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SIN, SCANDAL, AND SUBSTANTIVE DUE PROCESS: PERSONAL JURISDICTION AND *PENNOYER* RECONSIDERED

Wendy Collins Perdue*

"Confusion now hath made its masterpiece,"¹ exclaims Macduff in Act II of *Macbeth*. The same might be said of the venerable case, *Pennoyer v. Neff*.² Over 100 years after issuing *Pennoyer* the Supreme Court is still laboring to articulate a coherent doctrine of personal jurisdiction within the framework established by that opinion. Recently, the Court has become particularly interested in personal jurisdiction and has dealt with the issue seven times in the last four years.³ Yet despite this growing body of case law, the doctrinal underpinnings remain elusive. The Court continues to treat geographic boundaries as central to the interests protected by personal jurisdiction, but has never satisfactorily explained why they are so central or what interest the doctrine of personal jurisdiction is intended to protect.

The Court's recent attempts at clarification starkly pose the core issue of personal jurisdiction. The Court has observed that "[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest,"⁴ but has never explained what liberty interest is at stake. This article explores some of the possible theories of what individual or collective interests the personal jurisdiction doctrine protects.

As part of the attempt to understand modern doctrine, this article first reexamines *Pennoyer v. Neff*. This reexamination goes beyond the Supreme Court opinion and looks both at the underlying story of the case and the lower court opinion. The story of *Pennoyer v. Neff* is of considerable interest in and of itself. The cast of characters includes a bigamous United States Senator who was elected under an alias, a governor of Oregon who used his inauguration as a platform to decry his loss in the case, and an illiterate but litigious

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1. W. Shakespeare, *Macbeth*, Act II, scene iii, 1.72.

2. 95 U.S. 714 (1877).

3. See *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987); *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985); *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984); *Insurance Corp. of Ireland v. Compagnie de Bauxites des Guinees*, 456 U.S. 694 (1982).

4. *Insurance Corp. of Ireland*, 456 U.S. at 702.

settler. In addition, the lower court opinion, all but ignored in most discussions of the case, merits closer attention than it has received. The contrast between the lower court's narrow approach to the issues, and the Supreme Court's far more expansive opinion, highlights the extraordinary nature of Justice Field's opinion. Field, the "prophet" of substantive due process, seized on *Pennoyer* as a vehicle to entrench the due process clause of the fourteenth amendment as a barrier to state action inconsistent with natural law rights, and went far beyond the facts and issues before him to do so.

Field's approach to personal jurisdiction continues to dominate modern personal jurisdiction doctrine. His opinion in *Pennoyer* not only laid the foundation for treating personal jurisdiction as a substantive liberty interest, but also established that geographic boundaries are central in the protection of that interest. The final section of the article is devoted to an examination of these surviving elements of *Pennoyer*.

I. THE UNDERLYING STORY⁵

As students of civil procedure will recall,⁶ *Pennoyer v. Neff* involved a collateral attack on a prior default judgment. In the initial suit, one J.H. Mitchell sued Neff in Oregon state court. Because Neff could not be found within Oregon, he was served by publication. Neff never appeared and a default judgment was entered against him. To satisfy the judgment, Mitchell attached Neff's Oregon real estate. The property was sold at auction and *Pennoyer* later acquired it. Nearly a decade later, Neff returned to Oregon and brought suit in federal court to evict *Pennoyer* from the land, claiming that the original judgment was invalid. The Supreme Court found for Neff in an opinion that has become a cornerstone of personal jurisdiction doctrine.

These well known facts about the case don't begin to tell the full story. The rich underlying tale is worth exploring not only to satisfy the curiosity of "*Pennoyer* cultists,"⁷ but also because, as John Noonan has observed, "Facts which cannot be shown to be crucial to the disposition of a case are important in grasping how person affected person Even details

5. Any attempt to recreate the circumstances surrounding events that occurred over 100 years ago is fraught with obvious difficulties. Establishing the facts about events in which J.H. Mitchell was involved is particularly difficult because, as one research librarian commented, "Mitchell was the kind of person who ended his correspondence with burn this letter after reading." The story described here has been pieced together from a variety of sources and there are inevitable gaps. Recognizing the risks of doing so, I have filled in some of these gaps with hypotheses or speculation, though I have attempted to indicate where I have done so.

6. See Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 33-34 (1978) (recounting the extraordinary memory of the case by one student).

7. *Id.* at 44 n.53.

which are purely extrinsic to any participant in the process have an effect on the understanding of the case.”⁸

Our story begins with a young man, Marcus Neff, heading across the country by covered wagon train, presumably to seek his fortune. Neff left Iowa in early 1848 at the age of 24,⁹ joining a wagon train of five companies of wagons.¹⁰ At that time, the question of Oregon statehood was being considered in Congress, and there was much speculation that large tracts of the vast, undeveloped land of Oregon would be made available to homesteaders.¹¹ The speculation proved to be correct and Marcus Neff was one of the earliest settlers to claim land under the Oregon Donation Act.¹²

To qualify for land under the Donation Act, one had to be a citizen living in Oregon and had to submit a request for land by December 1, 1850.¹³ Interestingly, Neff’s land request was originally dated December 15, 1850, which would have made it too late, but “December” was crossed out and “September” written in above.¹⁴ This is the first instance of many to suggest that events surrounding *Pennoyer v. Neff* may have been tainted by fraud and deception.

Not surprisingly, registration of a Donation Act claim required a certain amount of paperwork. In addition to the initial claim, the homesteader was required after four years to submit the affidavits of two disinterested

8. J. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* 141 (1976).

9. Neff’s affidavit, submitted in connection with his land claim, states that he was born in 1826.

10. *Oregon Spectator*, Sept. 7, 1848, at 3, col. 1.

11. *Id.* The newspaper article noted that a small company of Packers arrived in Oregon City, bringing with them news that the House of Representatives had set June 4, 1848, for action on the Oregon question. The article went on to note that “it was the general impression among the emigrants and others, that Congress would donate a section of land to the heads of families in Oregon and half a section to single men.”

12. Neff’s claim was number 57, making it among the earliest.

13. An Act to Create the Office of Surveyor General, ch. 76, 9 Stat. 496 (1850) [hereinafter “The Donation Act”]. The Act granted 320 acres (a half section) to a single man, and 640 acres (a whole section) to a married couple. Interestingly, in the case of a married couple, the land did not go entirely to the husband. Instead, half was granted to the wife, “to be held by her in her own right.” *Id.* See generally Chused, *The Oregon Donation Act of 1850 and Nineteenth Century Federal Married Women’s Property Law*, 2 *LAW & HIST. REV.* 44 (1984).

14. Notification to the Surveyor General of Oregon, No. 80, Oregon City Land Donation Files, March 9, 1852 [hereinafter Notification to Surveyor General of Oregon] (notice of Claim for land by Marcus Neff) (available in Seattle Federal Archives and Record Center, Record Group No. 49). The same issue of the *Oregon Spectator* which announced the arrival of the wagon train in which Neff was traveling, also announced the discovery of gold in California. *Oregon Spectator*, Sept. 7, 1848, at 2, col. 5. One historian has speculated that upon arriving in Oregon, Neff probably went south to the mines, returning to Oregon in the fall of 1850, just in time to file a land claim. King, *Pennoyer v. Neff: Legal Landmark*, 73 *OR. HIST. Q.* 60 (1972); see *Oregon Spectator*, Nov. 9, 1848, at 2, col. 4 (miners return to Oregon with considerable gold; Oregonians urged to go to California gold mines but to retain Oregon land claims). Given the correction on Neff’s donation claim, it is possible that he returned a little late to file a donation claim.

persons affirming that the homesteader had cultivated the land for his own use.¹⁵ Neff secured two affidavits, which were submitted prematurely in 1853 and resubmitted in 1856.¹⁶ The 1856 submission should have entitled Neff to receive a patent to the land, but the government was notoriously slow in processing claims,¹⁷ and ten years passed before Neff received his land patent.¹⁸

Early in 1862 Neff made the unfortunate decision to consult a local Portland attorney, J.H. Mitchell.¹⁹ Although the nature of the legal services is unclear, Neff may have consulted Mitchell in an attempt to expedite the paperwork concerning his land patent.²⁰ Neff was illiterate,²¹ and at the time he consulted Mitchell the government had still not issued his patent. Mitchell, moreover, specialized in land matters.²² In mid-1862, several months after Neff first consulted Mitchell, another affidavit was filed on Neff's behalf. Several months thereafter Neff received a document from the government certifying that he had met the criteria for issuance of a patent.²³

Whatever Neff's reasons for seeking Mitchell's legal services, he certainly could have done better in his choice of lawyers. "J.H. Mitchell" was actually the Oregon alias of one John Hipple.²⁴ Hipple had been a teacher in Pennsylvania who, after being forced to marry the 15-year-old student whom he had seduced, left teaching and took up law.²⁵ He practiced with a partner for several years, but apparently concluded that it was time to move on to greener pastures. Thus, in 1860 Hipple headed west taking with him four thousand dollars of client money and his then current paramour, a local

15. The Donation Act, *supra* note 13, at § 7.

16. Notification to Surveyor General of Oregon, *supra* note 14.

17. See Messing, *Public Lands, Politics and Progressives: The Oregon Land Fraud Trials, 1903-10*, 35 PAC. HIST. REV. 35, 36 (1966).

18. Record Copy of Patent, vol. 5, at 12 (March 19, 1866) (National Archives, Record Group No. 49).

19. See *Neff v. Pennoyer*, 17 F. Cas. 1279, 1286 (C.C.D. Or. 1875) (No. 10,083), *aff'd*, 95 U.S. 714 (1877).

20. One reviewer of this period in Oregon has observed that "[b]oth in Washington and the District Land Offices, influence, friendships, family ties, and money were essential for the proper expediting of a claim." Messing, *supra* note 17, at 36.

21. Neff's affidavits submitted in 1852 and his oath of allegiance submitted in 1862 were both marked with "X" in place of Neff's signature. By 1875, Neff had learned at least to write his name. See Affidavit of Marcus Neff submitted in *McGuire v. Neff*, No. 237, District of Oregon (1875).

22. See I M. CLARK, JR., *PHARISEE AMONG PHILISTINES: THE DIARY OF JUDGE MATTHEW P. DEADY 1871-92*, at 150-51 (1975) [hereinafter *DEADY DIARY*].

23. Oregon Donation Certificate No. 1416 to Marcus Neff, Dec. 31, 1862 (available in Seattle Federal Archives and Records Center, Record Group No. 49). Nevertheless, four more years passed before the general land office granted Neff his patent. Record Copy of Patent, *supra* note 18.

24. I *DEADY DIARY*, *supra* note 22, at 151.

25. *Id.*

school teacher.²⁶ They made their way to California where Hipple abandoned the teacher, ostensibly because she was sick and her medical expenses had become too burdensome,²⁷ and moved on to Portland, Oregon. There, using the name John H. Mitchell,²⁸ he quickly established himself as a successful lawyer, specializing in land litigation and railroad right-of-way cases.²⁹ He also remarried without bothering to divorce his first wife.³⁰ As one historian has observed, Mitchell's success as a lawyer cannot be attributed to either intellectual or oratorical skills; rather, his strengths included exceptional political instincts, a generous disposition, and a friendly handshake.³¹ What he lacked in ethics and ability, he made up for with persistence and desire for success.³² In his subsequent political career, he became known as a man whose "political ethics justified any means that would win the battle."³³

Mitchell's ethical standards as a lawyer were no higher than his ethics as a politician. As the *Oregonian* observed: "His political methods are indeed pitched on a sufficiently low scale, but not below his methods as a

26. *Id.*

27. *Id.*

28. *Id.* Mitchell claimed he had dropped his surname, Hipple, and had taken to using his mother's maiden name in order to escape from "great domestic unhappiness." *Washington Star*, June 16, 1873, at 2, col. 1. The name change generated its own set of problems. There was some talk of removing him from his newly acquired Senate seat because he had run under an assumed name. *Id.* In addition, in another law suit in which Mitchell and his partner were apparently trying to acquire land as payment for legal services, the defendants argued that there was an improper joinder of parties because John H. Mitchell was a mythical personage. *See New York Times*, Dec. 13, 1873, at 6, col. 7.

29. 1 *DEADY DIARY*, *supra* note 22, at 151–52; E. MACCOLL, *THE SHAPING OF A CITY: BUSINESS AND POLITICS IN PORTLAND, OREGON 1885–1915*, at 202 (1976); Silberman, *supra* note 6, at 44 n.53.

30. 1 *DEADY DIARY*, *supra* note 22, at 151–52. After Mitchell's bigamy came to light, there was great interest in his views on polygamy in Utah. *Id.* at 128–29. Ironically, some years after this incident, Mitchell criticized the Oregon Donation Act as encouraging too many marriages. Mitchell, *Oregon: Its History, Geography and Resources*, *Nat. Geographic Mag.*, Apr. 20, 1895, at 266.

31. J. GASTON, *THE CENTENNIAL HISTORY OF OREGON 1811–1912*, at 665 (1912).

32. *See id.* at 665–66.

33. *Id.* at 665. Mitchell had an extremely successful political career. He was first elected to the State Senate in 1862, became president of the State Senate in 1864, *see id.* at 666, was seven times a candidate for the United States Senate, and was elected in four of those contests. *See id.* at 665. Interestingly, Mitchell received strong political support from Abigail Scott Duniway, an important leader of the 19th century western women's movement. Duniway continued to support Mitchell even after it was revealed that Mitchell was a bigamist and an adulterer. Duniway did urge Mitchell to make "restitution" for the wrongs he had done to women "by becoming the special champion of the rights of all women. . . . [L]et his Senatorial career be one continued grand atonement to all womanhood for the errors of his youth." R. MOYNEHAN, *REBEL FOR RIGHTS: ABIGAIL SCOTT DUNIWAY 173* (1983) (quoting remark made by Mrs. Duniway). There is no evidence that Mitchell ever undertook such "atonement."

lawyer.”³⁴ Given Mitchell’s reputation, one might at least question whether Neff in fact owed the money Mitchell claimed was due. Neff paid Mitchell \$6.50,³⁵ but Mitchell claimed he was owed an additional \$209.³⁶ Although Mitchell’s services were rendered between early 1862 and mid-1863,³⁷ Mitchell waited several years to take legal action against Neff, perhaps purposely waiting until Neff left the state.

On November 3, 1865, Mitchell filed suit against Neff in Oregon state court, seeking \$253.14 plus costs.³⁸ Mitchell secured jurisdiction under Oregon statute section 55, which provided that if the defendant, after due diligence, cannot be found within the state, he may be served by publication.³⁹ Mitchell supplied an affidavit in which he asserted that Neff was living somewhere in California and could not be found.⁴⁰ Mitchell provided no details as to what he had done to locate Neff, and given Mitchell’s lack of scruples,⁴¹ one might wonder whether Neff’s whereabouts were indeed unknown to Mitchell and whether Mitchell made any attempt to locate Neff.⁴² Notice of the lawsuit was published for six weeks in the *Pacific*

34. Morning Oregonian, Aug. 25, 1882, at 2, col. 1. Two incidents illustrate that Mitchell had no hesitation about cheating or defrauding his own clients. In one case, a client had consulted Mitchell concerning certain debts which the client had incurred. Mitchell apparently notified the creditors of his client’s whereabouts, and was appointed by the creditors to collect the debt. Mitchell then went back to the client and offered in exchange for \$600 to tell the creditors that the debt could not be collected. The client paid the price. See 1 DEADY DIARY, *supra* note 22, at 182 (diary entry Jan. 2, 1875). In another incident, Mitchell persuaded a recently widowed client to appoint a friend of Mitchell’s as guardian of her young children. Although the guardian soon disappeared, Mitchell, acting on behalf of the guardian, requested that the court order the sale of real estate inherited by the children. The sale was supposedly to pay expenses incurred by the guardian in caring for the children, although the children in fact never lived with or received any benefit from the guardian. The sale was ordered and Mitchell purchased the land at auction for a fraction of its actual value. Mitchell turned around and sold the land at a sizeable profit, while the widow and her young children were left destitute. See Morning Oregonian, Aug. 25, 1882, at 2, col. 1; Morning Oregonian, Nov. 25, 1886, at 4, cols. 1–3.

