It is doubtless correct to say that when courts profess to honor the wishes of Congress, they in fact follow their own normative views concerning the desirable scope of American regulatory legislation. It is difficult, however, to accept Professor Brilmayer's proposition that such transparent cover-ups seriously compromise a court's ability to change an erroneous "construction" in the light of later and, one hopes, better insights. Few federal judges, after confessing error (either their own or that of their predecessors), would perpetuate the mistake merely because the earlier decision pretended to rest, in whole or in part, on statutory construction.

Not only does Professor Brilmayer fail to adduce empirical evidence to support her view, cases such as *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*[2] and *Mannington Mills, Inc. v. Congoleum Corp.*[3] show that assumptions about congressional intent are not likely to inhibit courts from making foreign policy judgments. The opinions in these cases also demonstrate that the concern about insensitivity to the interests of foreign nations is overdrawn. As for the future, one may expect that courts will cite the proposed section 403 of the Restatement (Revised) of Foreign Relations Law,[4] which counsels restraint in the application of domestic regulatory laws to foreign parties and transactions, just as they have cited its predecessor, section 40 of the Restatement (Second) of Foreign Relations Law.[5] Since the shopping list of considerations contained in these provisions is exceedingly open-ended and amorphous, worries about the lack of judicial "elbow room" seem quite unwarranted.

Also, it is doubtful whether American assertions of legislative jurisdiction are truly exorbitant. Although Professor Brilmayer's article is not altogether clear on that point, it appears that she rejects the objective territoriality principle[6] established by Judge Learned Hand in *United States v. Aluminum Company of America*.[7] She prefers some unspecified set of multilateralist principles[8] that would presumably discard the criterion of anticompetitive impact on the American market. Such a change, however, would probably violate legislative intent, for Congress has expressly endorsed the effects test.[9] Moreover, to eliminate that basis of legislative jurisdiction would put American practices at odds with those followed by some of its major foreign trading partners. The *Alcoa* test has been enshrined in section 98, paragraph 2, of the German Act Against Restraints of Competition,[10] which

2. 549 F.2d 597 (9th Cir. 1976).
3. 595 F.2d 1287 (3d Cir. 1979).
4. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 403 (Tent. Draft No. 7, 1987).
5. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 (1965).
6. *See* Brilmayer, *supra* note 1, at 14, 16-24.
7. 148 F.2d 416 (2d Cir. 1945).
8. *See* Brilmayer, *supra* note 1, at 21-22.
9. *See* 15 U.S.C. §§ 6a, 45(a)(3) (1982).
10. Gesetz gegen Wettbewerbsbeschr'a'nkugen of July 27, 1957, BGBI. I 1081. Paragraph 2 of section 98 provides as follows:

> This Act shall apply to all restraints of competition that have effects within the territory in which this Act applies, even if such effects are caused by activities outside such territory.

demonstrates that the handiwork of legislatures is not necessarily superior to judicial lawmaking. The same criterion has since been adopted by the Court of Justice of the European Communities with respect to the extraterritorial reach of the Common Market's antitrust rules.[11]

III

PROPOSING A NON-SOLUTION

My disagreement with Professor Brilmayer's contribution is not limited to her assessment of the ills of extraterritoriality; it extends to what she proposes as a therapy. Relying on parallels to domestic conflict of laws problems, she proffers the due process clause of the fifth amendment as a remedy. The problem of extraterritoriality, however, transcends our own body politic; it is a matter of international rather than merely national concern. Domestic law alone may therefore not suffice to provide a cure to what ails current American practice. In addition, the manner in which the United States Supreme Court has dealt with jurisdiction and choice of law suggests that faith in the Court's ability to fashion principles that would resolve problems created by the overlap of domestic and foreign legislation may be misplaced.

First, a word about the asserted similarities between interstate conflicts and the international clash of regulatory policies. The problems presented by such enactments as antitrust and securities legislation are quite different from run-of-the-mill conflicts questions. Conflicts approaches start from the premise that both the *lex fori* and foreign law are entitled to a roll of the dice at the choice-of-law table. (This is true even of interest analysis, although the analysts are wont to load the dice heavily in favor of forum law.[12]) In contrast, regulatory statutes do not pose the issue whether the *lex fori* or some other law should be applied. Rather, the court is asked to decide whether to enforce the domestic statute or to dismiss the case. As Professor Brilmayer notes, the issue is "jurisdictional,"[13] because courts assume that they may not choose to apply foreign law. Accordingly, the propriety of drawing an analogy between the law of conflicts and the extraterritorial application of regulatory enactments is questionable.

