

## LIBERALISM, COMMUNITY, AND STATE BORDERS

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Legal doctrine is a collection of technicalities, but it is not only that. It is also, often, something more. Legal doctrines embody intuitions about justice, fairness, efficiency—all the values held by the individuals who contribute to their formulation. Faced with problems that lack clear legal answers, judges grope for appropriate solutions; in their groping, they follow deeply held intuitions about what the law ought to be. It should be of no surprise that even some of the humblest legal doctrines reflect much larger philosophical assumptions.

The legal doctrine that I want to put on the current philosophical agenda—the proper reach of domestic authority across state borders—is straightforwardly linked to an important jurisprudential question. It provides a concrete example of one of the most important and difficult theoretical issues of political philosophy. Viewed doctrinally, it is an issue of state (or national) jurisdiction.<sup>1</sup> Viewed philosophically, it is an issue of the proper reach of state authority as a matter of political theory.

Political philosophy is largely concerned with the legitimacy of state authority. What gives a state a right to exercise coercive power over individuals? Why is state power legitimate? If we had a good answer to this question, then this answer should tell us something about the proper scope of state power over individuals, because we would have identified

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1. This Article will not address the differences between interstate and international relations, but will focus on problems as to which the two contexts have been treated similarly. There are, of course, significant differences between the two contexts as a matter of constitutional law. For example, the Full Faith and Credit Clause, U.S. CONST. art 4, § 1, does not apply to international problems. *See Home Ins. Co. v. Dick*, 281 U.S. 397, 411 (1930).

the necessary conditions for legitimate state authority. Coercive power would be appropriate, then, when the conditions for legitimacy had been satisfied. The answer to the question "why" should thus give us answers to the questions "when" and "whether."

Few would be surprised at the claim that political philosophy is relevant in deciding the propriety of state domestic authority.<sup>2</sup> Theories of state legitimacy influence our views about whether it is proper to force our citizens to pay taxes, serve in the army, or obey the state's criminal laws. But the answer to the "why" question also helps to spell out the circumstances in which a state may exercise coercive authority in the interstate and international setting. An adequate answer should tell us what sorts of connections with a state are necessary before the state may assert its power. It should also tell us whether in some particular multistate fact pattern, the exercise of state power is legitimate.

Legal scholars can put the insights of political philosophy to good use in the multistate setting by testing theories of jurisdiction against accepted notions of political legitimacy. It is also possible, however, to reverse the process and put multistate legal doctrines to work in the setting of domestic political philosophy. If I am correct that domestic theory has implications for multistate legitimacy,<sup>3</sup> then one ought to be able to rule out certain domestic political premises, namely those that would lead to untenable multistate conclusions. If domestic and multijurisdictional theory are to be made consistent, then the process of reasoning potentially works both ways. Inconsistency can be resolved by changing either one's domestic or one's multistate convictions—whichever is less firmly grounded.

My experience is that some of our intuitions about when assertion of state jurisdiction is appropriate in the interstate context are, indeed, firmly grounded. This allows us to start with our answers to the question of "whether" and work backwards to the "why." By examining some common intuitions about which factors seem to give a state a right to assert its authority, we can identify which elements of a fact pattern seem to be responsible for the legitimacy of state power. If we sense that jurisdiction is appropriate where a particular factor is present, then it would seem that that factor is important to the justification for the use of state coercive power. Multistate variations provide a series of concrete test cases to help identify which conditions are necessary and sufficient for the legitimacy of state power. Having identified these factors in the

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2. A possible exception might be those who favor the original-intent method of constitutional interpretation—who would deny that anything might be relevant other than the Framers' intent.

3. I develop this argument elsewhere at length. See LEA BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* 52-78 (1989).

multistate context, we can return to the domestic context with some confidence that the same factors might be relevant there.

My method, then, is to use jurisdictional intuitions to test domestic political theories, and vice versa. Employing this line of reasoning, I argue that there are two explanations for why state authority is appropriate in multistate situations. One explanation relates to direct connections between the state and the individual, such as residence or domicile;<sup>4</sup> the other relates to an individual's activities or the consequences of those activities within the state. The first depends on community membership; the second turns on territorial impact. This dichotomy will be familiar to teachers of civil procedure or conflicts of laws. The analysis gets more interesting when we ask why it is that two different sorts of factors legitimate state power. At this point, we have to probe some well-established legal doctrines to find the political assumptions that lurk underneath.

What we find beneath might be interesting even to those who have no particular love for civil procedure or conflicts of laws. The reason that we have two different triggering factors for jurisdiction lies in a fundamental duality in our approach to political justification; a duality that is reflected in two important movements in contemporary political theory. I refer to the current debate between proponents of liberalism and proponents of communitarianism. Both schools of thought receive support in the current law of interstate relations. The notion that a state may regulate activities or consequences that occur within the state reflects traditional liberalism. The notion that state authority is most appropriately directed at domiciliaries and local corporations reflects communitarian assumptions.

Liberalism and communitarianism currently coexist peacefully in the pages of the *United States Reports*. Yet many contemporary theorists assume that only one school can be correct: the positive case for each theory is built on the negative case against the other. A better view might be that both are right but that neither captures the whole truth. Legal doctrine raises the possibility that there are two separate and compatible alternatives to explain political authority. The goal of this Article is to use a set of rather technical doctrines of state jurisdiction to illuminate the relationship between two schools of contemporary political theory. Perhaps in this way we can learn something about the logic of the law (and of legal philosophy) from the law's experience.

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4. By "direct" connections I mean relations *between* a state and an individual as opposed to relations that connect a state to an individual via the individual's *activities* in the state.

## I. MEMBERS VERSUS ACTIVITIES

An explanation of the connection between legal doctrines and the contemporary philosophical debate must begin with a description of each. The legal doctrines are familiar and relatively straightforward. At issue are two different approaches to the reach of state power in legal disputes that cross state borders. One of these approaches is based upon membership in a political community; it is referred to as “general jurisdiction.” The other is based upon the occurrence of activities or causation of harm in the forum; it is referred to as “specific jurisdiction.” This dichotomy between general and specific jurisdiction arises in at least three contexts: state adjudicative jurisdiction, state choice of law, and extraterritoriality of federal law.

### A. *General and Specific Jurisdiction: State Adjudicative Jurisdiction, State Choice of Law, and Extraterritoriality of Federal Law*

Because the dichotomy between general and specific jurisdiction is best known in the context of adjudicative or “personal” jurisdiction, we can begin there. General judicial jurisdiction is permissible where a defendant has a direct and substantial connection with the forum. For the individual it is most commonly based on the defendant’s domicile or residence within the state.<sup>5</sup> For the corporation, general jurisdiction may be based on the fact that the forum is the state of incorporation, the principal place of business, or the location of substantial and continuous business.<sup>6</sup> Such jurisdiction is termed “general” because it is indiscriminate in the reach of state power that it justifies over a particular defendant. Once general jurisdiction is established, then the forum may assert its authority over the defendant on any cause of action whatsoever—even over one having nothing to do with the forum.<sup>7</sup>

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5. See, e.g., *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (service on a defendant whose domicile is in Wyoming, but who is absent, is nevertheless sufficient). See generally *Lea Brilmayer et al., A General Look at General Jurisdiction*, 66 *TEX. L. REV.* 721, 728 (1988) (describing the use of domicile as a basis for jurisdiction).