35. See *Neff v. Pennoyer*, 17 F. Cas. 1279, 1286 (C.C.D. Or. 1875) (No. 10,083), *aff’d*, 95 U.S. 714 (1877).

36. *Id.*

37. See Supreme Court Transcript of Record at 7, *Pennoyer v. Neff*, 95 U.S. 714 (1877).

38. *Id.* at 6. Judge Deady’s statement of the case indicates that Mitchell sought the sum of \$253.14 and was awarded \$258.18 plus \$36.80 in costs. See *id.* No explanation is given why the default judgment was \$5.04 more than the plaintiff requested.

39. OR. CODE CIV. P. § 55. The text of the statute is reproduced in *Pennoyer v. Neff*, 95 U.S. at 718.

40. See *Pennoyer v. Neff*, 95 U.S. at 717.

41. See *supra* text accompanying notes 24–37 and *infra* text accompanying notes 119–23.

42. In another lawsuit involving Neff’s Oregon property, *McGuire v. Neff*, No. 237 (Circuit Court of Oregon for Multnomah County, Complaint dated May 17, 1875), an issue arose whether at the time of that suit Neff was a citizen of California or a citizen of Oregon. Neff removed the case on the basis of diversity of citizenship and subsequently submitted an affidavit, dated Aug. 30, 1875, in which he asserted that he was a citizen of California. Affidavit of Marcus Neff filed August 31, 1875, *McGuire v. Neff*, Judgment No. 255 (C.C.D. Or. 1875). He described his home and property in California and asserted that he had been living in San Joaquin County, California for the prior five years. This suggests he did not move to California until 1870 and thus may still have been in Oregon when Mitchell sued him in 1865. See also

Christian Advocate,⁴³ a weekly newspaper published under the authority of the Methodist Episcopal Church and devoted primarily to religious news and inspirational articles.⁴⁴

In initiating the litigation, Mitchell made what ultimately proved to be a critical mistake. Mitchell's affidavit asserted that Neff owned property, but he did not attach the property at that time. Mitchell most likely neglected this step because Oregon law did not appear to require attachment as a prerequisite for reliance on section 55.⁴⁵

A default judgment in the amount of \$294.98 was entered against Neff on February 19, 1866.⁴⁶ Although Mitchell had an immediate right to execute on the judgment, he waited until early July 1866 to seek a writ of execution, possibly waiting for the arrival of Neff's land patent. The title, which was sent from Washington, D.C. on March 22, 1866, would have taken several months to arrive in Oregon, and thus probably arrived in Oregon shortly before Mitchell sought the writ of execution.⁴⁷ Interestingly, although Mitchell had alleged that Neff could not be found, the Oregon land office apparently had no difficulty delivering the patent to Neff.⁴⁸

infra note 71.

43. See *Pennoyer v. Neff*, 95 U.S. at 717.

44. The publisher's column of the *Pacific Christian Advocate* describes it as a weekly periodical dedicated to issues of religion, temperance, agriculture, education, and general intelligence.

45. Or. Code Civ. P. § 55 (1863). There is, however, another small complication regarding this matter: at the time *Mitchell v. Neff* was commenced and even at the time judgment in the case was rendered, the government had not yet sent Neff his patent for the land. The patent was not issued until March, 1866, see *Neff v. Pennoyer*, 17 F. Cas. 1279, 1280, which was a month after the judgment was entered in *Mitchell v. Neff*. Thus, an argument might have been made that at the time of the action, Neff did not yet own property in Oregon. See Lewis, *The "Forum State Interest" Factor in Personal Jurisdiction Adjudications: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769, 769-72 (1982). The practice in Oregon, however, was that if the settler had fulfilled all the prerequisites for issuance of the patent, then he was treated as the owner, with full rights to transfer the land. See *Dolph v. Barney*, 5 Or. 191, 204 (1874), *aff'd*, 97 U.S. 652 (1878); see also Act of July 17, 1854, ch. 84, § 2, 10 Stat. 305, § 2 (1854). This argument was not made, however, and the opinions of both the lower court and the Supreme Court are written on the assumption that Neff was the owner at the time of the original judgment. See *Pennoyer v. Neff*, 95 U.S. at 719; *Neff v. Pennoyer*, 17 F. Cas. at 1281.

46. See *Neff v. Pennoyer*, 17 F. Cas. at 1280.

47. See *id.*; Record Copy of Patent, *supra* note 18.

48. According to the Civil Archives Division of the National Archives, the procedure was that the patent was issued from the General Land Office in Washington, D.C. and sent to the local land office. In the case of Neff's patent, it was sent to the Registrar at Oregon City. The local office was responsible for seeing that the title was delivered to the homesteader. If the homesteader could not be found, the patent was returned to Washington. There are no notations or correspondence in Neff's file in Washington indicating that the patent was ever returned to Washington. Moreover, although the patent might have been delivered to Mitchell or someone else, the lower court opinion in *Pennoyer v. Neff* suggests that at the time of that litigation, Neff was in possession of, and produced, the actual patent. See *Neff v. Pennoyer*, 17 F. Cas. at 1280.

Under Oregon law, to secure execution one had to obtain a writ of execution and post and publish notice for four weeks.⁴⁹ All of the steps were apparently taken.⁵⁰ On August 7, 1866, the property was sold at a sheriff's auction for \$341.60.⁵¹ Notably, the buyer was not Sylvester Pennoyer, as the Supreme Court opinion⁵² and commentators have implied.⁵³ The property was purchased by none other than J.H. Mitchell, who three days later assigned the property to Sylvester Pennoyer.⁵⁴ Pennoyer had much in common with Mitchell. He, like Mitchell, was a Portland lawyer, involved in politics,⁵⁵ and active in real estate speculation.⁵⁶ There is no evidence available on whether Pennoyer had actual knowledge of, or connection to, the original action, though it is certainly possible.⁵⁷ Moreover, since he took title through Mitchell, it is not clear that he should have been treated as a true innocent third party purchaser.⁵⁸

It appears that for the next eight years Pennoyer peacefully minded his own business, doing those things one would expect of any property owner—he paid the taxes, cut some timber, and sold a small portion of the land.⁵⁹ The peace was broken in 1874 when Neff reappeared on the scene. The evidence suggests that Neff began making trouble for Pennoyer several

49. See OR. CODE CIV. P. §§ 271, 288(2).

50. Deady's statement of the case says that the property was sold following an order of execution. *Neff v. Pennoyer*, 17 F. Cas. at 1280.

51. See *id.*

52. Justice Hunt in his dissent states that "the land in question . . . was bought by the defendant Pennoyer, at a sale upon the judgment in such suit." 95 U.S. at 736 (Hunt, J., dissenting). Justice Field does not dispute this statement by Hunt, though his own description of the events is somewhat more ambiguous—he merely states that the "defendant claims to have acquired the premises under a sheriff's deed." *Id.* at 719; see also *id.* at 746 (Hunt, J., dissenting).

53. See, e.g., J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 100 (1985); Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1026 (1983); Lewis, *supra* note 45, at 772; Silberman, *supra* note 6, at 44 n.53.

54. See *Neff v. Pennoyer*, 17 F. Cas. at 1280. There is no evidence available concerning the amount Pennoyer paid Mitchell for the assignment. See Supreme Court Transcript of Record at 6, *Pennoyer v. Neff*, 95 U.S. 714 (1877) (stating that the assignment from Mitchell to Pennoyer was "for value received"). In his answer in a related lawsuit, see *infra* notes 67–69 and accompanying text, Pennoyer stated that the assignment was made "for a valuable consideration." Answer at 3, *Neff v. Pennoyer*, No. 222 (C.C. Or. 1875).

55. Mitchell and Pennoyer were from different political parties—Mitchell was a Republican, Pennoyer a Democrat.

56. See VII (Part 2) DICTIONARY OF AMERICAN BIOGRAPHY 445 (D. Malone ed., 1964).

57. Pennoyer may, of course, have been an innocent dupe. As one observer commented, "He was a prey to evil men." E. MACCOLL, *supra* note 29, at 214 n.

58. See C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 479 (2d ed. 1971) (basic common law rule is that one cannot pass a better title than that which he has; similarly, a purchaser can acquire no better title than that of his vendor).

59. See *Neff v. Pennoyer*, 17 F. Cas. 1291 (C.C.D. Or. 1875) (No. 10,085); *McGuire v. Neff*, No. 237 (C.C.D. Or. 1875), reprinted in Morning Oregonian, Dec. 7, 1875, at 1, col. 6 (plaintiff, who had purchased a portion of land from Pennoyer, sought to quiet title).

months before he actually filed suit, because in July of 1874 Pennoyer began taking steps to protect the validity of his title. It seems that local officials had been somewhat lax in the matter of title when the property was originally sold at the sheriff's auction. The sheriff's deed was not signed until five months after the sale, and then it was signed by the deputy sheriff, not the sheriff.⁶⁰ In an apparent effort to insure that this carelessness was not the basis for an attack on his title, Pennoyer obtained the signature of the then current sheriff on a second deed dated July 21, 1874.⁶¹ Not taking any chances, three days later he acquired still a third deed, this one signed by the man who had been sheriff at the time of the sale.⁶² But all the precautions were for naught; ultimately, Pennoyer was evicted.

The case of *Neff v. Pennoyer* was filed in federal court on September 10, 1874,⁶³ and the ensuing battle confirms that vindictive and protracted litigation is not a recent phenomenon. Neff apparently had prospered in California. He had settled in San Joaquin with a wife and family, as well as servants, property, and livestock.⁶⁴ He was prepared, however, to leave his home in California and move himself, his wife, and his daughter to Oregon for a year to pursue his various legal actions.⁶⁵

The opening salvo between Neff and Pennoyer was fired when Neff sued to evict Pennoyer, but the war did not end there. After Pennoyer lost the eviction suit, and costs were awarded against him, he battled bitterly over the amount of those costs.⁶⁶ Neff was again the winner, and adding insult to injury, he proceeded to sue Pennoyer again—this time to recover money damages sustained as a result of Pennoyer cutting down timber on the property.⁶⁷ Pennoyer counterclaimed to collect property taxes that he had paid from 1866 to 1875.⁶⁸ The counterclaim was dismissed and Pennoyer's defense of the damage action proved to be the closest that he got to a victory: the jury found for Neff but awarded only nominal damages.⁶⁹

60. *Neff v. Pennoyer*, 17 F. Cas. at 1280.

61. *Id.*

62. *Id.*

63. Supreme Court Transcript of Record at 6, *Pennoyer v. Neff*, 95 U.S. 714 (1877).

64. See Affidavit of Marcus Neff filed August 31, 1875, *McGuire v. Neff*, Judgment No. 255 (C.C.D. Or. 1875).

65. See *id.*

66. *Neff v. Pennoyer*, 17 F. Cas. 1290 (C.C.D. Or. 1875) (No. 10,084).

67. *Neff v. Pennoyer*, 17 F. Cas. 1291 (C.C.D. Or. 1875) (No. 10,085).

68. *Id.*

69. *Neff v. Pennoyer*, Oregon Circuit Journal "A" at 819–20 (Jan. 18, 1876) (available in Seattle Federal Archives and Records Center, GSA No. 21 USDC). The battle over the Neff homestead did not end with the *Pennoyer* litigation. Enter one Mary Maguire who had purchased a portion of the land from Pennoyer. She sued Neff in Oregon state court seeking to clear her title. *McGuire v. Neff*, No. 237 (Circuit Court of Oregon for Multnomah County, Complaint dated May 17, 1875). The case was removed to federal court, a step which generated a flurry of affidavits and counteraffidavits about

When the dust had settled, Pennoyer, whom the Supreme Court assumed was a bona fide purchaser for value, was left holding the bag. Pennoyer had purchased the land for "valuable consideration" and paid the taxes on it for a number of years, yet he found himself evicted, with nothing to show for his money and subject to suit for trespass for entering the land he thought he owned. There is no evidence that Pennoyer did or could ever recover the loss from anyone.⁷⁰

Following the litigation, Neff disappeared into obscurity;⁷¹ not so Pennoyer and Mitchell. Pennoyer went on to be Governor of Oregon,⁷² but he remained bitter about his defeat in *Pennoyer v. Neff*. Ten years after the Supreme Court decision, in his inaugural address as governor, Pennoyer decried that decision as a usurpation of state power.⁷³ He remained a

whether there was diversity.

Curiously, in the battle over diversity, McGuire seems to have missed an obvious argument. Total diversity, as outlined in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), presumably was required to remove the *McGuire* case to federal court. Although Neff was a citizen of California, McGuire also named Neff's attorneys (who had acquired a one-third interest in McGuire's land after *Neff v. Pennoyer*) as codefendants, and they were citizens of Oregon. This would have destroyed diversity and prevented removal. Arguably, McGuire's claim against Neff was separate and severable from her claims against the lawyers. See The Separable Controversy Act of 1866, ch. 288, 14 Stat. 306 (1866). However, given that they held an undivided interest in the property whose title she was seeking to clear, this seems a little doubtful. Whatever the basis or propriety of the removal, McGuire ultimately lost her claim in federal court. See *McGuire v. Neff*, No. 237 (C.C.D. Or. 1875), reprinted in *Morning Oregonian*, Dec. 7, 1875, at 1, col. 6.

70. Pennoyer probably could not recover from Mitchell because it appears that Mitchell conveyed by quit claim deed without warranties. See Assignment from Mitchell to Pennoyer, quoted in *Neff v. Pennoyer*, stipulation (filed Sept. 21, 1874).

71. In an affidavit filed in the *McGuire* case, see *supra* note 42, Neff asserted that he was a citizen of California, that he was in Oregon solely for the purpose of pursuing litigation, and that he did not intend to remain in Oregon. Whether he in fact returned to California is unclear, but by 1880 he was back in (or still in) Oregon and was listed along with his wife and two children in Multnomah County, Oregon in the 1880 census. Census of 1880, Multnomah County, Oregon at 213.