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11. *See, e.g.*, Tepea v. Commission of the European Communities, 1978 E. COMM. CT. J. REP. 1391; Béguelin Import Co. v. S.A.G.L. Import Export, 1971 C.J. COMM. E. 949. Henri Mayras, Advocate General at the Court of Justice of the European Communities, frankly acknowledged the Common Market's indebtedness to American notions of legislative jurisdiction. Addressing the court in a case involving the alleged extraterritorial application of the Communities' antitrust law, he cited various American decisions and said:

> Naturally, it is in American anti-trust law and especially in the case-law summarized in the 'Restatement of Foreign Relations Law' that one finds the clearest and most fully elaborated material concerning the criterion of the territorial application of competition law.

Imperial Chem. Indus. v. Commission of the European Communities, 1972 E. COMM. CT. J. REP. 619, 690.

12. *See generally*, Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 10-13, 37-39 (1984).

13. Brilmayer, *supra* note 1, at 13.

Furthermore, while governmental interests in domestic choice-of-law cases are tenuous, if not entirely lacking,[14] no one questions the reality of foreign and domestic interests that are at loggerheads when, for instance, the United States proceeds against restrictive trade practices that are lawful in the defendant's home country.[15] While state attorneys general have rarely intervened in conflicts cases,[16] litigation involving the extraterritorial reach of regulatory laws has provoked diplomatic protests, amicus briefs by foreign governments, as well as foreign protective or retaliatory legislation.[17] In marked contrast, most interstate conflicts cases do not present fundamental disagreements on policy. As Judge Weinstein pointed out in a well-known multistate case, within the United States major policy differences are rare because shared values as well as a common language and legal education assure a high degree of homogeneity.[18] Further, state "sovereignty" in our federal system is hardly comparable to the prerogatives enjoyed by independent nations. Accordingly, the divergences of basic policies among nations with different social, economic, and political systems, which enliven the debate of extraterritoriality, are noticeably absent in interstate conflicts cases.

Even if the conflicts analogy suggested by Professor Brilmayer were appropriate, the United States Supreme Court's pronouncements in conflicts cases inspire little confidence that the Justices, resorting to the due process clause, will better address the problems presented by extraterritorial regulatory assertions than judges who purport to divine congressional intent. The Court's opinions on interstate judicial jurisdiction, for instance, are far from satisfactory. Well over forty years after *International Shoe Co. v. Washington*,[19] the meanings of such phrases as "minimum contacts"[20] and "fair play and substantial justice"[21] remain unclear. The Court's more recent shibboleths, "purposeful availment"[22] and "purposeful direction,"[23] have not introduced greater certainty. In fact, the advance sheets are full of jurisdictional opinions, most of them long, heavily footnoted, and

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14. *See* Juenger, *supra* note 12, at 29-30, 35-37.

15. *See, e.g.*, United States v. Watchmakers of Switz. Info. Center, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y.); United States v. Imperial Chem. Indus. Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952).

16. *But see* Brief of Nevada, as Amicus Curiae, in Support of Petition for Writ of Certiorari to the Supreme Court of California, Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976), *cert. denied*, 429 U.S. 859 (1977).

17. For an illustrative discussion of foreign reactions to the extraterritorial application of American antitrust law, see 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 100-05 (2d ed. 1981); Note, *Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests, and Treble Damages*, LAW & CONTEMP. PROBS., Summer 1987, at 197.

18. *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 696 (E.D.N.Y. 1984).

19. 326 U.S. 310 (1945).

20. *Id.* at 316.

21. *Id.*

22. *See* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980); Kulko v. Superior Ct., 436 U.S. 84, 94 (1978). The "purposeful availment" test was first used in Hanson v. Denckla, 357 U.S. 235, 253 (1958).

23. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984). Both terms of phrase are used interchangeably in Asahi Metal Indus. v. Superior Ct., 107 S. Ct. 1026, 1033 (1987).

accompanied by dissents, in which state and federal courts struggle to apply these slippery concepts to concrete cases as best they can.[24] Their befuddlement is understandable, for not only the Supreme Court's terminology, but its reading of the Constitution has vacillated. Thus, the *Volkswagen* case says that the due process clause of the Civil War amendment, operating as an "instrument of interstate federalism," protects state sovereignty.[25] The Court has since retreated from that astonishing proposition.[26] But the Justices have never told us whether and how the Court's change of perception affects the precedential value of its earlier decisions, which state and federal courts continue to cite with scant regard for the fact that their foundations have been undermined.[27]