Another basis for general jurisdiction over individuals is transient presence of the defendant at the time of service of process. Such “tag” jurisdiction was recently upheld by the Supreme Court in *Burnham v. Superior Court*, 110 S. Ct. 2105, 2115 (1990). Tag jurisdiction is not well explained by either communitarian or liberal premises. Indeed, the Court itself seemed to acknowledge that the best justification for tag jurisdiction is its long history of judicial tolerance. See *id.* at 2115. Tag jurisdiction had been widely criticized on fairness grounds. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 28 (1986 revisions); *Brilmayer, supra*, at 748-55.

6. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952); *Brilmayer, supra* note 5, at 733-35.

7. In *Perkins*, for example, the cause of action arose in the Philippines but suit was brought in Ohio. 342 U.S. at 447-48.

Specific jurisdiction is more narrowly focused. It justifies jurisdiction over the defendant only for a cause of action that “arose out of” or “is related to” the defendant’s activities in the forum.<sup>8</sup> In a classic case from first-year civil procedure, a defendant drives into the forum, has an accident, and is then subject to jurisdiction in the forum on the resulting tort claim.<sup>9</sup> Because this is a case of specific and not general jurisdiction, the defendant would not, however, be subject to jurisdiction on unrelated causes of action arising outside of the state (such as a contract suit based on her failure to pay her credit card bills at home). Another common fact pattern involves injuries that predictably arise out of manufacture and shipment of defective products into the state.<sup>10</sup> Specific jurisdiction is based on the defendant’s activities or impact within the forum.

This thumbnail description of general and specific jurisdiction avoids the hardest cases in defining the two concepts. In the case of general jurisdiction, difficulties usually arise when a defendant has some measure of contact with the forum, but less than that of a local domiciliary or a locally incorporated business. The key difficulty is to specify the requisite quantity of contact.<sup>11</sup> One of the thorniest specific jurisdiction problems arises when the defendant has not physically entered the forum but his activities outside the forum have brought about local harm.<sup>12</sup> In such cases, the “predictability” or voluntary causation of the local harm must be established.<sup>13</sup> As will be explained, it is significant that these are

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8. The precise relationship between these two terms is unclear. *See, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 419-28 (1984) (Brennan, J., dissenting) (arguing that there is a “substantial difference” between the terms “arose out of” and “related to”). For a debate over the meanings of these terms, compare Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 652-62 (1988) and Mary Twitchell, *A Rejoinder to Professor Brilmayer*, 101 HARV. L. REV. 1465 (1988) (criticizing my approach of limiting “relating to” to contacts that have substantive relevance to the issue of liability) with Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1451-64 (1988) (defending that approach and criticizing possible alternatives).

9. *See Hess v. Pawloski*, 274 U.S. 352 (1927).

10. *See, e.g., Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961) (out-of-state manufacturer of exploded water heater subject to personal jurisdiction in state of malfunction); *cf. McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (upholding California statute subjecting foreign corporations to suit in California on insurance contracts made with California residents).

11. *See Helicopteros*, 466 U.S. at 416.

12. *See, e.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (holding that personal jurisdiction over tire valve assemblies manufacturer in Japan was unreasonable and rejecting personal jurisdiction based on “stream of commerce”); *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (New York automobile retailer and wholesaler not subject to personal jurisdiction in Oklahoma because they do not directly serve the Oklahoma market).

13. *See World Wide Volkswagen*, 444 U.S. at 297; Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 94 (analyzing predictability issue in terms of proximate cause).

the key borderline issues;<sup>14</sup> for present purposes, however, what matters is the simple distinction between jurisdiction based upon substantial personal connection with the forum and jurisdiction based upon activities or harms that occur there.

Although the terms “general” and “specific” are best known in the context of adjudicative jurisdiction, an analogous dichotomy exists with legislative jurisdiction, or choice of law. In the interstate context, some decisions to apply forum law are predicated upon direct affiliations between the parties and the state, whereas others are based on the occurrence of activities or impact within the state. Into the first category fall both old-fashioned choice of law rules<sup>15</sup> and more modern principles.<sup>16</sup> The second category also includes both traditional and modern holdings. The old learning, for example, would allow a state to apply its law to a tort case when an injury occurred there.<sup>17</sup> Modern approaches would allow states to regulate local activities or impact on a deterrence theory.<sup>18</sup>

The connection between the general/specific distinctions in the contexts of adjudicative and legislative jurisdiction should be obvious. General jurisdiction grounds a state’s right to regulate a local defendant’s activities outside the state on a direct and substantial connection between the forum and the defendant. It is triggered by membership in the community. The theory of specific jurisdiction authorizes forum regulation of events that occur within the state, without requiring that the parties themselves be members of the local community. It is triggered by local activity or impact. The same principle is involved whether the authority asserted is legislative or judicial.

A third and final example of the dichotomy between general and specific jurisdiction also involves legislative jurisdiction, but in the international rather than the interstate context. In some respects, the extra-territoriality of American federal law is doctrinally very different from

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14. See *infra* text accompanying notes 82-91.

15. See, e.g., RESTATEMENT OF CONFLICT OF LAWS § 295 (1934) (stating that validity of a trust of personal property created by will is governed by the law of the state where decedent was domiciled at time of death); *id.* § 306 (stating that validity and effect of a will of movables is determined by the law of the state where decedent was domiciled at the time of death).

16. One such modern principle involves so-called “false conflicts”—when the parties have a common domicile, that state’s law is applied. See, e.g., LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 58-60 (1991) (explaining why common domicile cases are usually false conflicts); John H. Ely, *Choice of Law and the State’s Interest in Protecting its Own*, 23 WM. & MARY L. REV. 173, 206 (1981) (same).

17. See RESTATEMENT OF CONFLICT OF LAWS §§ 377, 378 (1934).

18. See, e.g., *Hurtado v. Superior Court*, 522 P.2d 666, 672 (Cal. 1974) (“As to defendants the state interest in creating wrongful death actions is to deter conduct.”).

interstate choice of law.<sup>19</sup> It is in one way, however, similar: A comparable dichotomy exists between jurisdiction founded on direct links between the forum and the parties and jurisdiction founded on local impact or events. As with our first two examples, there are two sorts of triggering factors: membership and activities. Because this is perhaps the most interesting instance of the general/specific dichotomy, it is worth presenting some concrete examples.

First, consider the reach of American antitrust law. Early in this century, it was assumed that our antitrust laws would only apply to conduct that occurred within the United States.<sup>20</sup> More recent decisions have been much more expansive, resulting in the application of American law to conduct having an intentional impact on local markets<sup>21</sup> under a theory of "impact territoriality." Briefly stated, jurisdiction under this theory is based upon occurrence of harm within the United States, rather than upon a party's membership in the American community. In other contexts, however, jurisdiction rests upon membership in the community, particularly community membership of the defendant.<sup>22</sup> Some statutes specifically so provide.<sup>23</sup>

In other cases, the statute is silent and a court must determine its reach. For example, in *EEOC v. Arabian American Oil Co. (ARAMCO)*,<sup>24</sup> the Supreme Court held that Title VII does not apply extraterritorially to an American employer who discriminates against an American employee in another country (in this case, Saudi Arabia).<sup>25</sup> In

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19. For example, extraterritoriality analysis heavily relies on a presumption that Congress, unless it states otherwise, prefers to limit application of federal law to activities that occur on U.S. territory. *See, e.g., Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949) ("[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."). *See generally* Lea Brilmayer, *Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, *LAW & CONTEMP. PROBS.*, Summer 1987, at 11 (comparing the problems of the application of American law to international disputes to the problems of domestic conflict of laws).