72. Pennoyer served two terms as governor, followed by one term as Mayor of Portland. See J. GASTON, *PORTLAND OREGON: ITS HISTORY AND BUILDERS* 372-73 (1911). He was something of a maverick as a politician, and was described by former Attorney General Williams as a "political freak," E. MACCOLL, *supra* note 29, at 210, and by the *Morning Oregonian* as "peculiar, eccentric, and demagogic," *Morning Oregonian*, May 19, 1890, at 6, col. 1; see VII (Part 2) *DICTIONARY OF AMERICAN BIOGRAPHY* 445-46 (D. Malone ed., 1964). The *Morning Oregonian* was no fan of Pennoyer. In an editorial, it said of him: "On all large public questions throughout his life he has been conspicuously, absurdly wrong . . . We do not say that Mr. Pennoyer never deviates into sense. Doubtless he does, at times—when the subject is one of no particular or public importance; but they who have known him longest never knew him to entertain sound opinions on any important public question." *Morning Oregonian*, May 19, 1890, at 6, cols. 1-2. In a characteristic demonstration of his independence, Governor Pennoyer proclaimed Oregon's Thanksgiving holiday to be one week later than the date set by President Cleveland. See *id.*; E. MACCOLL, *supra* note 29, at 210.

73. Inaugural address of Governor Sylvester Pennoyer to the Legislative assembly of the State of Oregon 28 (1887). This speech was viewed as something of an embarrassment, at least by some. See 2 *DEADY DIARY*, *supra* note 22, at 510 (diary entry Jan. 15, 1887). The *Oregonian* published a satire of the speech in which Pennoyer is quoted as saying:

Some years ago I had a lawsuit with Mr. Neff. It was in the federal courts and finally in the supreme

vociferous critic of the Supreme Court, urging at one point that the entire Court should be impeached, explaining: "We have during this time been living under a government not based upon the Federal Constitution, but under one created by the plausible sophistries of John Marshall Our constitutional government has been supplanted by a judicial oligarchy."⁷⁴

Mitchell also remained in the public eye. He was elected to the United States Senate in 1872, lost his senate seat in 1879, but was reelected in 1885.⁷⁵ By modern standards, Mitchell's reelection is quite extraordinary. Shortly before the 1885 election, Judge Deady, the lower court judge in *Pennoyer v. Neff*, came into possession of a set of love letters which Mitchell had written to Mitchell's second wife's younger sister during the five years that he carried on an affair with her.⁷⁶ Deady turned the love letters over to a newspaper, the *Oregonian*,⁷⁷ an outspoken critic of Mitchell. The *Oregonian* willingly published the letters for all to read and enjoy.⁷⁸ Despite the scandal, Mitchell was elected four days later, something which Deady called "a disgrace to the state and a reproach to humanity."⁷⁹

Scandal was a way of life for Mitchell. In 1905 he, along with a number of other prominent Oregon officials, was indicted in connection with a massive land fraud scheme.⁸⁰ The scheme was a simple one. Following the Donation Act, Congress had passed the Homestead Act of 1862 and the Timber and Stone Act of 1878, all of which offered small tracts of land to

court of the United States and was decided against me. I have carefully examined the federal constitution, and I do not find there any authority delegated to the federal government to decide a case against me. That decision was, therefore, a clear usurpation. That soured me on federal courts.

Morning Oregonian, Jan. 22, 1887, at 4, col. 3.

74. 3 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 425 (1924) (quoting Pennoyer). Pennoyer's dislike of the Supreme Court apparently was expressed often and became known as "Pennoyerism." See T. GREER, *FIFTY YEARS IN OREGON: EXPERIENCES, OBSERVATIONS AND COMMENTARIES UPON MEAN, MEASURES AND CUSTOMS IN PIONEER TIMES AND LATER* 331-32 (1912). Pennoyer was not, however, entirely consistent in his view that the federal courts lacked jurisdiction to invalidate state laws. The *Morning Oregonian* reported that when the Supreme Court "issued an injunction that prevented for a time the erection of a bridge over the Willamette River below his sawmill, he came forward with congratulations on the courage and spirit of a court that would assume jurisdiction and overthrow a state law that he did not want." Morning Oregonian, May 19, 1890, at 6, col. 2.

75. Morning Oregonian, Nov. 19, 1885, at 1, col. 6.

76. 2 DEADY DIARY, *supra* note 22, at 417 (diary entry July 28, 1883), 435-36 (Appendix A, 1883).

77. *Id.* at 480 (diary entry Nov. 14, 1885), 435-36 (Appendix A, 1883).

78. Morning Oregonian, Nov. 14, 1885, at 2, cols. 1-4. The *Oregonian* was so outraged by Mitchell's behavior that it published letters with the hope that Mitchell would sue for libel, and thus further expose his sordid past. Mitchell was not to be caught in that trap, however, and simply denied the allegations and claimed that the letters were fraudulent. See Morning Oregonian, Nov. 16, 1885, at 4, cols. 1-5.

79. 2 DEADY DIARY, *supra* note 22, at 480 (diary entry Dec. 21, 1885). The day before the election, Deady predicted that the letters would not change the result, observing that Mitchell "is alone in making fornication a means of salvation." *Id.* (diary entry Dec. 14, 1885).

80. See Messing, *supra* note 17.

individual settlers. Aspiring lumber barons, trying to assemble large tracts of land, transported huge numbers of settlers to land offices to file dummy applications. With a few well placed bribes, the applications would be approved and the settlers would then transfer their deeds in exchange for a modest payoff.⁸¹ In July of 1905, while still serving in the United States Senate, Mitchell was convicted and sentenced to six months in jail, a \$1,000 fine, and complete disbarment from public office.⁸² In December of that same year, while his appeal was pending, Mitchell died, apparently from complications following a tooth extraction.⁸³ The *Daily Oregon Statesman* reported that the Senate adjourned without any official recognition of Mitchell's death, though the chaplain "recalled the situation to mind in his prayer by referring pointedly to corruption and death and by praying that the members of the senate might be given strength to bear each other's burdens."⁸⁴ Possibly moved by the chaplain's prayer, the Senate later passed a resolution to pay Mitchell's funeral expenses.⁸⁵

This fraudulent scheme is interesting not only because it was the last and among the most public of the scandals that had become a way of life for Mitchell, but also because the nature of the scheme itself raises a nagging, though unanswerable question: Were the initial transactions between Neff and Mitchell part of an aborted fraudulent arrangement? One can only wonder.⁸⁶

II. THE COURTS' HANDLING OF THE CASE

A. Judge Deady's Approach

The lower court opinion, written by Judge Matthew Deady,⁸⁷ merits

81. See E. MACCOLL, *supra* note 29, at 288-98.

82. See *Daily Oregon Statesman*, July 4, 1905, at 1, col. 3; Messing, *supra* note 17, at 56.

83. See *Daily Oregon Statesman*, Dec. 9, 1905, at 5, col. 1; Messing, *supra* note 17, at 56.

84. *Daily Oregon Statesman*, Dec. 12, 1905, at 1, col. 3. The paper further observed that this was "the first time the death of a senator was permitted to pass unnoticed by the senate."

85. 40 CONG. REC. 1738 (1906).

86. Information concerning this fraudulent scheme also raises another intriguing though unprovable possibility. It was not uncommon for bribes to be paid to officials in connection with the processing of land claims. See Messing, *supra* note 17, at 36. If it was in connection with his land claim that Neff consulted Mitchell, one wonders whether the dispute between Mitchell and Neff was about the reimbursement of bribe money paid by Mitchell to secure Neff's patent.

87. Mitchell was not the only one who had problems with his name. See *supra* note 28. In 1853, Deady was appointed to the territorial bench of Oregon. Inexplicably, his commission was issued in the name of "Mordecai Paul Deady" instead of Matthew Paul Deady. The reason for the error remains unclear, see M. CLARK, EDEN SEEKERS 265-66 (1981), but when word of the error reached Washington, President Pierce withdrew his nomination of Deady and repaid a political debt by appointing Odiah B. McFadden. Ultimately, McFadden was transferred to the newly-created Washington territory and Deady was reappointed under the correct name. See W. WOODWARD, THE RISE AND EARLY HISTORY OF POLITICAL PARTIES IN OREGON, 1843-1868, at 76-77 (1913).

closer scrutiny than it has received. Judge Deady, like the Supreme Court, found for Neff, but his rationale was more limited in scope. Deady's opinion is interesting, not only because the approach is strikingly modern, but also because it provides a useful counterpoint to the Supreme Court opinion. The Supreme Court affirmed Judge Deady, but on the basis of a different and much broader rationale. The fact that Justice Field chose to reject a more narrow approach which would have achieved the same result may suggest that he was less concerned with the particular case before him and more concerned with creating precedent.

Deady's opinion is long, careful, and quite conservative in approach. His analysis was limited to the question whether there was quasi-in-rem jurisdiction. He did not discuss whether there could have been in personam jurisdiction because, as he noted, all the parties agreed that there was no in personam jurisdiction.⁸⁸ His approach is based solely on state statutory construction, an area in which Deady was particularly knowledgeable since it was he who drafted the Oregon Code.⁸⁹ Although he acknowledged that "it is the duty of the state to deal justly and considerately with nonresidents who have property within her jurisdiction," he concluded that matters pertaining to the "mode of proceeding" are within the "absolute control" of the state.⁹⁰

Deady considered three specific objections to the original proceeding: (1) the order of publication was made without sufficient evidence that Mitchell had a cause of action against Neff;⁹¹ (2) Mitchell's affidavit was inadequate because it did not describe what diligence had been used to ascertain Neff's place of residence;⁹² and (3) the affidavit was made by the editor of the newspaper rather than by the "printer" as required by the statute.⁹³

Deady rejected the first argument. He noted that the only evidence for Mitchell's valid cause of action against Neff was the verified complaint itself and that "it is questionable whether even the complaint states facts sufficient to prove the existence of a cause of action."⁹⁴ He concluded,

88. *Neff*, 17 F. Cas. at 1280–81. The Oregon statute extended in personam jurisdiction only to persons who appeared in court, were "found within the state," or were a "resident thereof." OR. CODE CIV. P. § 506; see 17 F. Cas. at 1281.

89. Deady drafted in 1862 the Oregon Code of Civil Procedure, along with its 1874 revisions. See Beardsley, *Code Making in Early Oregon*, 23 OR. L. REV. 22, 49–53 (1943); Peters, *The "First" Oregon Code: Another Look at Deady's Role*, 82 OR. HIST. Q. 383 (1981).

90. *Neff*, 17 F. Cas. at 1282.

91. *Id.* at 1284.

92. *Id.* at 1286.

93. *Id.* at 1287.

94. *Id.* at 1286. He further observed that, "Concerning the material circumstances of time, place and amount, this affidavit is wholly silent, and whether this supposed cause of action arose upon an indebtedness of one mill for a small measure of moonshine or a million of dollars for as many miles of land, is left to conjecture." *Id.* at 1285.

however, that there was sufficient evidence to insulate the original judgment from a collateral attack.⁹⁵

Although Deady presumed from the record that Mitchell had a valid cause of action, he accepted the other two arguments concerning notice. His conclusion that the newspaper editor's affidavit did not meet the statutory requirement of a "printer's" affidavit might be dismissed as an overly literal reading of the statute.⁹⁶ Nevertheless, his construction of the provisions relevant to Mitchell's affidavit seems quite sensible. The Oregon statutes provided for service by publication when "the defendant after due diligence cannot be found within the state."⁹⁷ In addition, the Code mandated that in case of publication the court shall also direct a copy of the summons and complaint to be mailed to the defendant at his place of residence, "unless it shall appear that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him."⁹⁸ Pursuant to these provisions, Mitchell had filed an affidavit stating that Neff "is a nonresident of this state; that he resides somewhere in the State of California, at what place affiant knows not."⁹⁹ Mitchell's affidavit, however, had given no indication of what steps, if any, Mitchell had taken to locate Neff.¹⁰⁰ Construing the two relevant Oregon provisions together, Deady concluded that evidence of diligence in attempting to locate the defendant must appear in the affidavit.¹⁰¹ He noted that the law was not intended to be "a means of spoiling nonresidents" and that the statutory scheme was designed to ensure that defendants got notice "if possible."¹⁰² Deady recognized that a nonresident defendant was unlikely to get actual notice when service is by mere publication.¹⁰³ Moreover, the likelihood of actual notice is particularly small when, as in this case, the notice is published "in a weekly newspaper of denominational circulation within the state, and practically none without it."¹⁰⁴ Deady concluded that because this statutory scheme was designed to ensure that defendant get notice "if possible," it was critical that the plaintiff's affidavit demonstrate that diligence was used in the attempt to locate the defendant.

95. *Id.*

96. *Id.* at 1287-88.

97. OR. CODE CIV. P. § 55.

98. *Id.* § 56.

99. *See Pennoyer v. Neff*, 95 U.S. 714, 717 (1877) (quoting Mitchell's affidavit).

100. *See Transcript of Record at 7, Pennoyer v. Neff*, 95 U.S. 714 (1877).

101. *Neff*, 17 F. Cas. at 1287.

102. *Id.*

103. *Id.*

104. *Id.*

Deady's analysis of state law proved well founded,¹⁰⁵ and was consistent with contemporaneous treatises,¹⁰⁶ and the approach other states had taken.¹⁰⁷ In addition, a fair reading of a prior United States Supreme Court case suggests that failure to comply with such statutory requirements was a basis for a collateral attack. The case, *Galpin v. Page*,¹⁰⁸ written by none other than Justice Field, held that where service on a nonresident is by publication, a judgment may be collaterally attacked and invalidated where there has been a failure to comply literally with the statutory requirements for service.¹⁰⁹ While *Galpin* permitted a collateral attack to determine whether there had been compliance with statutory requirements, Field nowhere suggested that the prior judgment might be struck down where those statutory requirements in fact had been met.¹¹⁰

105. Subsequent Oregon decisions confirmed Deady's view that an adequate affidavit was a statutory prerequisite to jurisdiction. See *Goodale v. Coffee*, 24 Or. 346, 354, 33 P. 990 (1893); see also *Odell v. Campbell*, 9 Or. 298 (1881).

106. An 1873 treatise stated that "if the state requires certain steps to be taken as a prerequisite to jurisdiction, then a deficiency in respect thereto cannot be supplied by intendment or presumptions of law." D. RORER, A TREATISE ON THE LAW OF JUDICIAL AND EXECUTION SALES § 47 (1873).

107. The California and Iowa Supreme Courts had upheld collateral attacks on judgments where the publication and notice requirements were not complied with literally. *Townsend v. Tallant*, 33 Cal. 45 (1867); *McGahan v. Carr*, 6 Iowa 330 (1858); *Ehrenzweig & Mills, Personal Service Outside the State*, 41 CALIF. L. REV. 383, 385 & n.17 (1953). The Iowa decision is particularly interesting. Iowa's statute requiring publication and the mailing of notice was almost identical to Oregon's. The defendant to the original action who had lost by default alleged that notice had not in fact been mailed to him. The court sustained this collateral attack.

108. 85 U.S. (18 Wall.) 350 (1873). *Galpin* was discussed in Deady's opinion, *Neff*, 17 F. Cas. at 1283, and also in the briefs submitted to the Supreme Court. Field did not address that case at all, although Justice Hunt, in dissent, noted that *Galpin* "is cited in hostility to the views I have expressed." *Pennoyer*, 95 U.S. at 743. Professor Hazard, in his article on *Pennoyer*, suggests that the statement by Hunt indicates that there must have been an earlier version of Field's opinion which did cite *Galpin*. Hazard, A General Theory of State-Court Jurisdiction, 1965 SUP. CT. REV. 241, 263 n.78. It seems equally possible that Hunt's comments on *Galpin* were directed at the parties, who discussed and relied on that case.