The Supreme Court's pronouncements on choice of law are no more satisfactory than its jurisdictional opinions. While the question whether the courts of a particular state can hear a case ought to find a relatively easy answer, choice-of-law issues are notoriously difficult. Accordingly it is not surprising that the Court, in *Allstate Insurance Co. v. Hague*,[28] took a hands-off stance. If the scholarly reaction, reflected in two symposia,[29] is any indication, that case was a disappointment. What do the divergent opinions in *Allstate* have to offer on the question of extraterritoriality? How can they help unclutter the international overlap of regulatory laws? Except for Justice Stevens, the Court failed even to differentiate between due process and full faith and credit. Yet these two clauses have entirely different purposes: One protects individual rights, the other system values. Furthermore, while the due process clause may matter in international cases, the full faith and credit clause does not. Lumping them together hardly facilitates analysis, especially if the problem to be analyzed is as complex as that of extraterritoriality. The simple idea on which the entire Court agreed in *Allstate*, that the defendant must have some contact with the forum to justify the application of forum laws, does nothing to dispel the confusion that characterizes the current American conflicts law. Nor does that idea add anything to the lore of legislative jurisdiction, which, after all, proceeds from the very same premise.

If it is fair to draw conclusions from what has happened in the fields of jurisdiction and choice of law, it seems that recourse to constitutional tenets—that is, a greater measure of Supreme Court intervention—is unlikely to resolve the problems engendered by the extraterritorial application of domestic regulatory laws. If the Justices should feel that their wisdom

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24. *See, e.g.*, Chung v. NANA Dev. Corp., 783 F.2d 1124 (4th Cir.), *cert. denied*, 107 S. Ct. 431 (1986); Asahi Metal Indus. Co. v. Superior Ct., 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985), *rev'd*, 107 S. Ct. 1026 (1987).

25. 444 U.S. at 294.

26. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982).

27. *See* cases cited *supra* note 24.

28. 449 U.S. 302 (1981). *See also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

29. *Choice of Law Theory After* Allstate Insurance Co. v. Hague, 10 HOFSTRA L. REV. 1 (1981); *Supreme Court Intervention in Jurisdiction and Choice of Law: From* Shaffer *to* Allstate, 14 U.C. DAVIS L. REV. 837 (1981).

surpasses that of other judges, they may choose to exercise it by granting petitions for review. The subject matter being federal in nature, there is no need to resort to the Constitution in order to correct whatever mistakes lower courts may make in international cases. Instead of providing flexibility, a quality Professor Brilmayer finds desirable,[30] Supreme Court decisions that rest on constitutional grounds, even if they are phrased in such loose terms as "minimum contacts," introduce a measure of rigidity. Once the Court has spoken, the discretion of inferior tribunals is severely limited; they can no longer rely on their own sights but must guess, as best they can, what the supreme bench would do with the case at hand. Such speculation, far from improving justice in transnational cases, would merely add yet another layer of complexity to an already intricate subject.

The subject of extraterritoriality is surely intricate. Looking at the rich case law and literature dealing with the questions that are the topic of this colloquium, and at the Reporters' valiant efforts to codify these materials in the Foreign Relations Law Restatements, brings to mind the words of an eminent member of the Louisiana Supreme Court. Long ago, Judge Porter complained that

> the vast mass of learning . . . leaves the subject . . . enveloped in obscurity and doubt. . . .
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> When . . . so many . . . men, of great talents and learning, are thus found to fail in fixing certain principles, we are forced to conclude that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles.[31]

IV

THE JURISDICTION/COMITY CONUNDRUM

What is the source of this obscurity and doubt? Perhaps Professor Brilmayer should have looked for the "methodological dead end"[32] in a different place. More serious than the reliance on a fictive congressional intent is the ingrained habit of using the concept of "legislative jurisdiction" as a guide for decisionmaking. Among lawyers, "jurisdiction" is a very popular word; we all recall learning it as part of our initiation rites during the first year of law school. It appeals to legal minds because it has four syllables and can be combined with yet other polysyllabic words, such as "adjudicatory" or "legislative." While such phrases sound impressive, we may find it difficult to exercise our critical faculties while mouthing so many syllables, just as some may find it hard to walk while chewing gum.