20. *See American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).

21. *See, e.g., United States v. ALCOA*, 148 F.2d 416, 443 (2d Cir. 1945) ("[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.").

22. *See, e.g., Steele v. Bulova Watch Co.*, 344 U.S. 280 (1956) (applying Lanham Act to activities of U.S. citizen in Mexico); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 402(2) (1986) ("Subject to § 403, a state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory.").

23. *See Blackmer v. United States*, 284 U.S. 421, 436-38 (1932) (applying 28 U.S.C. §§ 711-718 (1926) to allow issuance of subpoena to U.S. citizen in France).

24. 111 S. Ct. 1227 (1991).

25. *See id.* at 1235-36. The Court held that unless affirmative congressional intent indicates otherwise, legislation of Congress applies only within the territorial jurisdiction of the United States. In this case, despite Title VII's broad jurisdictional language and an alien exemption clause, the

*ARAMCO*, the plaintiff was an American citizen. For purposes of illustration, however, consider a case in which the employer is American but the employee is Saudi Arabian, and the complained-of activity occurred (as in *ARAMCO* itself) in Saudi Arabia. This fact pattern presents a somewhat weaker argument for application of American law because one of the American contacts has been removed. It is more interesting because it presents more starkly the phenomenon of jurisdiction based on membership.

As a legal matter, *ARAMCO* turns primarily on a question of statutory interpretation: Did Congress want the law to apply to such a fact pattern?<sup>26</sup> For it is clear, as a legal matter, that Congress may do so if it desires. This is not, as some believe, because the Constitution does not limit extraterritorial application of federal statutes; I feel quite certain that it does.<sup>27</sup> The reason, rather, is that as a constitutional matter, the defendant's membership in the American community provides an adequate basis for application of our law.<sup>28</sup> The question is, therefore, whether Congress exercised power that it undoubtedly possesses.

In summary, whether in the context of judicial jurisdiction, state choice of law, or extraterritoriality of federal law, we see two different types of justification for assertion of state power. General jurisdiction is based upon a connection between the forum and the defendant, and authorizes power over any disputes to which the local party is a defendant. Specific jurisdiction is based upon the location of activities or consequences, and authorizes power only over cases that involve those local occurrences. The key difficulty in ascertaining the existence of general jurisdiction is whether a sufficient quantity of contact has been shown; the key difficulty with specific jurisdiction is whether the local occurrences were voluntary or foreseeable to the defendant. I argue that this dichotomy reflects a debate in contemporary political theory—namely, the debate between liberals and communitarians. The next task, therefore, is to describe this contemporary debate.

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Court determined that Congress did not intend to regulate practices of U.S. employers abroad. *See id.*

26. *See id.* at 1229; *see also Blackmer*, 284 U.S. at 437; Brilmayer, *supra* note 19, at 14.

27. *See Brilmayer, supra* note 19, at 14; *see also* Lea Brilmayer and Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. (1992) (forthcoming). *But see* Friedrich K. Juenger, *Constitutional Control or Extraterritoriality?: A Comment on Professor Brilmayer's Appraisal*, LAW & CONTEMP. PROBS., Summer 1987, at 39, 43-44 (denying applicability of Constitution).

28. *See Blackmer*, 284 U.S. at 437-42.

## B. *Liberalism and Communitarianism*

Contemporary political theory is preoccupied with a debated between liberals and communitarians.<sup>29</sup> On the liberal side, the most prominent name is John Rawls,<sup>30</sup> but the debate also implicates the work of other writers such as Ronald Dworkin<sup>31</sup> and Bruce Ackerman.<sup>32</sup> The communitarian critics of liberalism include Michael Sandel,<sup>33</sup> Alasdair MacIntyre,<sup>34</sup> Richard Rorty,<sup>35</sup> and Charles Taylor.<sup>36</sup>

To a communitarian, the key value is community membership. The community is both the chief source of political norms and an important source of personal identity. As Michael Walzer explains, community membership is the key value because membership is the criterion for distribution of all other social goods.<sup>37</sup> Communitarians tend to emphasize the importance of community traditions in the establishment of political principles.<sup>38</sup> They reject the possibility of universalist reasoning that would ground principles valid for all times and places.<sup>39</sup> Political norms are contextual because norms arise out of the shared history of a particular community.<sup>40</sup> The personal identities that we come to have, likewise, can only be appreciated in the context of the communities that shape us.

Liberals focus on a different key characteristic—personal autonomy.<sup>41</sup> This emphasis is sometimes explained in terms of equality, for

29. For general descriptions of this debate, see LIBERALISM AND ITS CRITICS (Michael J. Sandel ed., 1984); UNIVERSALISM VS. COMMUNITARIANISM (David M. Rasmussen ed., 1990); Amy Gutman, *Communitarian Critics of Liberalism*, 14 PHIL. PUB. AFF. 308 (1985); Will Kymlicka, *Liberalism and Communitarianism*, 18 CAN. J. PHIL. 181 (1988); see also Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideas After All*, 104 HARV. L. REV. 1350 (1991).

30. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

31. See, e.g., RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 240-58 (1977); Ronald Dworkin, *Liberalism, in PUBLIC AND PRIVATE MORALITY* 113 (Stuart Hampshire ed., 1978).

32. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

33. See MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

34. See ALASDAIR MACINTYRE, *AFTER VIRTUE* (1984); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988) [hereinafter MACINTYRE, *WHOSE JUSTICE?*].

35. See Richard Rorty, *The Priority of Democracy to Philosophy*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM* 257 (Merrill D. Peterson & Robert C. Vaughan eds., 1988).

36. See Charles Taylor, *Hegel: History and Politics*, in LIBERALISM AND ITS CRITICS, *supra* note 29, at 177.

37. See MICHAEL WALZER, *SPHERES OF JUSTICE* 31-32 (1983).

38. See, e.g., MACINTYRE, *WHOSE JUSTICE?*, *supra* note 34, at 6-11 (arguing that the failure of Enlightenment and post-Enlightenment thinkers to agree upon uniform principles of rationality requires a return to notions of rationality grounded in tradition).

39. See *id.*

40. See DON HERZOG, *WITHOUT FOUNDATIONS* 239 (1985).

41. See, e.g., JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 9, 14 (1984) (endorsing a presumption in favor of liberty, and ascribing that presumption to liberalism). This definition of the key element of liberalism, of course, sweeps in philosophers such as Robert Nozick who might today be called libertarian or conservative rather than liberal because

liberalism rests (some say) on principles of equal concern and respect.<sup>42</sup> The community is not supposed to favor one moral position over another, for instance by attempting to inculcate its citizens with some particular moral point of view. The protection of autonomy, furthermore, emphasizes the importance of individual voluntariness, for obligations should come to rest on an individual by virtue of voluntary assumption.<sup>43</sup>

This sketch is so brief as to be a virtual caricature. Even so, it is enough to make out a *prima facie* case that general jurisdiction seems to reflect communitarian assumptions whereas specific jurisdiction seems to reflect liberal ones. The connection between communitarianism and general jurisdiction is that the key element in the justification of state authority is community membership. The connection between liberalism and specific jurisdiction is that membership is downplayed: the key element instead is voluntary activity or causation of harm. The communitarianism/general jurisdiction connection is probably the easier one to spell out and therefore a good place to start. In taking a closer look at the philosophical assumptions that underlie general jurisdiction, we see how jurisdiction based upon local domicile or incorporation is both easy to square with communitarian theory and apparently anomalous in liberal theory. Once this task is completed, we turn our attention to specific jurisdiction; there we show that although communitarianism is not particularly well-equipped to deal with jurisdiction based on activities, liberal theory explains specific jurisdiction fairly well.