109. As Field stated in *Galpin*, "When, therefore, by legislation of a State constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the State nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions." 85 U.S. (18 Wall.) at 369. Despite *Galpin*, the Court in *Pennoyer* held that the affidavit could not be collaterally attacked. Justice Field may have had some reservations about this portion of the opinion since he notes that as to this issue there was "some difference of opinion among the members of this court." *Pennoyer*, 95 U.S. at 721. If Field had doubts about the majority's resolution of this issue, those doubts would seem to be well founded. The result of the majority's ruling is that if a judge accepts as adequate an affidavit which is clearly inadequate and, as a result, the defendant gets no notice, the defendant can attack that affidavit only by appealing the decision as to which he had no notice.

110. In *Galpin*, just as in *Pennoyer*, Field cites Justice Story for the proposition that no sovereign can extend its process beyond its own territorial limits. 85 U.S. (18 Wall.) at 367. In *Galpin*, however, Field uses Story for the more limited proposition that where the record shows the defendant was outside the state at the time of service, the presumption of jurisdiction is eliminated. Field explained that "where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its

Throughout his opinion, including the discussion of Mitchell's affidavit, Deady gives no indication of who Mitchell was or what his reputation for honesty was. Nonetheless, one suspects that Deady's holding concerning the requirements for the affidavits may have been influenced by his knowledge of Mitchell.¹¹¹ In Deady's analysis of the need for a more detailed affidavit, one gets the sense Deady believed that in this case the defect was no technical failure and that it was likely Mitchell had not used the requisite diligence. Deady notes that the original court order directing service by publication was made "without any evidence that the plaintiff [Mitchell] had ever used any diligence to ascertain such place of residence, or even that he was not conveniently and intentionally ignorant of the fact."¹¹² The suggestion that Mitchell might have ignored the statutory requirement of diligence or that he might have been "conveniently and intentionally ignorant" of the facts is certainly consistent with Deady's low opinion of Mitchell.

There is no question that by the time of *Neff v. Pennoyer*, Deady knew of Mitchell's lack of scruples.¹¹³ Deady was not only a distinguished jurist and long time resident of Oregon, he was also an acute observer of life and politics in Oregon.¹¹⁴ He kept extensive diaries in which he referred to the events and prominent people of the day. By the time *Neff v. Pennoyer* arose, Mitchell's prior activities in Pennsylvania and his bigamous marriage had received wide public attention in Oregon and Deady had closely followed the scandal.¹¹⁵ By June of 1873, Deady thought all of the scandals would be

ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court." *Id.* at 371. In that case, California sought to exercise jurisdiction over a nonresident through service by publication. Field gave no indication that the state lacked the authority to do this. He simply held that because this exercise of jurisdiction was "not according to the course of common law" that the statutory requirements must be strictly complied with.

111. Deady also knew Pennoyer—he is referred to from time to time in Deady's diary. While there is no indication that Deady held Pennoyer in the same contempt he held Mitchell, there are indications that he did not hold Pennoyer in particularly high regard. Not long after he decided *Neff v. Pennoyer* Deady speculates that a piece of doggerel apparently critical of Deady was probably the work of Pennoyer. 1 DEADY DIARY, *supra* note 22, at 191 (diary entry May 9, 1875). In January 1887, Deady says of Pennoyer's inaugural address: "He has made a laughing stock of himself as I knew he would if elected." 2 *id.* at 510 (diary entry Jan. 15, 1887). See *supra* note 74. Later, in his diaries, Deady refers to Pennoyer as "Silpester Annoyer," *id.* at 551 (diary entry Feb. 23, 1889), and a "Jacobin." *Id.* at 558 (diary entry August 10, 1889).

112. *Neff*, 17 F. Cas. at 1287.

113. See, e.g., 1 DEADY DIARY, *supra* note 22, at 128 (diary entry June 7, 1873), 142 (diary entry Dec. 8, 1873), 182 (diary entry Jan. 2, 1875). In 1873, Deady was presented with a petition against Mitchell. Deady indicated that had he not been on the bench he would have signed it. *Id.* at 143 (diary entry Dec. 18, 1873).

114. As one historian has observed, "Deady's personal correspondence reveals a cutting wit, a cynical view of human nature and of the political process, and a robust interest in the dynamics of life about him." Peters, *supra* note 89, at 392.

115. See 1 DEADY DIARY, *supra* note 22, at 129 (diary entry June 9, 1873).

the end of Mitchell. As he explained: "I think he [Mitchell] must go down. Seduction, desertion, theft, clandestine change of name and absconding and bigamy are too much for a man to carry in the Senate, though he is making a desparate [sic] fight of it."¹¹⁶ Mitchell nonetheless survived and even flourished. As time went by, Deady's diary entries displayed an increasing contempt for the man.¹¹⁷ After 1873, Deady generally referred to Mitchell by his born name, Hipple. On election day in 1876 Deady stated in disgust: "Have not voted for Congressman since the Republicans put Hipple in the platform in 1873 and don't think I will until they take him out" ¹¹⁸

Deady also had further reason to doubt Mitchell's integrity. In 1873, allegations of bribery by Mitchell and others surfaced in connection with a Senate election.¹¹⁹ Deady recorded in his diary that Ben Holliday, a political ally of Mitchell's had reportedly spent \$20,000 in bribes in order to buy the votes necessary to ensure Mitchell's election.¹²⁰ Deady, along with the United States Attorney in Oregon, pushed for a prompt and thorough investigation of the matter. When one grand jury refused to return an indictment Deady ordered a new grand jury.¹²¹ It looked like indictments might be returned until Mitchell managed to use further bribery to bring the investigation to a halt. The Attorney General at that time, George H. Williams, also from Oregon, had recently been nominated to the United States Supreme Court but his confirmation was in doubt. Senator Mitchell approached Williams and offered to vote for confirmation if in exchange Williams would halt the grand jury. Williams agreed and ordered the Oregon United States Attorney to drop the matter. When he refused,

116. *Id.* at 128 (diary entry June 7, 1873).

117. *See, e.g., id.* at 127–29 (diary entries May 31 to June 9, 1873), 142 (diary entry Dec. 8, 1873), 220 (diary entry Nov. 7, 1876), 222 (diary entry Dec. 18, 1876); 2 *id.* at 400 (diary entry Aug. 26, 1882), 468 (diary entry June 6, 1885). With characteristically biting wit, Deady commented frequently on Mitchell's romantic activities. In one entry, Deady mentions Mitchell's early exit from a party they had both attended and notes: "Of course some evil minded persons will be found to say that M[itche]ll preferred to spend the time with his hostess upstairs" *Id.* at 524 (diary entry Oct. 15, 1887). In another place Deady compares Mitchell with William Kissane, another politician with a sordid past and observes that "on the woman question M[itche]ll is a long ways ahead, and some of the back counties of Pennsylvania still to hear from" *Id.* at 515 (diary entry April 23, 1887).

118. 1 *id.* at 220 (diary entry Nov. 7, 1876).

119. *See id.* at 154–55. This election was not the first in which allegations of voter fraud were raised against Mitchell. Similar allegations surfaced in connection with Mitchell's unsuccessful 1866 bid for the United States Senate. *See J. GASTON, supra* note 31, at 666–67.

120. 1 DEADY DIARY, *supra* note 22, at 80 (diary entry May 20, 1872); *see E. MACCOLL, supra* note 29, at 40.

121. *See* 1 DEADY DIARY, *supra* note 22, at 155. Deady was under a great deal of pressure on this matter and there apparently were threats to abolish his job or remove him from office. *Id.*, at 134 (diary entry Aug. 27, 1873); *see id.* at 154–55.

Williams fired him.¹²² Commenting on this incident, Deady called the removal of the United States Attorney “[a]n atrocious act for which W[illiams] & M[itche]ll deserve severe punishment.”¹²³

Thus, it is not at all surprising that Deady would focus on Mitchell’s affidavit. He viewed the case not in the global terms that Field did, but as a battle between one plaintiff and one defendant under circumstances which raised a high likelihood of fraud. He wrote an opinion of limited scope that dealt with the particular injustice demonstrated by the facts of the case.

Though Deady’s opinion remains obscure, it is strikingly modern in approach. If *Pennoyer v. Neff* arose today, it is to Deady’s approach that a modern-day Neff would have looked for protection. The original suit involved legal services rendered in Oregon by an Oregon lawyer to a client then living in Oregon, and those legal services quite possibly concerned land located in Oregon. All of this would unquestionably be sufficient to constitute the “minimum contacts” necessary for the assertion of personal jurisdiction over Neff.¹²⁴ Of course, a modern-day Neff would be entitled to personal notice, but only if he could be found.¹²⁵ How would we protect a modern-day Neff from a modern-day scoundrel like Mitchell who might fraudulently assert that the defendant could not be found? By requiring, as Deady required, an affidavit that specifically describes the steps that were taken to locate the defendant.

B. *Field’s Approach*

1. *Field’s Opinion*

Field’s opinion is very different from Deady’s. Although Field was undoubtedly familiar with at least some of the scandal concerning Mitchell,¹²⁶ his focus was not on the affidavit or even the problem of notice.¹²⁷ He dismissed rather summarily the rationale of the lower court

122. See *id.*; E. MACCOLL, *supra* note 29, at 203.

123. 1 DEADY DIARY, *supra* note 22, at 142 (diary entry Dec. 8, 1873). Williams did suffer some punishment—he was never confirmed as Chief Justice, owing at least in part to this incident. See *id.* at 147 n.72.

124. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

125. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317–18 (1950).

126. Stories about Mitchell and the scandal surrounding him had been published in the *New York Times* and *Washington Star*, as well as in the Oregon papers. Field was from California, corresponded regularly with Deady and sat circuit with Deady in Oregon. Field had been active in politics before his appointment to the Supreme Court and remained politically active. The *New York Times* reported that the scandal was widely publicized throughout the east coast. *New York Times*, June 14, 1873, at 2, col. 2. Thus, Field’s knowledge of Mitchell’s reputation seems likely.

127. Professor Hazard suggests that a major concern for Field was the notice problem. Hazard, *supra* note 108, at 245; see also Drobak, *supra* note 53, at 1028. Nevertheless, Hazard notes, on the notice issue the *Pennoyer* opinion is a disaster. Hazard, *supra* note 108, at 261–62, 270. As discussed

and devoted the bulk of the opinion to matters which were not addressed by the court below.

Field's opinion is somewhat disorganized, but the essential elements can be easily summarized. First, although the opinion held that the defects in the affidavits were not a basis for a collateral attack,¹²⁸ the Court nonetheless found a jurisdictional defect which invalidated the sale.¹²⁹ Specifically,

earlier, Deady's opinion is far more successful at dealing with the problem of notice than is Field's. Field was not a man of weak intellect. Thus, one must suspect that his comments about notice did not in fact reflect his primary concern, but were instead incidental.

128. Field notes some members of the Court disagree on this point. *Pennoyer*, 95 U.S. at 721. See *supra* note 109.

129. Field assumed, as did Deady, that if the original judgment was void for lack of jurisdiction, then the execution on that judgment was necessarily also void. None of the parties argued to the contrary and today it is generally asserted that if the underlying judgment is void, the execution of that judgment is void and passes no title. See 30 AM. JUR. 2D *Executions* § 10 (1967); see also *Lincoln-Mercury-Phoenix, Inc. v. Base*, 84 Ariz. 9, 322 P.2d 891, 894 (1958); *City of Los Angeles v. Morgan*, 105 Cal. App. 2d 726, 731, 234 P.2d 319, 322 (1951); *Straw, Off-Record Risks for Bona Fide Purchasers of Interests in Real Property*, 72 DICK. L. REV. 35, 74-75 (1967); 33 C.J.S. *Executions* § 299 (a) (1942). Not self-evident, however, is the situation where the execution has been fully consummated and the property passed to an innocent third party purchaser. In such a situation, it may not be proper to permit the judgment debtor to recover the property, at least where steps were taken at the execution phase which would be adequate to confer jurisdiction. If the court had proper jurisdiction at the execution phase, then one could require the defendant to raise at that time all objections to the execution, or to waive those objections. This analysis is easiest to follow where enforcement is sought in a different state than the state that originally rendered the judgment. In such a case, the enforcement is a separate proceeding that requires an independent jurisdictional basis and the judgment debtor can defeat the execution by successfully challenging the jurisdiction of the executing state. See R. CASAD, JURISDICTION IN CIVIL ACTIONS ¶ 6.02[2][a] (1983) and cases cited therein. Given the rule that the last judgment is entitled to full faith and credit, see *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 76-77 (1939), it would seem quite appropriate to hold that where the enforcing forum had personal jurisdiction and the judgment debtor failed to raise the invalidity of the underlying judgment, the enforcement of that judgment was valid and could not be collaterally attacked. One might object that this analysis permits a plaintiff to bootstrap an invalid judgment into a valid one. On closer examination, however, this procedure does not seem at all unfair to the defendant. If, at the time of the execution, the court ordering the execution has jurisdiction and the defendant receives notice and has a full opportunity to challenge the validity of the prior judgment, then the defendant should not be permitted simply to stand by and allow a bona fide purchaser to buy the land. See D. RORER, *supra* note 106, § 1058 (an execution debtor can not challenge the validity of an execution sale where the debtor has knowledge of the sale but "silently stand[s] by and suffers others to purchase"). See generally *Roosevelt Hardware v. Green*, 72 A.D.2d 261, 424 N.Y.S.2d 276, 279 n.1 (App. Div. 1980) (stating that even where the underlying judgment is void, the doctrine of laches might limit a judgment debtor's right to recover the property; "purchasers at judicial sales are not subject to the arbitrary whims of judgment debtors who may seek to recover their properties at any time").

This same analysis could be applied even where execution is in the same forum that rendered the underlying judgment. If, at the time of the execution, the defendant were served in-state or if the court took sufficient steps to confer quasi-in-rem jurisdiction (such as attaching the property and posting notice, see *Pennoyer*, 95 U.S. at 727), then one could argue that there was jurisdiction to execute the judgment and the defendant had to come forward at that time with his objections or lose them. Apparently, in *Pennoyer* those steps were taken at the execution phase which would be sufficient to confer quasi-in-rem jurisdiction. See *supra* text accompanying notes 49-50. While one might complain that Neff had no actual notice of the execution, he had as much notice as Field thought a debtor was ever

the Court held that quasi-in-rem jurisdiction was never acquired because Neff's property in Oregon had not been attached at the beginning of the litigation.¹³⁰ Field thought it self-evident that the property must be attached at the beginning of the suit in order to secure quasi-in-rem jurisdiction.¹³¹ Field did not cite any authority for this proposition and in fact a number of states permitted quasi-in-rem jurisdiction without prior seizure.¹³² Undaunted by a lack of authority, Field reasoned that attachment at the beginning of the suit was necessary in order to prevent an unacceptable uncertainty about the validity of the judgment prior to the actual attachment of the property.¹³³

The second aspect of the opinion is a discussion of why there was not in personam jurisdiction—a completely unnecessary element of the opinion. Having concluded that there was no quasi-in-rem jurisdiction the opinion could have stopped there. As Deady noted, the Oregon Code did not permit in personam jurisdiction over a nonresident, and both parties conceded that the judgment was not binding in personam.¹³⁴ Field nonetheless proceeded

entitled to in any quasi-in-rem proceeding.