By now the seductive phrase "legislative jurisdiction" has been used so often that it has acquired an aura of reality. After entering a first appearance in David Dudley Field's *Draft Outlines of an International Code*,[33] it has become a

30. *See* Brilmayer, *supra* note 1, at 22, 23, 26-27.
31. Saul v. His Creditors, 5 Mart. (n.s.) 569, 571-72, 595-96 (La. 1827).
32. *See* Brilmayer, *supra* note 1, at 24.
33. *See* D. FIELD, DRAFT OUTLINES OF AN INTENATIONAL CODE arts. 307-14 (1872).

favorite of those who attempt to reduce the law of multistate transactions to black-letter rules. Joseph Beale popularized the phrase by according rules of legislative jurisdiction a prominent place in the Restatement of Conflicts.[34] While the rest of Beale's intellectual edifice lies in shambles, that particular concept has retained its popularity. Its name has changed (the Restatement of Foreign Relations Law speaks of "jurisdiction to prescribe"[35]) but the underlying idea has remained the same: A state has "power" to deal with transactions that have a sufficient nexus with the state. Notwithstanding the near universal acceptance of this notion, there are reasons to question its usefulness. The term suggests an analogy where none may exist, for whether a court can take a case is a rather different question from what law the court will apply if it does so. Also, the word "jurisdiction" conjures up territorial limits, whereas "law" lacks a spatial dimension. More important yet, so many principles of prescriptive jurisdiction have been proffered that inevitably there will be much overlap. Accordingly, instead of resolving conflicts, the notion of legislative jurisdiction provokes them.

The Restatements of Foreign Relations Law show that "jurisdiction to prescribe" is a poor problem solver, for the Restatements need a *deus ex machina* to undo conflicts created by that very concept. The Restatements' elaborate provisions[36] attempt to accomplish this feat by pushing the problem to a different level, which is loosely called "comity."[37] That concept, in turn, is not very helpful because, as Judge Porter observed, "comity is, and ever must be, uncertain."[38] Just how uncertain it is becomes clear if one peruses the factors thrown together, without assigning priorities, in the pertinent provisions of the Foreign Relations Law Restatements. Those lists demonstrate that comity is as nebulous as the public policy exception to which classical conflicts law had to resort whenever the going got rough. The purposes of these two fudge factors are of course diametrically opposed to each other: while public policy invokes the *lex fori* to ward off undesirable foreign law, comity is used to curtail unreasonable impositions of forum law. But both concepts are equally unhelpful; while telling the decisionmaker to exercise discretion, they fail to provide firm guidance on how to exercise it. What Lorenzen said about public policy also applies to comity: That "doctrine . . . ought to have been a warning that there was something the matter with the reasoning upon which the rules to which it is the exception were supposed to be based."[39]

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34. *See* RESTATEMENT OF CONFLICT OF LAWS §§ 42-55, 59-70 (1934). The Restatement (Second) of Conflict's black-letter rules eschew this term, but it does crop up in the comments. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 comments b-d, f (1971).

35. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 6-19, 30-31, 33-36 (1965); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW §§ 401-02 (Tent. Draft No. 6, 1985).

36. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 (1965); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 403 (Tent. Draft No. 7, 1986).

37. Meesen, *Antitrust Jurisdiction in Customary International Law*, 78 AM. J. INT'L L. 783, 784-89 (1984).

38. Saul v. His Creditors, 5 Mart. (n.s.) 569, 596 (La. 1827).

39. E. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 13-14 (1947).

V

CONCLUSION

The "methodological dead end" about which Professor Brilmayer complains was reached once courts decided to dispel clashes of regulatory policies by resorting to an implausible admixture of expansive legislative jurisdiction and self-effacing comity. When foreign parties and their governments object to what they consider an overly expansive application of American regulatory laws, they are really less concerned about jurisdiction and comity than the sanctions American courts mete out. In other words, what actually conflicts are substantive concerns rather than territorial claims. To deal with these concerns as if they were border disputes cannot help but distort the decisionmaker's perspective. Moreover, the jurisdiction/comity approach requires courts to evaluate conflicting domestic and foreign interests, thus casting domestic judges in the role of international arbitrators. For that role they are ill-equipped, and their pronouncements are bound to be viewed with suspicion from abroad. Unless the decision comes out squarely in favor of the foreign party, it is bound to be perceived as biased.

For these reasons, the solution to the problem of extraterritoriality will remain elusive as long as the clash of regulatory policies is analyzed in terms of legislative jurisdiction. That approach is not only misguided, it impedes the search for workable solutions. Perhaps the problem is unsolvable by legal means; perhaps hope lies with such soft approaches as exchanges of information, consultation, the issuance of guidelines, and, conceivably, the negotiation of treaties and conventions. In some areas, the difficulties may even fade away as substantive policies begin to converge. Thus, several foreign nations have begun to realize the evils of insider trading and, conversely, the United States has become less zealous in imposing antitrust morality at home and abroad. The controversies which persist cannot be laid to rest by engaging in "rarefied theoretical observations"[40] that disregard the substance of the issues arising from the attempts of nation states to regulate transnational realities.

40. *See* Brilmayer, *supra* note 1, at 38.