## II. MEMBERSHIP AS A BASIS FOR INTERSTATE AUTHORITY

General jurisdiction is primarily based upon membership in the local community. For individuals, as we have said, this typically means domicile or residence, whereas for corporations this typically means that the defendant either is incorporated in the forum, has its principal place of business there, or has substantial and continuous business there. One factor that explains why general jurisdiction is fair is that local residents and businesses have a political voice in state decisionmaking, either through voting or through the exercise of informal political clout.<sup>44</sup> But

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of their enthusiasm for the free market. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

42. See DWORKIN, *supra* note 31, at 263.

43. See A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 14 (1979) (citing H.L.A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 179 n.7 (1955)). Where actual assumption of obligations is implausible, hypothetical or tacit agreement is sometimes relied upon. See SANDEL, *supra* note 33, at 179 (criticizing the requirement of voluntariness).

44. Compare Brilmayer, *supra* note 13, at 87 (“[S]ystematic . . . activity [unrelated to the litigation], such as domicile, incorporation, or doing business, suggests that the person or corporate entity is enough of an ‘insider’ that he may safely be relegated to the State’s political process.”).

voice cannot be the whole answer because even politically powerless individuals are subject to state authority. Because a showing of political influence is not required in particular cases, the better explanatory variable would seem to be the mere fact that the defendant is a member of the local community.

Communitarians should find such reasoning easily intelligible. Political obligation is founded, first and foremost, on membership in the community. Community and traditions are the source of a society's laws; political reasoning is contextual and no political principles are fundamentally true for all societies and in all historical periods. Furthermore, the relationship between the community and the individual is an intimate one. Our personalities are largely shaped by the communities of which we are a part. We do not arbitrarily choose to be certain sorts of people, or to have certain preferences and beliefs; instead, we respond to our social environments. This intimate connection between the individual and society is a positive thing. It provides us with a sense of belonging and an ability to make sense of the world around us.

Communitarianism leads naturally to a view that interstate authority should be based on community membership. Under the communitarian view, the community would have an interest in regulating the individual regardless of the location in which the individual acts and without concern for the victim's residence. The connecting factor that interests the communitarian is the individual who is constrained by the exercise of state authority.<sup>45</sup> As long as that individual is a member of the community, the communitarian should be satisfied that the state has a legitimate concern with the dispute. Communitarianism does not seem to provide a justification for coercion over nonmembers.

The liberal view is rather different. Liberals typically deny the community extensive powers over the arguably private aspects of individuals' lives.<sup>46</sup> The individual is thought to be entitled to autonomy over purely personal matters, as long as he or she does not interfere with comparable autonomy of others. Actions that are purely private are not properly the state's business. The state is not supposed to "legislate morality."<sup>47</sup>

Liberals might well be doubtful about general jurisdiction for exactly the reasons that communitarians find general jurisdiction attractive.

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45. For a discussion of whether the community membership of the victim should be relevant, see *infra* text accompanying note 76.

46. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 17 (1986).

47. See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 5 (1963); cf. DWORKIN, *supra* note 31, at 240-58 (discussing Lord Devlin's arguments supporting state legislation of morality).

Recall the earlier discussion of whether Title VII ought to apply extraterritorially.<sup>48</sup> We hypothesized a variation on *ARAMCO*, in which the dispute's sole connection with the United States was that the defendant employer was American. If jurisdiction were to be recognized, it would probably be based on a theory of general jurisdiction because membership in the community is (in this hypothetical) the sole predicate for state authority. One might at first imagine that a liberal should applaud such a result; Title VII is a liberal statute, and many liberals would probably approve the broadest possible application of it.

But how would a liberal justify this conclusion? The explanation that immediately comes to mind would revolve around the presumed interest of the United States in ensuring that its citizens behave morally both at home and abroad. This is, indeed, one of the arguments offered in the briefs on behalf of the plaintiff in *ARAMCO*.<sup>49</sup> The state has a *per se* interest in the morality of its members. Is such an argument consistent with liberalism? To show why it probably is not, we should pause to examine one of the basic tenets of liberalism: the so-called "harm principle."

#### A. *The Harm Principle*

The harm principle, usually attributed to John Stuart Mill, holds that the sole permissible basis for government intervention in people's lives is the prevention of harm to others.<sup>50</sup> Government is not entitled to act for paternalistic reasons—coercing an individual for his or her own benefit. Neither is government supposed to interfere with private liberty to protect traditional culture, or to upgrade the moral character of its citizenry. Prevention of harm or compensation to others is the only legitimate state function. A key contemporary proponent of the harm principle is Joel Feinberg, who examines and defends its ramifications in his four-volume work, *The Moral Limits of the Criminal Law*.<sup>51</sup>

Supporters of the harm principle recognize that it raises difficulties.<sup>52</sup> In the classic debate over the harm principle, liberals have relied

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48. See *supra* text accompanying notes 24-28.

49. See Brief of the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae in Support of Petitioners at 12-14, *EEOC v. Arabian Am. Oil Co. (ARAMCO)*, 111 S. Ct. 1227 (1991) (No. 89-1345).

50. See JOHN S. MILL, *ON LIBERTY* 5-12 (Cambridge Univ. Press 1929) (1859).

51. FEINBERG, *supra* note 41; JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* (1985); JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* (1986); JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* (1988).

52. Feinberg devotes the entire first volume of his set to addressing some of its difficulties. See FEINBERG, *supra* note 41.

on such examples as prohibitions of private sexual conduct between consenting adults and restrictions on pornographic literature.<sup>53</sup> Additional examples might include requirements that motorcyclists wear helmets and the criminalization of certain addictive drugs. But even these paradigm examples have provoked controversy. What exactly is to count as a harm? What about harms to natural resources or animals? Should the promotion of benefits count as much as the prevention of harms? Should it count as a basis for government action that some activity causes deeply felt offense to some section of the community? How certain must the government be that harm will, in fact, occur? The debate raises both normative questions about what harms should be preventable, and empirical issues about the likelihood that certain kinds of conduct actually cause harm. The harm principle is not easy to apply in practice.

And in addition, there is continuing debate over whether the harm principle is valid even *in principle*. One prominent critic of the liberal position, Lord Devlin, entered the debate in response to recommendations that certain sorts of sexual offenses be legalized.<sup>54</sup> He argued that one reason to allow regulation of consensual conduct that does not cause harm to others is that society has a right to enforce certain minimum moral standards of decency, simply to affirm its moral code.<sup>55</sup> Both H.L.A. Hart and Ronald Dworkin have responded to Lord Devlin, defending the liberal point of view.<sup>56</sup>

One example of the dispute's contemporary relevance is the regulation of smoking; another is the prohibition of pornography. In part, the argument for banning pornography rests on arguments that would be entirely consistent with liberal premises, such as the claim that pornography leads to assaults on women.<sup>57</sup> But the debate is undoubtedly colored by a perception that pornography is simply vile. After all, automobiles also cause a great deal of damage, but few argue that we should ban them because of the benefits that they otherwise provide. Pornography is not typically thought of as providing much of a benefit; this is probably because reading or making a living off of pornography is considered by many to be morally reprehensible.