130. Deady had considered this argument and rejected it, concluding that if the defendant had property in the state, then the state had the power to exercise quasi-in-rem jurisdiction and that the timing of the attachment was "a matter for the state to determine." *Neff*, 17 F. Cas. at 1281.

131. *Pennoyer*, 95 U.S. at 728.

132. See, e.g., *Cleland v. Tavernier*, 11 Minn. 194 (1866); *Eaton v. Badger*, 33 N.H. 228 (1856); *Jarvis v. Barrett*, 14 Wis. 591 (1861); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 306 (1956); Fraser, *Actions in Rem*, 34 CORNELL L.Q. 29, 38-40 (1948); Hazard, *supra* note 108, at 269; Note, *The Requirement of Seizure in the Exercise of Quasi in Rem Jurisdiction: Pennoyer v. Neff Re-Examined*, 63 HARV. L. REV. 657, 659-60 (1950); see also *Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308, 320 (1870) ("whether the writ [of attachment] should have been issued simultaneously with the institution of the suit, or at some other stage of its progress, cannot be a question of jurisdiction . . .").

133. Field's conclusion that prior attachment of the property is a necessary prerequisite to quasi-in-rem jurisdiction is not well explained and it is on this point that Justice Hunt disagreed with the majority. See *Pennoyer*, 95 U.S. at 741-43 (Hunt, J., dissenting). The uncertainty which troubled Field is, of course, an appropriate concern for plaintiffs who would not want to find in the middle of litigation that they could no longer get a valid judgment. See *Jarvis v. Barrett*, 14 Wis. 591, 594, 596 (1861). That certainty is also an appropriate concern for local authorities who might not want their courts to waste time on cases which could later be terminated for lack of jurisdiction. What Field never explains is why these concerns rise to the level of a constitutional infirmity. If the plaintiff and the local courts are prepared to accept the uncertainty and wastefulness of potentially futile litigation, why should the federal courts—or any other courts—care? Of course, the defendant may not want to waste his time on a lawsuit that could turn out to be futile, but the defendant has complete control of the situation. So long as the defendant retains property in the forum, the court will retain jurisdiction.

Possibly Field was concerned because he felt there was some question as to whether Neff actually owned the land at the time of the first proceeding since Neff had not yet received his patent. However, neither of the parties raised this issue and, by the time the case got to the Supreme Court, Oregon had held that a settler who had fulfilled all of the prerequisites for issuance of the patent was a full owner of the land whether or not he had received the actual patent. See *Dolph v. Barney*, 5 Or. 191, 204 (1874); see *supra* note 45.

134. *Neff*, 17 F. Cas. at 1280-81.

to discuss at length the circumstances under which in personam jurisdiction could be exercised.¹³⁵ Field held that in personam jurisdiction was proper only where the defendant was served with process within the state, voluntarily appeared, or otherwise consented to jurisdiction.¹³⁶ This position was not as universally accepted as Field suggested.¹³⁷ Not only was there contrary authority in other countries,¹³⁸ but the statutes of New York and California, the two states with whose laws Field surely would have been familiar, appeared to authorize in personam jurisdiction without in-state service.¹³⁹

Field's final and most startling step was to introduce the due process clause of the fourteenth amendment into his jurisdictional analysis.¹⁴⁰ This step was unnecessary and surprising for several reasons. First, that clause had not been raised or argued by either party or by the court below. Second, Field had already concluded that the federal courts were not required to (and hence would not) enforce the prior Oregon judgment.¹⁴¹ Third, the due process discussion was dictum for the additional reason that the

135. Much of Field's discussion of jurisdiction can be traced to Neff's brief. Although Pennoyer's argument was based solely on the theory that the court had in rem jurisdiction, Neff's attorneys devoted the majority of their brief to discussing when in personam jurisdiction could be exercised. Neff's brief was the one that introduced concepts drawn from international law and that quoted Justice Story for the proposition that "[n]o sovereign can extend its process beyond its own territorial limits." Respondent's Brief at 2-3, *Pennoyer v. Neff*, 95 U.S. 714 (1877). Of course, because Pennoyer did not assert that there was in personam jurisdiction, his brief did not dispute or analyze any of Neff's assertions on this subject.

136. *Pennoyer*, 95 U.S. at 729, 735.

137. See *id.* at 722 (discussing "two well-established principles of public law" concerning jurisdiction).

138. For example, Article 14 of the French Code Napoleon of 1804 provided: "An alien, though not residing in France, can be cited before the French courts, for the performance of obligations contracted by him in France with a Frenchman; he can be brought before French courts for obligations contracted by him in a foreign country toward Frenchmen." See de Vries & Lowenfeld, *Jurisdiction in Personal Actions—A Comparison of Civil Law Views*, 44 IOWA L. REV. 306, 317 (1959) (quoting Code); see Casad, Shaffer v. Heitner: *An End to Ambivalence in Jurisdiction Theory?*, 26 KAN. L. REV. 61 (1977); Ehrenzweig, *supra* note 132, at 289 n.3, 299, 308; Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 797-99 (1955); Note, *Jurisdiction Over Non-residents in Personal Actions*, 5 COLUM. L. REV. 436 (1905).

139. 1851 Practice Act of California, Calif. Stats. 1851, title III, ch.5, §§ 30, 31; New York Code of Procedure § 114 (1848); see Ehrenzweig & Mills, *supra* note 107, at 384 n.10. Field was the primary drafter of the California Civil Practice Act, see C. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 54 (1963), and based that act on the New York Code which was drafted by his brother, David Dudley Field. See *id.*; W. Goedecke, Rights, Interests, and the Constitution: The Jurisprudence of Mr. Justice Stephen Johnson Field 59 n.2 (1958) (Ph.D. dissertation, Univ. of Chicago); see also Pound, *David Dudley Field: An Appraisal*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 8-10 (A. Reppy ed. 1949).

140. *Pennoyer*, 95 U.S. at 733.

141. *Id.* at 732-33.

fourteenth amendment did not exist at the relevant time.¹⁴² Finally, the specific due process “holding” of the case—that a judgment rendered without personal jurisdiction is unenforceable even in the rendering forum—has been viewed by at least some courts and commentators as itself quite novel.¹⁴³

In some ways, the actual result in *Pennoyer* is a surprising one, at least coming from Field. Field was a vigorous defender of private property and in other opinions he had been far more sensitive to the problem of disturbing title once it has fallen to a bona fide purchaser for value.¹⁴⁴ The result of *Pennoyer* was to unsettle title to property. Under the facts of the case, at

142. Most commentators have focused on the fact that the fourteenth amendment was not in existence at the time of the original judgment in *Mitchell v. Neff*. See, e.g., Lewis, *supra* note 45, at 773 n.20; Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses* ((pt. 1)), 14 CREIGHTON L. REV. 499, 504–05 (1981). However, given Field’s analysis of the fourteenth amendment, the relevant question is not whether the due process clause existed at the time of the original judgment, but whether it existed at the time of the enforcement proceeding. This is so, because, as explained *infra* in the text accompanying notes 172–174, Field does not rely on the clause as the source of the criteria for determining the validity of the original judgment but simply as the reason for refusing to enforce the judgment. Thus, the fourteenth amendment could be relied on so long as it was in existence at the time of the enforcement proceeding. Although the fourteenth amendment did not exist at the time of the sheriff’s sale, it did exist at the time of Neff’s ejectment action. Even focusing on the ejectment action, however, the discussion of the fourteenth amendment is still dictum because that proceeding was brought in federal court, not in state court, and the actions of a federal court would not be limited by the fourteenth amendment (though the due process clause of the fifth amendment might be relevant). For a discussion of the differences between the fourteenth and fifteenth amendments, see R. CASAD, *supra* note 129, ¶ 5.01; Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 434–36 (1981); Note, *Fifth Amendment Due Process Limitations on Nationwide Federal Jurisdiction*, 61 B.U.L. REV. 403 (1981).

143. See, e.g., *De La Montanya v. De La Montanya*, 112 Cal. 101, 121–22, 44 P. 345, 350 (1896) (McFarland, J., dissenting); FREEMAN ON JUDGMENTS § 567 (3d ed. 1881); Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses* (Part Two), 14 CREIGHTON L. REV. 735, 822–28 (1981); see also Note, *supra* note 138. Even after *Pennoyer*, the Supreme Court continued to express some uncertainty on this point. In *Hart v. Sansom*, 110 U.S. 151 (1884), a nonresident defendant was served by publication in a manner prescribed by state statute. Although the Court held that federal courts were not bound by the prior judgment because the defendant was not served in person within the state, the Court observed that “[t]he courts of the State [which rendered the judgment] might, perhaps, feel bound to give effect to the service made as directed by its statutes.” *Id.* at 155.

144. In *Galpin v. Page*, 85 U.S. (18 Wall.) 350 (1874), for example, Field held that under the circumstances of that case, a judicial sale of property based on a judgment rendered without personal jurisdiction passed no title. He noted, however, that there is a well established exception where the sale is to a “stranger bona fide.” *Id.* at 375 (quoting *Gott v. Powell*, 41 Mo. 416, 420 (1867)). In *Galpin*, the sale was to one of the attorneys for the original plaintiff, not to a stranger *bona fide*. See also *Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308, 321 (1870) (expressing concern about “unsettl[ing] titles to vast amounts of property”). In the somewhat different context of the Sinking Fund Cases, 99 U.S. 700 (1879), Field expressed a similar concern. There, the Court upheld a federal law requiring the railroads to establish a sinking fund for payment of debts due the federal government. Field, dissenting, expressed alarm that the decision would “tend to create insecurity in the title to corporate property in the country.” *Id.* at 750 (Field, J., dissenting).

least as presumed by the Court, Pennoyer was a bona fide purchaser for value who had purchased property at a sheriff's auction held pursuant to a court order, paid valuable consideration to the state, and received a signed deed. He had then gone about his business for years, paying taxes on the land, selling off a portion and using the land as any landowner might. Ten years after the sheriff's sale, this bona fide purchaser discovered that not only did he not have title but he was subject to damages for trespass and could not even recover the taxes paid on the true owner's behalf.

It is one thing to decide whether a judgment should be enforced, but once a judgment has been executed and we introduce bona fide purchasers, the problem becomes much more complex.¹⁴⁵ Oregon dealt with the problem of bona fide purchasers through a statutory scheme which gave the judgment debtor a year after execution of the judgment to set aside the execution.¹⁴⁶ After a year, the debtor could not reclaim the property although he might be able to recover against the original plaintiff. Such a system preserves the rights of bona fide purchasers and the integrity and reliability of a sheriff's deed, while giving the original debtor some opportunity to undo any fraud. All of this was ignored by the Court.

The opinion in *Pennoyer* is commonly explained as being based on a theory that state power is coextensive with physical power.¹⁴⁷ However, both the facts of *Pennoyer* and Field's views expressed in other cases concerning the limits of governmental authority¹⁴⁸ suggest that he did not believe that state power was coextensive with physical power. Under the facts of the case, there can be no question that Oregon had the physical power to enforce the judgment—it exercised that power when the sheriff auctioned Neff's Oregon land. Moreover, the view that jurisdiction is coextensive with physical power is flatly contrary to the fundamental premise which Field labored much of his judicial career to establish—that there are limits on the power of states irrespective of the existence of

145. As noted earlier, *see supra* note 52, the Supreme Court appears to have treated the case as if Pennoyer were a bona fide purchaser who had purchased the land directly from the sheriff at the auction.

146. Section 57 of the Oregon Code of Civil Procedure allowed a defendant, if successful after reopening his default judgment, to collect restitution as ordered by the court. Nonetheless, if the property was sold upon execution to a purchaser in good faith, the title would remain with the purchaser, despite the defendant's success.

147. *See McDonald v. Mabee*, 243 U.S. 90, 91 (1917) ("[t]he foundation of jurisdiction is physical power"); R. CASAD, *supra* note 142, at 2–10.

148. *See infra* notes 155–61 and accompanying text.

physical power.¹⁴⁹ *Pennoyer*, like so many of Field's decisions,¹⁵⁰ is not about the physical limitations on state power, but about constitutional limitations which restrict state authority notwithstanding the existence of physical power.¹⁵¹

The explanation as to why Justice Field was prepared to write an elaborate exegesis, most of it dicta, the result of which was to unsettle title to real estate, seems not to lie in some theory of physical power. Rather, the explanation seems to lie in Field's discussion of the nonphysical limitations on state power. The basic premise of the opinion is that there are limitations on state power that are simply inherent in the nature of government. Having described these limitations, Field then goes on to invoke the due process clause as a mechanism to which the federal courts may turn to ensure that states do not exceed the inherent limitations on their power.¹⁵² When the due process discussion of *Pennoyer* is viewed in the context of Field's other opinions, it appears not as a chance afterthought, but as the primary point

149. See Bird, *The Evolution of Due Process of Law in the Decisions of the United States Supreme Court*, 13 COLUM. L. REV. 37, 42-43 (1913). Further, Field implies in *Pennoyer* that consent by the defendant would be a basis for jurisdiction. *Pennoyer*, 95 U.S. at 729. This suggests that not only is physical power not a sufficient condition, it is not a necessary condition either.

150. See, e.g., *Powell v. Pennsylvania*, 127 U.S. 678, 690-91 (1888) (Field, J., dissenting); *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 759 (1884) (Field, J., concurring); *Munn v. Illinois*, 94 U.S. 113, 138 (1877) (Field, J., dissenting); *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 139-40 (1874) (Field, J., concurring); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83 (1873) (Field, J., dissenting); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 316, 321-22 (1867); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6546).

151. As others have noted, the physical power explanation for Field's personal jurisdiction concepts is inadequate for another reason. The need for physical power has been explained as relating to concerns about the enforceability of judgments. While this may be a legitimate worry in the international context, it is not clear why it is a problem in our federal system in which states are bound under the full faith and credit clause to enforce the judgments of other states. See Jay, "Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C.L. REV. 429, 453 (1981); Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 585 (1958).

152. Professor Whitten has argued that prior to *Pennoyer* there was a general understanding that territorial limits on personal jurisdiction could be altered by state legislatures. Whitten, *supra* note 143, at 800-04. Whitten cites, for example, Justice Johnson's dissent in *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813), in which Johnson observed that the territorial rules of personal jurisdiction were "eternal principles of justice" which "never ought to be dispensed with, and which courts of justice never can dispense with, but when compelled by positive statute." *Id.* at 486 (emphasis added); *accord* *Hollingsworth v. Barbour*, 29 U.S. (4 Pet.) 466, 472 (1830); see Whitten, *supra* note 143, at 801. Whitten concludes that "the predominant pre-fourteenth amendment view would have rejected due process as limiting the legislature's power to exceed the territorial rules of jurisdictions." *Id.* at 803-04 (emphasis in original). One might add of course, that those holding this predominant view would probably also have rejected the premise of substantive due process—that the due process clause limits substantive legislative power. These observations, however, simply highlight that Field's opinion in *Pennoyer* reflects more than his views about personal jurisdiction, it reflects a new view of states' substantive legislative authority.

which Field wanted to establish throughout the second half of his judicial career.¹⁵³

2. Due Process

Field was the “pioneer and prophet” of the doctrine of substantive due process.¹⁵⁴ His opinions during the 1870’s and 1880’s, largely dissents and concurrences, formed the foundation for the substantive due process approach later embraced in *Lochner v. New York*.¹⁵⁵ Field’s view was that there were certain fundamental and inalienable rights. These rights were not created by the fourteenth amendment. Rather, the fourteenth amendment provided the mechanism for protecting these rights from intrusions by the states.¹⁵⁶ In Field’s view, the fourteenth amendment “was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator; which the law does not confer, but only recognizes.”¹⁵⁷ Field’s concept of what rights were fundamental was quite broad¹⁵⁸ and he was deeply troubled by what he perceived to be a rising tide of socialism and a growing use of government power to alter or limit those fundamental private rights.¹⁵⁹ He became preoccupied by a desire to establish the limits of government power, and he viewed the fourteenth amendment as one of the best weapons available in that fight. His views in this area were entrenched,¹⁶⁰ and though repeatedly in the minority, he

153. *Pennoyer* is not the only case in which Field was willing to embark on extended discussions of the fourteenth amendment even where such discussions were not strictly necessary to the decision in the particular case. See, e.g., *Butchers’ Union Co. v. Crescent City Co.*, 111 U.S. 746, 754 (1884) (Field, J., concurring); *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 138–41 (1874) (Field, J., concurring). As one commentator has observed about Field’s propensity toward dicta: “For Field, it is not *this* case that is of crucial importance, but this class of cases, and the statement of a correct or an incorrect principle governing the class of cases.” W. Goedecke, *supra* note 139, at 85–86.

154. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 653 (1909); see Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851, 853 (1943).

155. *Lochner v. New York*, 198 U.S. 45 (1905); see Frankfurter, *Mr. Justice Holmes and the Constitution*, 41 HARV. L. REV. 121, 141 (1927).

156. See *Powell v. Pennsylvania*, 127 U.S. 678, 690 (1888) (Field, J., dissenting).

157. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 105 (1873) (Field, J., dissenting); see *Powell v. Pennsylvania*, 127 U.S. 678, 692 (1888) (Field, J., dissenting); *Butchers’ Union Co. v. Crescent City Co.*, 111 U.S. 746, 756 (1884) (Field, J., concurring); see also *Cummings v. Missouri*, 71 U.S. (4 Wall.) 316, 321–22 (1867).

158. See *Powell v. Pennsylvania*, 127 U.S. 678, 692–94 (1888) (Field, J., dissenting); *Butchers’ Union Co. v. Crescent City Co.*, 111 U.S. 746, 756–58 (1884) (Field, J., concurring); *Munn v. Illinois*, 94 U.S. 113, 141–44 (1877) (Field, J., dissenting); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96–98 (1873) (Field, J., dissenting); see also *O’Neil v. Vermont*, 144 U.S. 323, 362–63 (1892) (Field, J., dissenting).

159. See Graham, *supra* note 154, at 853–57.

160. See *id.*

continued to write impassioned opinions setting forth his views on the fourteenth amendment.¹⁶¹

In the midst of Field's as yet unsuccessful battle to use the fourteenth amendment as a weapon limiting state power, *Pennoyer v. Neff* must have been a real bright spot. As one commentator observed, the opinion in *Pennoyer* was undoubtedly for Field a "labor of love."¹⁶² *Pennoyer* appears to be the first case in which a state action or statute was actually invalidated and the fourteenth amendment was cited as a basis for such invalidation. *Pennoyer* offered an ideal vehicle for Field to set forth his approach to the fourteenth amendment. Factually, it appeared that an injustice had been done. In addition, the case did not concern the more controversial areas of economic and social regulation. Further, while the scope of the due process clause as a limit on substantive state regulation was unclear, there was general agreement that the due process clause had something to do with what procedures were required.¹⁶³ Thus, *Pennoyer* offered an opportune vehicle for Field to set forth his fourteenth amendment jurisprudence in a relatively noncontroversial context. Once the general approach was established in the area of procedure, the Court could move into the more controversial substantive areas.¹⁶⁴

Field appears to have taken full advantage of the opportunity, and his approach in *Pennoyer* parallels in several respects his approach in other fourteenth amendment cases.¹⁶⁵ First, and most basically, the focus is not on concerns about fairness to the particular defendant, but instead is on the inherent limitations on the power of governments. Early in the *Pennoyer* opinion, Field articulates what he believes to be two central and self-

161. See, e.g., *Powell v. Pennsylvania*, 127 U.S. 678, 687 (1888) (Field, J., dissenting); *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 756 (1884) (Field, J., concurring); *Munn v. Illinois*, 94 U.S. 113, 136 (1877) (Field, J., dissenting); *Bartemeyer v. Iowa*, 85 U.S. 129, 140 (1874) (Field, J., concurring). The strength of Field's convictions in this area is demonstrated by the opinions he wrote while riding circuit in the Ninth Circuit. See, e.g., *County of San Mateo v. Southern Pac. R.R.*, 13 F. Cas. 722 (C.C.D. Cal. 1882); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6546); *In re Ah Fong*, 1 F. Cas. 213 (C.C.D. Cal. 1874) (No. 102). These circuit opinions include broad dicta about the fourteenth amendment and statements which seem to be at odds with the then current position of the Supreme Court. See Graham, *supra* note 154, at 883-87.

162. Hough, *Due Process of Law—To-day*, 32 HARV. L. REV. 218, 226 (1919).

163. See *id.*; see also Bird, *supra* note 149, at 45; Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125, 125-26 (1956).

164. As Professor Willis observed, "after the Supreme Court had made the due process clause apply to legislation so far as concerned matters of legal procedure, it was easy for it to extend the doctrine to legislation so far as concerned matters of substantive law." Willis, *Due Process of Law Under the United States Constitution*, 74 U. PA. L. REV. 331, 336 (1926).

165. See generally *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 759 (1884) (Field, J., concurring); *Munn v. Illinois*, 94 U.S. 113, 140 (1877) (Field, J., dissenting); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83 (1873) (Field, J., dissenting); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 316 (1867); W. Goedecke, *supra* note 139, at 81.

evident rules about state power: “that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory”¹⁶⁶ and “that no State can exercise direct jurisdiction and authority over persons or property without its territory.”¹⁶⁷ From these premises Field derives his conclusion that in personam jurisdiction exists only where there has been service in the state. Later in the opinion, Field does note that his approach to personal jurisdiction is consistent with concerns about issuing proper notice to the defendant.¹⁶⁸ Nonetheless, the focus of the opinion is not on notice or insuring litigation fairness.¹⁶⁹ Instead, it is on the inherent limitations of government power. Given this focus, that there is no mention in the opinion of the plaintiff and his interests is not surprising; Field perceived the case as a confrontation between government power and the defendant—the plaintiff’s interest is simply irrelevant.¹⁷⁰

A second interesting parallel between *Pennoyer* and Field’s other fourteenth amendment decisions is that in all of these cases, Field treats the fourteenth amendment not as the *source* of the rights in question, but rather as a device for recognizing and enforcing preexisting and inalienable rights.¹⁷¹ This purely instrumental approach to the due process clause is apparent both from the structure of the *Pennoyer* opinion and from the due process discussion itself. The discussion of the due process clause comes at the end of the opinion, after Field concluded that there was no personal jurisdiction and that enforcement of the judgment could be resisted on the basis of the full faith and credit clause.¹⁷² Moreover, when Field does address the due process clause, his discussion strongly suggests that the due process clause is not itself the source of the personal jurisdiction principles. This is apparent from the last sentence of the paragraph in which

166. *Pennoyer*, 95 U.S. at 722.

167. *Id.*

168. *Id.* at 726.

169. See *supra* note 127 and accompanying text.

170. This approach to the case stands in contrast to Deady’s approach. As discussed earlier, Deady treated the case less as a confrontation between the government and the defendant, and more as a confrontation between the plaintiff and the defendant. Field, on the other hand, perceived the problem in *Pennoyer* as being a confrontation between government power and private rights.

171. See, e.g., *Butchers’ Union Co. v. Crescent City Co.*, 111 U.S. 746, 756–57 (1884) (Field, J., concurring); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 105 (1873) (Field, J., dissenting). See generally *Powell v. Pennsylvania*, 127 U.S. 678, 690–94 (1888) (Field, J., dissenting); *Munn v. Illinois*, 94 U.S. 113, 136 (1877) (Field, J., dissenting). W. Goedecke, *supra* note 139, at 77–78.

172. Because *Pennoyer v. Neff* was in federal court, the full faith and credit clause of the Constitution was not involved, but the comparable provision for federal courts now embodied in 28 U.S.C. § 1738 (1982).

Field discusses due process.¹⁷³ In that sentence, Field talks about both personal jurisdiction and subject matter jurisdiction as prerequisites to a valid and enforceable judgment. Subject matter jurisdiction and personal jurisdiction are put on the same footing in his due process analysis, yet one would certainly not infer that Field meant to suggest that the determination of *whether* there is subject matter jurisdiction is controlled by the due process clause. All that Field says in *Pennoyer* is that due process requires that a court rendering a judgment have subject matter and personal jurisdiction. He does not say that the due process clause provides the criteria for determining whether such jurisdiction exists.¹⁷⁴

In *Pennoyer*, as in his other fourteenth amendment cases,¹⁷⁵ Field looks elsewhere for the substantive rights protected by the fourteenth amendment. The result is that the rules for determining when personal jurisdiction exists were analyzed independent of the due process clause itself. Field thought the rules for determining when personal jurisdiction exists derived from universally accepted principles of international law and concerns about relations among independent states. The substance of the rules for personal jurisdiction have little to do with protecting defendants, but given that the rules exist, the defendant has the right under the due process clause to insist that the rules are followed.

This basic approach in which the fourteenth amendment is used as an instrument for implementing preexisting rights leads to a third similarity between *Pennoyer* and Field's other fourteenth amendment opinions. It seems to be characteristic of Field (and probably others of his era) that he thought fundamental natural law rights were largely self-evident.¹⁷⁶ As a

173. The paragraph on the due process clause states:

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom the court has no jurisdiction, do not constitute due process of law. . . . [T]here can be no doubt of [the meaning of those terms] when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Pennoyer, 95 U.S. at 733.

174. See Abrams & Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 78 n.18 (1984); Rheinstein, *supra* note 138, at 791.

175. See, e.g., *O'Neil v. Vermont*, 144 U.S. 323, 362–63 (1892) (Field, J., dissenting); *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 756–57 (1884) (Field, J., concurring); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96 (1873) (Field, J., dissenting).

176. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 105. See generally C. SWISHER, *supra* note 139, at 426 (noting that "the content of these rights which he [Field] endeavored to protect through his judicial decisions was largely made up of his own ideas as to what was good in the life around him").

result, he was not as rigorous as one would have liked in his analysis of the supposed preexisting rules of natural law.¹⁷⁷

Field's analysis of what he thought to be the universally accepted rules of personal jurisdiction is similarly unsatisfying. Field asserts that it would be an "encroachment upon the independence" of a sister state for a forum to exercise jurisdiction over persons or property outside its borders.¹⁷⁸ Field never explains why one state is hurt by another state's exercise of judicial jurisdiction. How was California (Neff's supposed state of residence at the time of the original suit) hurt by Oregon's exercise of jurisdiction? California may be hurt when Oregon taxes people or property in California, at least if there is a limit on multiple taxation. It may be hurt when Oregon substantive laws are applied to conduct in California since that might encourage conduct which California considers undesirable or discourage conduct which it considers beneficial. It is far from clear, though, how California is hurt from the mere exercise of judicial jurisdiction by a sister state.¹⁷⁹ Moreover, as in the *Slaughter-House Cases*, Field overstates the evidence—the "universal" principles of personal jurisdiction were not as universally accepted as Field thought them to be.¹⁸⁰

177. The *Slaughter-House Cases*, for example, concerned a monopoly granted by the state of Louisiana to one New Orleans slaughterhouse. In the *Slaughter-House Cases* Field focused on the privilege and immunities clause of the fourteenth amendment rather than the due process clause. After the decision in the *Slaughter-House Cases*, Field shifted his focus to the due process clause. Nonetheless, this shift did not affect the basic analysis and Field's opinion in the *Slaughter-House Cases* remains one of the classic articulations of the position which formed the foundation for substantive due process. Field thought it largely self-evident that such a monopoly violated fundamental law. He asserted early in his dissent: "No one will deny the abstract justice which lies in the position of the plaintiffs in error" 83 U.S. (16 Wall.) at 86. To Field, it was unthinkable that the states could have the power to grant monopolies and thereby interfere with "the sacred right of labor." *Id.* at 106. Though Field did attempt to reinforce his views with some objective evidence—specifically the treatment of monopolies in England—Field substantially overstates the evidence. After a lengthy discussion, Field concurred that "[t]he common law of England . . . condemned all monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade." *Id.* at 104. This conclusion is simply not accurate—the battles in England were not so much over whether monopolies could be granted but over who should grant them. See Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954).

Some other examples of the universal and self-evident propositions set forth by Field were that the issuance of paper money violated the "universal law of currency," *Julliard v. Greenman*, 110 U.S. 421, 452 (1884) (Field, J., dissenting), and that all nations "possessing any degree of civilization" observed Sunday closing laws. *Ex parte Newman*, 9 Cal. 502, 520 (1858) (Field, J., dissenting).

178. *Pennoyer*, 95 U.S. at 723.

179. See *Abrams & Dimond*, *supra* note 174, at 84; *Drobak*, *supra* note 53, at 1050.

180. See *supra* notes 138, 139; see also *Casad*, *supra* note 138, at 61; *Ehrenzweig*, *supra* note 132, at 289 n.3, 299, 308; Note, *supra* note 138, *passim*. Field thought that the jurisdictional limits on state taxing authority were similarly self-evident. In *Case of the State Tax on Foreign-Held Bonds*, 82 U.S. (15 Wall.) 300, 319 (1872), he asserts:

[P]roperty lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to

Field's lack of rigor in analyzing what he thought to be the preexisting rules of personal jurisdiction may not be surprising. Not only might Field have thought those principles to be self-evident, but the precise contours of these principles were not relevant to the actual case (since the in personam discussion was dictum). Moreover, the scope of these preexisting principles may not have been Field's primary concern. Field may have been less concerned about the precise contours of the rules for personal jurisdiction and more concerned about the framework which he offered for analyzing fourteenth amendment cases.

Field's opinion in *Pennoyer* is not merely of historical interest. As is so often the case, the person who frames the issue controls the debate. So it is with personal jurisdiction. Field's opinion continues to influence personal jurisdiction doctrine today.¹⁸¹

III. JURISDICTION TODAY

In the one hundred plus years since *Pennoyer*, the Court has expanded significantly the jurisdictional power of states. If *Pennoyer* arose today, the court would probably decide there was personal jurisdiction.¹⁸² Despite the changes, personal jurisdiction retains a doctrinal core derived from Field's opinion. Just as in Field's time, personal jurisdiction continues to be treated as a substantive due process right.¹⁸³ Similarly, modern courts continue to perceive personal jurisdiction as a confrontation between state power and

establish so obvious a proposition. The power of taxation . . . is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business.