These examples illustrate a key difference between the liberal and communitarian point of view. Does the state have a legitimate role in

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53. See, e.g., HART, *supra* note 47, at 5 (sexual morality); DWORKIN, *supra* note 31, at 240-58 (homosexuality and pornography).

54. See LORD PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1959).

55. See *id.* at 7-25.

56. See HART, *supra* note 47, at 17-24; DWORKIN, *supra* note 31, at 240-58.

57. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 147 n.9 (1987).

forming its citizen's moral character? Liberals argue that moral character is not *per se* the state's business; moral education is proper only to prevent individuals from harming others. Communitarians, in contrast, believe that our personalities are inevitably shaped by the societies that we inhabit, and that it is not possible to imagine ourselves abstracted from the characteristics that we have acquired in this way. Furthermore, communitarians seem largely to think that this is a good thing.<sup>58</sup>

This difference seems naturally to lead to different attitudes toward interstate authority. The communitarian, we noted earlier, would authorize the state to assert authority over community members regardless of where their activities occurred. The liberal, in contrast, ought perhaps to be skeptical about whether mere membership, without more, is an adequate basis for regulation. And as the harm principle suggests, the liberal ought to focus instead on the occurrence of harm within state territory, because prevention of harm is the sole legitimate basis for exercise of state authority. This does not mean that liberals cannot approve the exercise of state authority when objectionable conduct occurs locally and the injury occurs outside the state. In such circumstances, the local conduct has at least created a risk of local injury; this should be enough as a basis for regulation.<sup>59</sup> It does, however, suggest that activities that occur elsewhere should not be regulated when they do not threaten local harm.

How, then, would the liberal justify application of Title VII to our variation on the *ARAMCO* case? The obvious argument for applying Title VII would be simply that it is morally wrong to discriminate; but this argument in its simplest form seems ruled out (for liberals) by the harm principle. With the best tool for the job apparently disqualified, the

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58. See, e.g., MACINTYRE, *WHOSE JUSTICE?*, *supra* note 34, at 388 (describing the alienation of "rootless cosmopolitanism" in which individuals in fact become "citizens of nowhere"). As Ian Shapiro argues, it is unclear what contextualist authors would do about societies that are inherently evil. See IAN SHAPIRO, *POLITICAL CRITICISM* 54 (criticizing Richard Rorty's uncritical acceptance of the status quo); *id.* at 139 (discussing MacIntyre).

59. This raises the question of what to do when it is clear that the defendant's conduct, although occurring locally, cannot cause harm within the state. Perhaps the defendant manufactures a defective product inside the state but is careful to distribute the product only out-of-state. Of course, someone might still return the product to the forum, where it causes injury. But the local injury is no more likely in such a case than if an out-of-state manufacturer engaged in similar precautions to prevent the goods entering the forum. If the sole consideration is local harm, it does not seem that situations where the local manufacturer sends goods out-of-state present a better case for jurisdiction than do situations where the out-of-state manufacturer does not send goods into the forum.

A liberal would probably not favor jurisdiction in a case where the defendant's local conduct creates no risk of local harm. The harm principle is offended by penalizing conduct that does not create a risk of harm—whether the conduct is penalized because it is thought immoral or simply because local persons do not want the activity to occur within the state.

liberal must somehow fall back on more cumbersome justifications to apply Title VII—or else give up on Title VII's application to such cases altogether. The more cumbersome methods might involve either showing how discrimination abroad causes harms within the United States or explaining why a liberal's concern should extend to harm to outsiders. Let us briefly examine these two strategies for regulating cases that involve local community membership without local impact.

### B. *Membership Without Impact: The Liberal Response*

1. *Preventing Harm in the United States.* The first strategy that a liberal might adopt to justify application of Title VII to our *ARAMCO* variation<sup>60</sup> would be to claim that even where the only connection with the United States is the defendant's local residence, application of Title VII is still necessary to prevent harm within the United States. General jurisdiction would be squared with liberalism by arguing that the harm principle is in fact satisfied.

A liberal might, for instance, claim that application of Title VII to American defendants is necessary to protect the image of Americans abroad. There would be undesirable consequences for the nation as a whole if Americans were perceived as racist or sexist. A desire to project a particular public image might be motivated by the need to demonstrate that we do not lag behind other nations in our commitment to eradicating racism. Putting an end to segregation in education was characterized as a "cold war imperative" because segregation was thought to convey the wrong impression to developing nations.<sup>61</sup>

In the alternative, a liberal might believe that adopting nondiscrimination standards would set a good example for nations that continue to discriminate on the basis of gender or race. To the extent that we could encourage other states to adopt similar legal principles, Americans would receive greater protection from discrimination when they travel abroad. Or, it is possible that if we insist on the application of Title VII abroad, our own people will be more likely to internalize the principle of nondiscrimination and thus be less likely to discriminate against fellow Americans. If our citizens are allowed to discriminate when they are in other countries, then they are more likely to continue this sort of behavior when they return home.<sup>62</sup>

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60. See *supra* text accompanying notes 24-28.

61. See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

62. Another argument might be that Title VII should be applied extraterritorially to prevent American companies from committing discrimination by simply transferring employees to another

Some or all of these arguments may be plausible as liberal bases for applying Title VII extraterritorially. Yet it is unclear whether they provide a complete explanation; they seem instead to be *ad hoc* rationalizations. They do not explain why proponents of applicability have frequently made the “moral character” argument, and why it has been claimed that the United States has an interest in the morality of its citizens that are abroad. It remains a possibility that a liberal justification for applicability could be constructed by careful attention to the local harms that would occur from allowing Americans to discriminate abroad. If so, then perhaps my point should merely be that liberals should doubt one of the *reasons* that has been given for this result. The point should address the nature of the justification that can be offered for extraterritoriality, rather than the legitimacy of applying Title VII to certain sorts of facts; it should concern the means of analysis, rather than the substantive bottom line.

2. *Preventing Harm to Outsiders.* These liberal arguments try to satisfy the requirement of a local harm, but it is also possible that a liberal should resist the claim that a local harm must be shown. Liberals might offer a second sort of argument about extraterritoriality—one which takes on my hypothetical more directly. The liberal might claim that although it must be shown that the defendant’s activities caused harm, it need not be shown that the harm occurred within the United States. The liberal might attempt to distinguish, in other words, between cases of *nonresident* harm and cases of *nonexistent* harm. Only in the case of nonexistent harm would the state be guilty of “legislating morality.”<sup>63</sup>

This response raises issues of consent. Most liberals would recognize that a victim might consent to “injury” and would claim that when such consent occurs, the harm principle has not been satisfied.<sup>64</sup> This is why (for example) regulation of private consensual sexual activity cannot be justified (in liberal terms) on the grounds of the “harm” that each of the actors perpetrates upon the other. There is something resembling consent in situations where American law is applied extraterritorially, to the benefit of a nonresident victim. The consent argument would be that

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country before maltreating them. This is not a true case of extraterritoriality, however, because in such a situation the objectionable action would have occurred within the United States.

63. One basis for this conclusion might be that it is discriminatory to deny the benefits of Title VII to nonresidents. This begs the question, however, for “discrimination” is improper only if there is no basis for the difference in treatment. The question posed here, however, is precisely whether an adequate basis for different treatment exists.