181. See generally Hazard, *supra* note 108, at 241; Jay, *supra* note 151.

182. See *supra* text accompanying notes 124-25.

183. See R. FIELD, B. KAPLAN & K. CLERMONT, CIVIL PROCEDURE 717 n.e (4th ed. 1978); Rheinstein, *supra* note 138, at 789; Whitten, *supra* note 143, at 736. Classifying personal jurisdiction as a substantive rather than a procedural due process concept eliminates an anomaly that would otherwise exist. Field noted in *Pennoyer* that "proceedings in a court . . . [which lacks personal jurisdiction] do not constitute due process of law," *Pennoyer*, 95 U.S. at 733, but it does not necessarily follow from this that such proceedings violate the due process clause. A violation of the clause requires deprivation of life, liberty, or property. See *Ingraham v. Wright*, 430 U.S. 651, 672 (1977); *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). Specifically, it is not at all clear that a taking of life or property occurs by virtue of the mere assertion of jurisdiction, prior to judgment or enforcement of a judgment. See Rheinstein, *supra* note 138, at 779; Note, *supra* note 138, at 453-55. Nonetheless, the Court has found violations of the due process clause in cases before there was enforcement or even a judgment. See, e.g., *World-Wide Volkswagen v. Woodsen*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978). Moreover, in some of these cases it seems unlikely that enforcement ever would be sought against the complaining defendant. In *World-Wide Volkswagen*, for example, even if the local dealer had stayed in the case and the plaintiff had prevailed, one suspects that it would be the manufacturer not the local dealer who would ultimately pay. If personal jurisdiction is a substantive due process right, however, then the mere existence of a proceeding in an improper forum is itself a taking of liberty regardless of whether it results later in a taking of property. This further suggests that *York v. Texas*, 137 U.S. 15 (1890), has at least been partially overruled. That case held that the mere entry of a judgment which was void for lack of personal jurisdiction is not a taking of liberty or property.

the defendant, with the plaintiff's interest being largely irrelevant.¹⁸⁴ Finally, modern courts assume, as did Field, that the proper scope of personal jurisdiction is closely tied to geographic boundaries.

That personal jurisdiction is treated as a substantive due process protection has not always been recognized. Much of the recent commentary critical of current personal jurisdiction doctrine assumes that the only interest properly considered is the strictly procedural concern¹⁸⁵ of litigation fairness.¹⁸⁶ Certainly, however, the Court thinks there is some broader substantive interest at stake—some interest tied to state boundaries.¹⁸⁷ This is demonstrated by the Court's continued insistence that the defendant have sufficient "contacts" with the state. Thus, although it has abandoned *Pennoyer's* inflexible requirement of actual physical presence,¹⁸⁸ the Court continues to require that the defendant have engaged in some purposeful activities directed at the forum or its residents.¹⁸⁹ Moreover, the "contacts" requirement of the modern approach is intended as something more than some rough test of convenience.¹⁹⁰ This point is vividly demonstrated by

184. The Court has repeatedly stressed that state interest is a relevant consideration in assessing whether personal jurisdiction exists and has sometimes even suggested that the state's interest is dispositive. *See, e.g.,* Shaffer v. Heitner, 433 U.S. 186, 214–15 (1977); Hanson v. Denckla, 357 U.S. 235, 252 (1958); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Lewis, *supra* note 45. The Court has, by contrast, paid far less attention to the plaintiff's interest. *See, e.g.,* World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980).

185. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 417 (2d ed. 1983); Grey, *Procedural Fairness and Substantive Rights*, in DUE PROCESS; NOMOS XVIII 183 (J. Pennock & J. Chapman eds. 1977).

186. *See, e.g.,* Lewis, *supra* note 45, at 771; Redish, *Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112 (1981); Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OREG. L. REV. 485, 522–27 (1984).

187. One commentator has described the approach as "neo-territorial." McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1, 4 (1982).

188. *See, e.g.,* Calder v. Jones, 465 U.S. 783 (1984); Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174 (1985); *see also* Clermont, *supra* note 142, at 445 (noting that the Court has shifted from a focus on physical power to "metaphorical power"). *But see* Shaffer v. Heitner, 433 U.S. 186, 213 (1977) (noting that the defendants never "set foot" in the forum).

189. *See* Asahi Metal Indus. Co. v. Superior Court, 107 S. Ct. 1026, 1031–33 (O'Connor, J., for the plurality), 1035 (Brennan, J., concurring in part and in the judgment) (1987); Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174, 2182 (1985); World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980); Hanson v. Denckla, 357 U.S. 235, 253 (1958).

190. *See* Hanson, 357 U.S. at 251 (restrictions on personal jurisdiction "more than a guarantee of immunity from inconvenient . . . litigation"), *quoted in* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 294 (1980); Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 21–22 (1982); Redish, *supra* note 186, at 1117–18, 1137. *But see* Clermont, *supra* note 142, at 416; Lewis, *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 709 (1983) (suggesting that the minimum contacts test is a rule of thumb for estimating convenience and reasonableness). In *International Shoe*, the Court did mention an "estimate of the inconveniences"

the Court's recent opinion in *Asahi Metal Industry Co. v. Superior Court* in which the Court treated the contacts test and concerns about litigation fairness as distinct elements, with both necessary in order to support jurisdiction.¹⁹¹ Second, in today's world with modern transportation and metropolitan areas which overlap multiple states, the contacts test with its emphasis on state boundaries seems a crude and inappropriate measure of convenience. Finally, the Court's application of the contacts requirement shows little concern for actual litigation convenience. The focus is on past rather than current contacts¹⁹² and it is sufficient for the defendant to have "directed" his activities at a resident of the forum¹⁹³ or to have purposefully availed himself of privileges or protection of the forum¹⁹⁴ regardless of whether the defendant has ever been physically present in the forum.

If the contacts requirement and territoriality element of personal jurisdiction have nothing to do with convenience, then what is the interest they are intended to protect? The Court has never offered much explanation but seems simply to have accepted Field's approach as largely self-evident. In *International Shoe*, for example, the Court merely asserts that the due process clause "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations."¹⁹⁵ The Court, however, never explains why such a judgment would violate the due process clause, or why personal jurisdiction must be tied to state boundaries. Likewise, in *Insurance Corporation of Ireland* the Court states that "[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest."¹⁹⁶ Yet, the Court nowhere explains what that liberty interest is or why it has some connection with state boundaries.¹⁹⁷

which result from distant litigation, 326 U.S. at 317, but this factor was in addition to the "minimum contacts" requirement.

191. Justice O'Connor wrote for the Court. The analytical portion of her opinion is divided into two sections. In the first section she analyzed whether the defendant had sufficient contacts with the forum and concluded that it did not. 107 S. Ct. at 1029-31. In the second section she analyzed fairness considerations and concluded that litigation in the forum would be unfair and unreasonable. *Id.* at 1035. Five Justices dissented from the section of the opinion discussing the contacts test and specifically found that the defendant did have sufficient contacts. *Id.* at 1035-38 (Brennan, J., concurring in part and in the judgment); *id.* at 1038 (Stevens, J., concurring in part and in the judgment). However, these five Justices concurred in O'Connor's analysis of the fairness considerations, and thus, although they thought that there were sufficient contacts to satisfy that prong of the jurisdictional test, they nonetheless concluded that fairness considerations defeated jurisdiction in this case.

192. See, e.g., *McDaniel v. Armstrong World Indus.*, 603 F. Supp. 1337, 1343 (D.D.C. 1985).

193. See *Calder v. Jones*, 465 U.S. 783 (1984).

194. See *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985).

195. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

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

197. Moreover, the Court nowhere acknowledges the extensive case law concerning the meaning of "liberty" in the due process clause. See, e.g., *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 845-46 (1977); *Paul v. Davis*, 424 U.S. 693, 699-718, *reh'g denied*, 425 U.S.

A. Defining the Interests Protected by Personal Jurisdiction

1. Territorial Limitations on State Power

On a few occasions, the Supreme Court has attempted to go beyond its usual treatment of the personal jurisdiction rules as self-evident and to offer some explanation for the territorially based framework established by *Pennoyer*. Nevertheless, the explanations have been brief and inadequate. One explanation the Court has offered is that it is a consequence of the “territorial limitations on the power of the respective States.”¹⁹⁸ In other words, jurisdiction represents an assertion of state authority and state authority is inherently territorially limited.¹⁹⁹ This observation, however, explains nothing

985 (1976); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Butler v. Perry*, 240 U.S. 328, 333 (1916); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897). See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 185, at 452–61; Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 133–39 (1978). This mere assertion of a liberty interest seems even more startling coming from the same Court which has in recent years taken some pains to narrow the scope of “liberty.” See, e.g., *Bowers v. Hardwick*, 106 S. Ct. 2841, 2843–46 (1986); *Olim v. Wakinekona*, 461 U.S. 238 (1983); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Meachum v. Fano*, 427 U.S. 215 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972); Monaghan, *Of “Liberty” and “Property,”* 62 CORNELL L. REV. 405 (1977).

198. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958), *quoted in* *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 294 (1980).

199. See *Shaffer v. Heitner*, 433 U.S. 186, 204 n.20 (1977); Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U.L.Q. 377, 383 (1985). In support of this position that judicial jurisdiction is inherently territorially limited, Professor Weisburd has argued that there are similar sovereignty constraints which limit states’ authority to tax nonresidents, to regulate property in other states, or to punish nonresidents for crimes in other states. *Id.* at 386–401. While it is true that state authority in these other areas is not unlimited, modern cases in these areas do not support the conclusion that the constraints on state authority stem from territorial sovereignty.

In the tax area, although the early cases talk in terms of territorial limits of state sovereignty, see, e.g., *Case of the State Tax on Foreign-Held Bonds*, 82 U.S. (15 Wall.) 300, 319 (1872); *Hays v. Pacific Mail S.S. Co.*, 58 U.S. (17 How.) 596, 598 (1854), this is no longer true. While the Court continues to require that there be some minimal connection between the state and the nonresident taxpayer, this requirement is not related to territorial sovereignty, but stems from the fact that taxes are the quid pro quo for services rendered by a state and thus can only be levied against those who plausibly received something from the state. “The simple but controlling question is whether the state has given anything for which it can ask return.” *Asarco Inc. v. Idaho State Tax Comm’n*, 458 U.S. 307, 315 (1982) (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)). As Professor Martin has observed, the modern tax cases seem to be more concerned with fairness than territorial power. See Martin, *A Reply to Professor Kirgis*, 62 CORNELL L. REV. 151, 152 (1976); see also Redish, *supra* note 186, at 1135.

The cases concerning lack of state authority to regulate property or crimes in other states are examples of situations in which state regulatory authority, sometimes called legislative jurisdiction, is limited. At the outset, it should be noted that the Court has generally allowed a state very broad authority to apply its laws to situations largely unconnected to that state. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). Moreover, as in the tax cases, to the extent the Court has limited states’ legislative jurisdiction it has generally not relied on notions of territorial sovereignty, but has instead focused on concerns about fairness. See W. RICHMAN & W. REYNOLDS, *UNDERSTANDING CONFLICT OF LAWS* 244, 246 (1984). In particular, the Court has focused on the expectations of the parties at the time of the conduct in question. See *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965, 2980–81 (1985);

about personal jurisdiction. Of course, the authority of states is in some sense limited territorially. Unless this is an attempt to revive Field's discredited notion that states can only "directly" affect things located within the state,²⁰⁰ however, this observation is quite unhelpful. One could argue that as long as a state court is physically located within the state which established it and does not roam around the country looking for disputes but instead only resolves

Redish, *supra* note 186, at 1134. The two specific areas which Weisburd discusses provide, at best, weak support for his position. As to the local action rule, while there is authority that seems to treat the rule as a jurisdictional matter linked to state territorial sovereignty, there are other cases which treat the rule as a matter of venue, not jurisdictional power. *See* *Humble Oil & Refining Co. v. Copeland*, 398 F.2d 364, 367 n.5 (4th Cir. 1968) (noting there is disagreement about whether local action rule is a matter of jurisdiction or venue); J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* 87 (1985). *Compare* *Eddington v. Texas & New Orleans R.R.*, 83 F. Supp. 230 (S.D. Tex. 1949) (local action rule is a matter of venue), *with* *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521-22 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985) (local action rule is a matter of jurisdiction). Moreover, as Professor Currie has observed, the local action rule seems to be largely grounded in English history and the forms of common law; Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 67-72 (1959); *see* Wicker, *The Development of the Distinction Between Local and Transitory Actions*, 4 TENN. L. REV. 55 (1925). Moreover, the rule itself has been criticized. *See, e.g.,* W. Richman & W. Reynolds, *supra*, at 100-01, 218-20. In the criminal area, it is true that under the traditional common law approach, a state could assert criminal jurisdiction only if the gravamen of the offense occurred within the territorial boundaries of the forum. *See* Comment, *Jurisdiction Over Felony Murder*, 50 U. CHI. L. REV. 1431, 1434 (1983). However, not only has strict territoriality eroded over the years, *see generally* L. BRILMAYER, *AN INTRODUCTION TO JURISDICTION* 324-26 (1986), there is relatively little authority on the extent to which a territorial approach is constitutionally mandated. *See* Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEX. L. REV. 763, 773-81 (1960). Moreover, any constitutional limits that do exist may reflect, at least in part, venue and vicinage requirements imposed by the sixth amendment, *see generally* L. BRILMAYER, *supra*, at 329-35, or concerns about subjecting conduct to conflicting criminal standards, *see* *Nielson v. Oregon*, 212 U.S. 315, 321 (1909), rather than concerns about the inherent territoriality of state power.

Finally, the antisuit injunction cases seem to have little to do with territorial sovereignty. As Weisburd himself notes, injunctions against suits in other states are not considered void, Weisburd, *supra*, at 391 n.62, and thus they do not support the broad proposition that state courts lack jurisdiction to issue orders the legal consequences of which are "felt exclusively outside the forum state." *Id.* at 391. As Professor Reese has explained, the reason why antisuit injunctions are not subject to the full faith and credit clause is that they are "thought to be a situation where the national policy of full faith and credit should bow before the obvious interest of an individual state in being permitted . . . to control the actions of its own courts." Reese, *Full Faith and Credit to Foreign Equity Decrees*, 42 IOWA L. REV. 183, 198 (1957); *see also* RESTATEMENT (SECOND) OF CONFLICTS § 103 comment b (1971). Thus, antisuit injunctions involve issues of comity and the relations between coequal sovereigns rather than issues of power.

200. *Pennoyer v. Neff*, 95 U.S. at 722; *see* Hazard, *supra* 108, at 264.

questions that have been brought before it by a plaintiff, then it has fully complied with the territorial limitation on its authority to adjudicate.²⁰¹

2. Federalism

The Court has also explained the prominence of territoriality in modern personal jurisdiction theory as having something to do with federalism, that is, with the protection of states from other states. As the Court explained in *World-Wide Volkswagen*, the due process clause “acting as an instrument of interstate federalism” may divest a state of jurisdiction even where there is no unfairness to the defendant.²⁰² This explanation seems to derive from Field’s mention of international law and concerns about relations among states.²⁰³ Nonetheless, the Court’s federalism theory seems to be a misapplication of Field’s opinion. Field’s discussion of international law was simply part of his analysis of what he saw as the inherent limitation on state power.²⁰⁴ But Field understood as well as anyone that due process was a protection for individuals, not a protection for states. His opinions on the fourteenth amendment vividly demonstrate that he believed that provision to be a major limitation on the power of states to affect the rights of individuals.²⁰⁵ Nowhere in his fourteenth amendment opinions does Field express concern about protecting states from other states; his sole concern was to protect private rights from usurpation by the states.²⁰⁶ Most importantly, regardless of whether the

201. Some commentators have argued that judicial jurisdiction is proper only if the conduct involved has a sufficient connection with the forum that the forum could properly regulate that conduct. See Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77; Weisburd, *supra* note 199, at 404–05. This assumes, however, that the scope of judicial jurisdiction should be no more extensive than legislative jurisdiction. It is not obvious why this should be so. See Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149, 151 n.7 (1981), and authorities cited therein. Overly expansive legislative jurisdiction is not only more intrusive into the sovereignty of other jurisdictions, it presents the potential for subjecting people to inconsistent legal standards. For example, it would be unacceptable for the State of Nevada to legislate the speed limit in California. Judicial jurisdiction does not present these problems (or at least not to the same degree).