64. See, e.g., FEINBERG, *supra* note 41, at 116-17 (describing John Stuart Mill’s acceptance of this proposition).

by being part of a society that adopted a different set of laws that permits the conduct in question, the victim has consented to the injury. This argument seems to fit, moreover, with the liberal pluralist claim that we are not entitled to intervene in other cultures, but should respect the different choices they have made to regulate their societies.<sup>65</sup>

In the actual *ARAMCO* case, which arose in Saudi Arabia, we might not feel comfortable making such a consent argument, for the victims of discrimination (particularly victims of sex discrimination) did not consent because they were not allowed to vote. Conceivably, it might be claimed that the victims nonetheless consented by continuing to live in Saudi society,<sup>66</sup> although I emphatically would not want to press the consent argument very far in this specific context. The argument does, however, raise some interesting questions in other contexts, where this objection to consent theories cannot be made. Even in a society with fair electoral processes, a liberal might reject the consent argument as implausible.

A liberal might argue, for instance, that it does not matter whether the other state's laws permit discrimination; one cannot waive one's right to sue for discrimination, because it is just too important a right. This line of response is not particularly promising as a way to square extraterritorial regulation with Mill's harm principle.<sup>67</sup> It seems too paternalistic to be consistent with traditional liberal assumptions, because it assumes that the state is better able to judge what is in people's own best interests than are the people themselves.

A better response might be that individual consent cannot be inferred from passage of laws because at best the passing of laws shows that a majority consents. According to this argument one might want to ask whether the particular victim in question had approved or opposed discrimination legislation when it was proposed. If the victim had opposed adoption of a domestic cause of action for discrimination, perhaps we would then say that he or she had consented. This does not necessarily follow, however; if it did, we would deprive domestic opponents of Title

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65. See, e.g., CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979). Beitz discusses the claim that intervention is morally objectionable because it offends a right of autonomy. *Id.* at 69-83. He ultimately rejects this argument, however, and concludes that intervention is morally objectionable because it offends principles of justice. *Id.* at 69.

66. This tacit consent argument has been much criticized. See DAVID HUME, *Of the Original Contract*, in HUME'S *ETHICAL WRITINGS* 356 (Henry D. Aiken ed., 1948); Hanna Pitkin, *Obligation and Consent—I*, 59 *AM. POL. SCI. REV.* 990, 994-98 (1965).

67. A better version of the "no waiver" argument might be that the waiver is ineffective because the victims were under duress due to social pressure not to vote for discrimination legislation, were deliberately kept ill-informed by opponents of the legislation, or were for some other procedural reason unable to exercise effective choice.

VII of a cause of action. Conversely, it is not clear that proponents of antidiscrimination legislation have failed to consent. For it is not completely illogical to talk about groups that consent on behalf of individuals, especially where the group is formed for the express political purpose of taking stands on whether certain causes of action should exist.

Whether or not this "consent" response to liberals can be made to work, the basic puzzle for the liberal still remains. Assume for the moment that the liberal is entitled to care as much about harm to nonresidents as to residents. How, then, can the liberal explain a jurisdictional test that differentiates along the lines of the defendant's community membership? Admittedly, a liberal might recognize that it is inappropriate to assert state authority in all cases, and that a line has to be drawn somewhere.<sup>68</sup> But why draw it at this point? Absent some sort of communitarian assumptions, it is hard to see why states would allocate authority between themselves on the basis of the parties' affiliation with particular states, rather than in some other manner.

At a minimum, the liberal should at least acknowledge that general jurisdiction poses special problems of justification. The obvious answer—that the state has a concern *per se* with the morality of its members—must be ruled out. Perhaps my arguments about general jurisdiction are best understood, then, as merely posing a challenge to liberals to explain why membership is an adequate basis for authority in the interstate setting. Liberals should explain either why the membership of the defendant shows that a harm has occurred within the United States or why the state should concern itself with victims that have been injured by Americans as opposed to ones injured by non-Americans. Liberalism may not be literally *inconsistent* with general jurisdiction, but it is interesting to try to figure out why the two might be compatible.

As an example of this question, Title VII provides a nice irony. It is, of course, a statute that liberals generally approve. I assume that most liberals would wish to see the law more broadly applicable; liberal groups, for instance, filed *amicus* briefs in the *ARAMCO* case.<sup>69</sup> But

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68. I am grateful to Chris Schroeder for raising a similar point, although I suspect that we still disagree. One liberal rejoinder might be that the line can be drawn according to community membership because only members are allowed to vote. The main problem with this argument is that the right to vote itself is determined by community membership. Pointing to the right to vote does not solve the problem because we can only impose an exchange of legal obligation for voting rights on community members; nonmembers cannot become obligated to obey our laws by virtue of our decision to accord them voting rights. See BRILMAYER, *supra* note 3, at 54-55.

69. See, e.g., Brief of the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae in Support of Petitioners, *EEOC v. Arabian Am. Oil Co. (ARAMCO)*, 111 S. Ct. 1227 (1991) (No. 89-1845); Brief of the International Human Rights Law Group as Amicus Curiae in Support of the Position of Petitioner, *ARAMCO* (No. 89-1845); Brief Amici Curiae of the NAACP Legal Defense and Education Fund, Inc. et al. in Support of Petitioners, *ARAMCO* (No. 89-1845); Brief Amicus

rhetoric about enforcing morality for the sake of the improved moral character of our citizens seems better suited to Lord Devlin than to liberals. I admit that when this irony became apparent to me, it caused me to take a somewhat closer look at some of my own beliefs. I consider myself a liberal and had never stopped to wonder whether my general approval of the harm principle might not sit a bit uncomfortably with my taste for a relatively expansive interpretation of Title VII and similar statutes.

Perhaps this different reaction to the morality argument in the two contexts might only be due, in my own case, to a different attitude toward different moral principles. Those of us who believe that our companies should be forced to conform to Title VII abroad, but that our government should not enforce sexual morality at home, may simply find one moral argument more compelling than the other. The fact is that I *do* find race and sex discrimination wrong, whereas I am *not* particularly convinced by arguments that extramarital sexual relations or homosexual acts between consenting adults are immoral.<sup>70</sup> Of course, if this is the case, then it would be more honest simply to say that I do not think our government should force upon us its vision of morality, when that vision is morally "mistaken."

### III. ACTIVITIES AND INJURY AS A BASIS OF STATE AUTHORITY

If the liberals should be a bit puzzled about how to address cases in which membership is the only basis for state authority, communitarians should be uncertain about the converse problem: cases in which there is activity or impact within a state but the individual subject to state authority is not a member of the community. Just as authority triggered by community membership is apparently anomalous to liberals, authority triggered by impact is anomalous to communitarians. Anomaly or no anomaly, outsiders are nonetheless held to community standards when they act within the territorial limits of the community or when they cause foreseeable harm within the community.

Many different types of laws apply to nonmembers, some regulating business practices and morals, and others regulating more private types

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Curiae of the American Civil Liberties Union et al. in Support of Petitioners, *ARAMCO* (No. 89-1845).

70. One should probably differentiate between two related positions: First, that victimless acts should not be penalized because they are *per se* not immoral; and second, that although some victimless acts may be immoral they should nonetheless not be criminalized. The classic liberal position is the latter; a liberal might believe that failure to believe in God or the use of addictive drugs is immoral even if no one is injured. Although I do not believe that victimless acts are automatically morally acceptable, the fact that some act is victimless (e.g., consensual homosexuality) may be one factor in the moral equation.

of conduct. American willingness to apply our antitrust laws has been notorious (and unpopular).<sup>71</sup> Recently, actions have been brought against former Philippine government officials for RICO violations,<sup>72</sup> and we have brought General Manuel Noriega to the United States for trial for violations of U.S. drug laws.<sup>73</sup> We apply our product liability laws to foreign manufacturers<sup>74</sup> and our securities laws to foreign sellers.<sup>75</sup> Can this be squared with reliance on community membership as a basis for coercion?

In one sense, such cases make perfect sense to the communitarian. The purpose of regulating the conduct is to prevent harms to the community. But this does not adequately explain why the state has a right to impose its will on the outsider.<sup>76</sup> Community membership of the affected parties does not seem to be a fair justification for the coerced persons; more must be done to explain the coercion of outsiders. As a theory, then, communitarianism is necessarily incomplete. It fails to tell us why and in what circumstances a community may impose its will upon nonmembers.

Specific jurisdiction sits uneasily with communitarianism for two reasons. The first is that, by alleging that political argument is only possible within particular communities, communitarianism suggests that there can be no principled way to develop standards to determine whether an outsider can be held to local law. This is a methodological issue, for the problem is that communitarian theory is contextual whereas norms between communities seem universalistic. The second is that the standards that are currently used to determine whether specific jurisdiction is appropriate in particular cases place great emphasis on consent and voluntariness—traditional liberal values. Whereas the first point relates to the *source* of fairness standards, the second relates to their *content*. Together, these two arguments make the following point: It is both necessary and possible to develop fairness norms that operate

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71. See Brilmayer, *supra* note 19, at 21 (discussing the dissatisfaction of foreign parties and governments with the extraterritorial expansion of U.S. antitrust laws).

72. See *Republic of Philippines v. Marcos*, 818 F.2d 1473 (9th Cir. 1987), *aff'd*, 862 F.2d 1355 (1988) (en banc), *cert. denied*, 490 U.S. 1035 (1989).

73. See *Jurors Selected for Noriega Trial*, N.Y. TIMES, Sept. 14, 1991, § 1, at 8.

74. See, e.g., *Holmes v. Syntex Labs., Inc.*, 202 Cal. Rptr. 773 (Ct. App. 1984) (refusing to dismiss products liability case brought against British defendants on *forum non conveniens* grounds because of desire to see California strict liability law applied).

75. See Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677, 678 (1990).

76. See Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989) (arguing that fairness to the defendant must be shown, not just that a state would further instrumental goals by applying its laws).

outside communities, and the most appealing existing candidates are liberal ones. Not only does communitarianism seem to lack the ability to explain state authority over nonmembers, it is also mistaken in its critique of liberalism—it erroneously suggests that the liberal project is misguided and doomed to fail.

### A. *Contextualism*

Communitarians view the community as the source of political norms.<sup>77</sup> It is pointless, they claim, to approach political theory foundationally—seeking, that is, to uncover basic principles of political legitimacy that apply to all societies in all historical settings.<sup>78</sup> Typically, foundational efforts do little more than display the biases of particular philosophers that reflect the particular traditions in which those philosophers have been educated. Norms are contextual, not universal. It is not possible to judge impartially whether one society is politically “better” than another; there are no objective standards. The best that can be done is to uncover the political values that are embedded in particular political traditions.

If this argument is correct, then what are we to make of exercises of state authority over individuals who are not members of the community? One might, perhaps, take the position that there can be no political norms to govern such interactions: anything goes.<sup>79</sup> The decision whether one state can apply its law to someone from another state should be made solely according to the convenience of the community that has the power to impose its will.<sup>80</sup> Most of us, however, would probably not approve such an arrangement. We seek instead to *justify* the assertion of authority over outsiders and would limit authority over outsiders to cases in which it could be properly justified. Allocation rules tell us whether it is proper to apply the authority of one state or another.

But where would we find the principles to test whether such authority is justifiable? If the communitarian position is sound, then one would think that the principles would themselves have to arise out of some

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77. See HERZOG, *supra* note 40, at 239.

78. See *id.* at 243.

79. This is similar to the position taken by the realist school of international law. For a description, see BEITZ, *supra* note 65, at 15-27. This may also be the position of the interest analysis school of choice of law. See BRILMAYER, *supra* note 16, at 104 (comparing international realism to interest analysis).

80. In some cases, all communities might have the identical norms about whether an outsider is subject to community substantive law; then the community could apply its own norms without unfairly imposing on outsiders by holding them to foreign norms. This is unlikely to occur, however, unless there is some universalistic foundation for the norms of allocation of state power.

community. They cannot be foundational norms, which would hold universally, because according to the communitarian such norms are nonexistent. But it would also seem that the community in question should not simply use its own allocation norms to justify the application of its law. If it were to offer its own allocation norms as justification, then the question of why the state might apply its own law would remain unanswered, for there would still be the problem of justifying the community's norms that specify that its substantive law was applicable. The individual would still be held to the norms of a foreign state.

If there can be no justification in terms of the norms of the forum, then perhaps there is a different community to turn to—a community of which the defendant is more plausibly a member. When the forum applies its law to an outsider, perhaps, it is authorized to do so by the norms of the world community.<sup>81</sup> World community norms specify the proper allocation of state power, and can be used to determine whether a particular individual should be held to a particular state's laws.

The problem with this argument is that it threatens to stretch the notion of community to the breaking point. To show why forum law can be applied to an outsider, the communitarian must show that the outsider is a member of the relevant community of which the forum state is a part. Yet to make this argument work in all cases where outsiders are regulated, the community in question must be virtually universal. It is one thing to justify applying U.S. law to a Canadian on the grounds that the Canadian is a member of the same community. But the resident of Lima, Peru must be a member of this community as well, as must the subsistence farmer from the Laotian highlands. This strategy effectively destroys the distinction between members and nonmembers; everyone is a member, in the appropriate circumstances. The concept of community loses its power to discriminate because everyone is a member of the universal community.

This world community ought to raise doubts in the minds of communitarians. Community ought to be a genuine organic tie and not just an abstract relationship. In addition, this interpretation of community raises a strong suspicion that "community" can be used as a *post hoc* rationalization for assertions of state authority that are intuitively satisfactory for other reasons.

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81. In a federal system, of course, a federal community fills this role. In such cases, the "overarching community" argument is much more plausible. However, in the United States at least, the federal rules of allocation are incomplete; they restrain states to some degree, but do not uniquely specify a correct answer. The problem of a state applying its allocation rules to an outsider is not, therefore, completely resolved.

## B. *Impact Without Membership*

These “other reasons,” appear on closer examination to embody distinctively liberal premises, not communitarian ones. The most intuitively attractive way to justify regulation of outsiders is in terms of the fact that the outsiders have somehow brought themselves into the community (by entering a state, for instance). The relevant tests seem to be consent and voluntariness, and the underlying rationale seems to be protection of individual autonomy.

For example, one of the primary bases for specific jurisdiction is that the defendant has consented to jurisdiction.<sup>82</sup> Consent can be based upon a contractual choice of forum or choice of law clause;<sup>83</sup> or the defendant can consent to jurisdiction at trial by failing to object to state authority.<sup>84</sup> In addition, courts in an earlier era were known to use tacit consent as a basis for jurisdiction.<sup>85</sup> Where the defendant entered the state and committed a tort there, the state might assume that the defendant had implicitly agreed to service of process by the secretary of state.<sup>86</sup> The tacit consent theory is not as important as it once was, in part because other bases for specific jurisdiction have been found. One theory espoused by the Supreme Court requires that the defendant have purposefully availed himself or herself of the benefits of doing business in the forum.<sup>87</sup> In this way, the defendant can structure his or her conduct to avoid being subjected to jurisdiction in the forum.<sup>88</sup>

Norms about inferring consent from entrance into the community or requiring that the defendant's subjection to state authority be foreseeable or purposeful have an undeniably liberal flavor.<sup>89</sup> It can be argued that liberal theory is most valuable in precisely these cases—cases in which different communities collide. Where the parties to a dispute are

82. Consent does not suffice for all forms of jurisdiction; federal subject matter jurisdiction, for instance, cannot be established by the parties' consent. See LEA BRILMAYER ET AL., AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 44 (1986).

83. See *National Equip. Rental v. Szukhent*, 375 U.S. 311, 315-16 (1964) (“[P]arties to a contract may agree in advance to submit to the jurisdiction of a given court.”).

84. See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705 (1982) (“[T]he failure to enter a timely objection to personal jurisdiction constitutes . . . a waiver of the objection.”); *Adam v. Saenger*, 303 U.S. 59, 67 (1938) (plaintiff consented to counterclaim).

85. For a discussion of some problems with tacit consent theory, see Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1 (1989).

86. See *Hess v. Pawloski*, 274 U.S. 352 (1927).

87. See *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Kulko v. Superior Court*, 436 U.S. 84, 94 (1978); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

88. See *World Wide Volkswagen*, 444 U.S. at 298.

89. It is arguable that voluntariness is just an instrumental value, with states recognizing that it is impossible to deter unintended effects on the community. A voluntariness requirement, then, would not necessarily reflect liberal assumptions. However, the court has consistently phrased the voluntariness requirement in terms of fairness to individual defendants. See *id.* at 292.

from different communities, it does not seem fair to resolve the controversy solely according to the norms of one community or the other. At a minimum, the decision about which community's norms to apply should be made according to standards that are relatively distanced between the two.<sup>90</sup> The defendant should not be subject to state authority without a showing that he or she has in some way assented to state power.<sup>91</sup> A standard of this sort requires somehow stepping outside of particular communities. With this motivation in mind, the liberal project is well worth undertaking.

The problem with liberalism, perhaps, is that it views all political relations through this lens. In trying to avoid reliance on context-specific assumptions, and in trying not to take for granted that individuals and groups share traditions and practices, it chooses in effect to search for principles to regulate relations between individuals that are maximally distant. It takes as the standard case the situation where individuals have nothing in common, in order to build a philosophical structure upon as few assumptions of commonality as possible. Yet surely this maximally distant case is not the typical one. Most political relations do occur within communities rather than between them, although this becomes less and less true as the world grows smaller.

The communitarian should not take too much satisfaction, however, in the fact that the liberal enterprise addresses what may be the numerically less significant question. Liberalism, even as I have described it, is not necessarily limited to relations that cross community lines. If it were, in fact, possible to make some progress toward the analysis of political relations between persons from different communities, the results might well have some relevance for purely domestic disputes.<sup>92</sup> If one were able to determine what constituted the minimum principles that political institutions must provide between communities, then this minimum should not automatically be assumed to be irrelevant within communities. It is one thing to say that community traditions are the sole possible basis for political analysis, and that the search for foundationalist principles will necessarily end in failure; it would be another to say

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90. This argument is little different from the claim that when *individual* interests conflict, the dispute should be resolved by a neutral third party rather than by one of the disputants. When community interests conflict, neither community should have the final word.

91. This is not to say that the norm of consent is unproblematical. See Brilmayer, *supra* note 85.

92. For a discussion related to interaction among different cultures, see MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 13-15 (1987) (questioning whether a universalist morality, even if successfully invented, would have any relevance for the societies we actually inhabit).

that foundationalist principles exist for purposes of regulating intercommunity affairs, but somehow fail to have any relevance for domestic purposes. Once foundationalism is shown to be possible, it is at least arguable that it is useful within communities.

Communitarians should therefore not be quite so quick to dismiss liberal reasoning. Liberal conclusions should be examined with an eye toward determining their potential relevance for domestic cases. But liberals should also be more open-minded about communitarian conclusions. I remain unconvinced that the community can have no legitimate claim to regulate the moral lives of its members. Some of the community's norms are properly designed to apply to member's activities wherever they occur, and where a legal rule is silent as to its territorial applicability, the fact that the rule embodies an important moral purpose should be taken into account in determining its extraterritorial reach.

#### IV. THE NEED FOR A SYNTHESIS

Political theory in domestic cases is, in one sense, overdetermined, for there are different approaches that might explain why state power is legitimate. State power is exercised within the community, over community members. But these situations tend also to be cases where harm is done to the community. Purely domestic cases possess *both* local triggers: membership and impact. In most cases, then, it can be plausibly argued that either the reason coercion is appropriate is because those who are regulated are part of the community and the community takes a moral interest in them, or because the activities complained of occur within the community.

In the typical domestic case, the communitarian and the liberal are likely to agree that exercise of state power is appropriate but disagree over the reason. Is it because of membership, or the locus of activity? One way to choose between the two theories is to examine the reasons that each gives for state authority to see which analysis fits better with our understandings about legitimate government. This is the task of domestic political theory. In posing such questions, it helps to examine test cases on which the two theories disagree, to see which theory provides the more acceptable results. There are domestic cases on which the two theories differ, such as the regulation of pornography, because communitarians seem to be more inclined to regulate harmful speech than liberals.<sup>93</sup>

Another sort of test case is the sort that has been discussed here. Cases that transcend state borders offer unusual opportunities to test

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93. See Michael J. Sandel, *Introduction to LIBERALISM AND ITS CRITICS*, *supra* note 29, at 6.

which factors really matter in political reasoning. It is as though we could remove those factors from a fact pattern altogether, simply by moving them to another state. We can disaggregate the relevant facts by placing hypothetical examples in the multistate context.

Thus, for example, we can remove the factor of harm to others from the justification by hypothesizing that the harm took place in another state. Instead of assuming that no harm occurred, we can keep the substantive facts exactly as they are but simply posit that the harm occurred elsewhere. Similarly, we can remove the justifying factor of community membership by assuming that the individual in question is a member of some other community. The substance of the hypothetical is unchanged because the operative substantive facts are identical. This process of varying hypotheticals is entirely familiar to law teachers, especially those who teach conflict of laws. I simply suggest that this technique of geographical variation ought to be of broader interest. It can also be of value to political philosophers who ask which factors are central to political justification. This technique helps us to desegregate a fact pattern, to separate the factors from one another, and to test which are of greater importance.

In this way, problems that seem to be rather mundane turn out to have greater significance. Jurisdictional disputes can admittedly appear rather technical, but they reflect a much wider range of concerns than what appears at first glance. One theory of jurisdiction—the one known as general jurisdiction—reflects assumptions about the importance of community membership. The other—specific jurisdiction—reflects liberal assumptions that the proper basis for state intervention is the causing of harm to others.

Law does not choose between communitarianism and liberalism. Both general and specific jurisdiction are recognized, and neither is considered more persuasive than the other. Their coexistence suggests that there may be ways in which the two theories of justification are consistent; each may be persuasive to some degree. To a political theorist, this might suggest that the answer does not lie in communitarians showing that the liberals are wrong, or vice versa. With luck, political theorists may find as much of interest in the law as academic lawyers find in political theory.