202. 444 U.S. 286, 294 (1980).

203. See *Pennoyer*, 95 U.S. at 722–23; Redish, *supra* note 191, at 1116.

204. See *supra* notes 175–80 and accompanying text.

205. See *supra* cases cited in note 153.

206. Further, for all the talk in *Pennoyer* about sovereignty of states, that is surely not what the case is about, because the result of the case is in fact a major intrusion into state sovereignty. The issue in *Pennoyer* was not whether the prior judgment could be enforced. The issue was whether the federal court would evict a holder of a title issued pursuant to a sheriff’s auction held pursuant to an Oregon judgment. The federal court in *Pennoyer v. Neff* did not merely decline to enforce a judgment, it affirmatively undid the prior action of the Oregon state court. This is hardly a step which preserves state sovereignty.

federalism explanation is consistent with Field's opinion, it simply makes no sense to turn the fourteenth amendment from a provision protecting citizens from states into a provision protecting states from other states. As others have amply demonstrated, contrary to the Court's assertion in *World-Wide Volkswagen*, the due process clause is surely *not* "an instrument of interstate federalism."²⁰⁷

3. *Individual Liberty Interests*

More recently, the Court has itself acknowledged that the federalism explanation is inconsistent with its theory that the principle of personal

207. 444 U.S. at 294; see, e.g., Lewis, *supra* note 45, at 809–12; Redish, *supra* note 186, at 1113–14, 1129, 1132.

Professor Brilmayer has offered a variation of a federalism argument to explain why it is constitutionally necessary that defendants be able to control where they are subject to suit. She argues that unless we require purposeful contacts by the defendant with the forum, states could improperly impose costs on nonresident consumers because defendants who could not structure their conduct to avoid high cost states would have to raise their prices to everyone to cover the potential cost. Brilmayer, *supra* note 201, at 94–96. This explanation is not adequate for several reasons. First, it is important to recognize that the costs at issue are not the costs of litigation or the amount of any liability judgment—they are only the difference in cost in litigating in one place rather than another. Thus, the scale of the costs involved is relatively small. Second, even requiring purposeful contacts, states can still impose costs on nonresidents. Brilmayer assumes that if defendants can structure their conduct to avoid high cost jurisdictions they can and will either decline to deal with that jurisdiction or will deal with residents of that jurisdiction only at a higher price which reflects the higher cost of potential litigation there. This assumes that price discrimination is possible, an assumption that is not always warranted. Suppose the *National Enquirer* were to decide that California is a high cost jurisdiction in which to litigate. It could stop selling newspapers in California or it could charge a higher price in California. The *National Enquirer* might also choose, however, a third course which is to charge a higher price nationwide. It might take this third course if it were not practically or economically feasible to charge a different price in California. Thus, even under a system which requires purposeful contacts, people in Florida may pay more for the *National Enquirer* simply because California is an expensive place to litigate. Finally, Brilmayer analyzes the economic implications of imposing those costs on the defendant, but does not consider the implications of imposing those costs on the plaintiff. If the plaintiff is in Oklahoma and the defendant is in New York, then one of them will have to bear the cost of distant litigation. If the jurisdictional rules force the plaintiff to litigate in New York, then it is the plaintiff who is forced to bear these costs. New York could permit successful plaintiffs to recover the expenses associated with litigating in that more distant forum, but New York has no incentive to impose such a cost shifting rule because the absence of such a rule is a way to lower the costs of its local businesses at the expense of people who live in other states. See Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1185–86.

One might respond, of course, that the plaintiff knowingly bought the product and that this justifies a general rule that plaintiffs must assume the cost of distant litigation. Thus, when someone buys a product from a New York firm, he knows that the true cost of that product is the cash price, plus the cost of litigating in New York times the likelihood of such litigation. Having calculated the true price, our knowledgeable buyer may conclude that New York products are too expensive and buy fewer of them. Thus, New York pays the price for its refusal to have a cost shifting rule. For this analysis to work, however, we must assume that the buyer is in a position to know where each product has come from and thus to properly calculate its true cost. Buyers may not have this information, and even if they did, it might be so time-consuming to make these individual calculations, that it is more efficient for buyers to spread this risk over all purchases from all states.

jurisdiction emanates from the due process clause.²⁰⁸ The due process clause protects individual rights, not states' rights. This recognition, though, has not eliminated the territoriality element.²⁰⁹ Now the Court merely asserts that the territoriality element is necessary in order to protect citizens. The shift still does not explain why boundaries should matter; it in fact presents the problem more boldly. If the due process clause protects litigants, then before one can define and rationalize the appropriate test, one must first determine what it is one is protecting litigants from. That the Court has never asked this question, let alone attempted to answer it, may be the strongest testament to the grip which *Pennoyer* holds on us.

In some of its recent cases, the Court has stressed that the reason for requiring contacts with the forum is to give defendants "fair warning" about what conduct will subject them to jurisdiction²¹⁰ and allow them to "structure their primary conduct" to control where they will be subject to jurisdiction.²¹¹ This does not, however, explain why boundaries matter or, to put it differently, why defendants have a constitutional right to know and be able to control whether they will be subject to jurisdiction in any given state. We could have a strict liability personal jurisdictions system in which defendants could be sued wherever their conduct caused injury. In substantive tort law, strict liability is clearly constitutional. If a defendant engaged in certain activities can be liable whenever injury occurs, why can't that defendant be subject to suit wherever injury occurs?²¹²

Although the Court has apparently thought it obvious that subjecting a defendant to jurisdiction in a state as to which the defendant has no contacts is a taking of "liberty," I must admit that I do not find this quite so clear. It is true, of course, that the Court has in a variety of contexts construed very broadly the word "liberty" as it is used in the due process clause,²¹³ but the

208. *Insurance Corp. of Ireland v. Compagnie des Bauxetes de Guinee*, 456 U.S. 694, 702 n.10 (1982).

209. The Court continues to stress the importance of the defendant having purposeful contacts with the forum. *See, e.g., Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174, 2181-82 (1985); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 417 (1984).

210. *Burger King Corp.*, 105 S. Ct. at 2182 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)).

211. *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

212. Professor Brilmayer in her article on personal jurisdiction raised this analogy between substantive strict liability and personal jurisdiction. Brilmayer, *supra* note 201, at 94-95. She concluded that although it is constitutional as a matter of substantive law to hold people strictly liable for certain conduct, strict liability personal jurisdiction is not constitutional. For a discussion of her rationale, see *supra* note 207.

213. A classic description of the scope of liberty is that given in *Meyers v. Nebraska*, 262 U.S. 390, 399 (1923), *quoted in Board of Regents v. Roth*, 408 U.S. 564, 573 (1972):

[Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own

Court has also noted that the range of interests protected by that clause "is not infinite."²¹⁴ The right to be free from litigation in a state to which one has not purposefully connected oneself does not seem to be one of those obvious fundamental rights "valued by sensible men."²¹⁵ Moreover, this supposed liberty interest seems different from other constitutionally protected liberty interests. A defendant in civil litigation remains free to go about all aspects of her life as she chooses. Admittedly, litigation can be an inconvenience in that defendants are subject to discovery and certain other compulsory processes,²¹⁶ but these burdens are the result of the fact of litigation and have nothing to do with the place of the litigation. Moreover, the location of litigation does not make that litigation unfair or arbitrary,²¹⁷ provided that the proceeding is not so distant that the defendant is unable to attend or prepare a defense.²¹⁸

conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

See *Moore v. East Cleveland*, 431 U.S. 494, 545-46 (1977) (White, J., dissenting); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

214. *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972); see also cases cited *supra* in note 197.

215. *Monaghan*, *supra* note 197, at 409. Recently, in *Daniels v. Williams*, 106 S. Ct. 662 (1986), the Supreme Court enumerated three purposes served by the due process clause. According to Justice Rehnquist, that clause "was 'intended to secure the individual from the arbitrary exercise of the powers of government,'" *id.* at 665 (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)), promotes fairness in the decision-making process, 106 S. Ct. at 665, and "serves to prevent governmental power from being used for purposes of oppression." *Id.* (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (16 How.) 272, 277 (1856)). Though personal jurisdiction has nothing to do with decisional fairness nor with concerns about preventing government power from being used for purposes of oppression, one might argue that it is an "arbitrary exercise of the powers of government" for a state to take jurisdiction of a case where the defendant has not purposefully connected himself with the state. However, the cases in which the Supreme Court has found in personam jurisdiction can hardly be characterized as arbitrary attempts by those states to exercise power. There was nothing arbitrary in Delaware's attempt to take jurisdiction over the directors of a Delaware corporation, see *Shaffer v. Heitner*, 433 U.S. 186 (1977), or California's attempt in a child support case to get jurisdiction over the father where the children were residing in California, see *Kulko v. Superior Court*, 436 U.S. 74 (1978), or Oklahoma's attempt to get jurisdiction over the seller of a car which blew up in Oklahoma, see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). In none of these cases was the state acting in a capricious way. In all of these cases there were plausible reasons for the exercise of governmental authority.

216. See, e.g., *FED. R. CIV. P.* 11, 37; see also *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965, 2973 (1985) (discussing the "burdens" to which defendants are subject).

217. Professor Van Alstyne has argued that there is a liberty interest in "freedom from arbitrary adjudicative procedures." Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 *CORNELL L. REV.* 445, 487 (1977). The place of the litigation, however, does not seem to make that litigation "arbitrary," at least as Van Alstyne uses that word. He defines arbitrary procedures as ones that are "fundamentally unfair, biased, arbitrary, summary, peremptory, ex parte means that without justification create an intolerable margin of probable error or prejudice." *Id.* at 488.

218. See *Redish*, *supra* note 186, at 1113-14. Professor Redish argues that the test for jurisdiction should be whether the parties will suffer meaningful inconvenience. *Id.* at 1138.

Though the Court has not seen fit since *Pennoyer* to offer much analysis of the interests protected by personal jurisdiction, a few commentators have suggested that the liberty interest protected by due process is “the defendant’s interest in freedom from an unrelated sovereign.”²¹⁹ This explanation seems to derive at least in part from a social contract theory of government,²²⁰ and appears to be based on the idea that one ought not be subject to a judicial system which one did not choose and as to which one has no political input.²²¹ One might elaborate further and note that even today, states retain an importance beyond merely being political subunits. States are to some extent mechanisms “for recognition of social and cultural group differences”²²² and people identify with their own states and feel like outsiders in other states. This justification for the territorial component of personal jurisdiction is not without its appeal, at least in the context of individuals and their personal affairs though it is somewhat less persuasive in a commercial context.²²³ Moreover to the extent personal jurisdiction is based on concerns about bias and prejudice, those concerns can be met largely through diversity jurisdiction and removal to the federal courts.²²⁴ Further, while it may be that some people feel like outsiders in a particular state and wish they didn’t have to litigate there, a question remains: What gives them a constitutional right not to litigate there? As Professor Redish has observed, “[U]nder our constitutional system, the inquiry is not why *should* a state be allowed to take an action, but why *shouldn’t* a state be allowed to do so.”²²⁵ Finally, if one accepts that there is a constitutionally protected liberty interest, plaintiffs as well as defendants should have such an interest.²²⁶ Why should the plaintiff be forced to resort to the courts of some other state to vindicate her rights? Plaintiffs, like

219. Drobak, *supra* note 53, at 1047.

220. See J. LOCKE, THE SECOND TREATISE OF GOVERNMENT § 119 (P. Laslett ed. 1960).

221. See Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 237 (1967); Redish, *supra* note 186, at 1125; Weisburd, *supra* note 199, at 378, 416 n.126. The Court has never relied on this rationale as an explanation for its approach to judicial jurisdiction. See Redish, *supra* note 186, at 1125. Nor has it used this as the justification for the limitations which exist on state authority to tax nonresidents or to apply its laws to nonresidents. See *supra* note 199.

222. Hunter, *Federalism and State Taxation of Multistate Enterprises*, 32 EMORY L.J. 89, 130 (1983).

223. See Jay, *supra* note 151, at 446.

224. See Redish, *supra* note 186, at 1139.

225. *Id.* at 1134 (emphasis in original) (footnote omitted).

226. See Brilmayer, *supra* note 201, at 89; Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 610–11 (1984); Lewis, *supra* note 45, at 810; Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 26 (1984); McDougal, *supra* note 187, at 9.

defendants, are subject to sanctions²²⁷ and the compulsory processes²²⁸ of the court; they may be forced to defend against counterclaims—even counterclaims unrelated to the original claim.²²⁹ No one likes to be an outsider in a strange place, but it is not clear why the Constitution should protect defendants but not plaintiffs from this unhappy situation.²³⁰

B. *The Future of Personal Jurisdiction*

In recent years, there have been occasional hints that the Court might be moving toward a reconsideration of some enduring elements of *Pennoyer*. On closer examination, however, the Court seems to be doing more tinkering than a fundamental reassessment. For example, in *Insurance Corporation of Ireland*, the Court acknowledged that personal jurisdiction protects an individual liberty interest, not the sovereignty of states.²³¹ Some, including Justice Powell, thought this foretold the elimination of the minimum contacts requirement.²³² However, in subsequent cases the Court has continued to emphasize that a purposeful “contact” with the forum is still required, even if that contact need not be physical.²³³ Similarly, the Court has suggested that it might begin moving away from its treatment of personal jurisdiction as a confrontation between the government and one

227. See, e.g., FED. R. CIV. P. 11; OHIO R. CIV. P. 11; 1 MICH. STAT. ANN. RULE 2.114.

228. See, e.g., FED. R. CIV. P. 37; OHIO R. CIV. P. 37; 1 MICH. STAT. ANN. RULE 2.313.

229. See *Adam v. Saenger*, 303 U.S. 59, 68–69 (1938); *Brandtjen & Kluge, Inc. v. Joseph Freeman, Inc.*, 75 F.2d 472, 472–73 (2d Cir.), *aff'd on other grounds sub nom. Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U.S. 53 (1935); *Mayer v. Development Corp. of Am.*, 396 F. Supp. 917, 933 (D. Del. 1975); *G & M Tire Corp. v. Dunlop Tire & Rubber Corp.*, 36 F.R.D. 440, 441 (N.D. Miss. 1964). See generally C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1416, 1424 (1969).

230. Professor Weisburd has asserted that it is not appropriate to consider the interest of the plaintiff in assessing the proper reach of personal jurisdiction. Weisburd, *supra* note 199, at 423–27. He argues that a court's failure to take jurisdiction does not deprive the plaintiff of any property interest because the court's failure to take the case does not affect the plaintiff's substantive claim. *Id.* at 423. There are several responses that can be made to this. First, this argument can be turned on its head and the same said of defendants: that is, the court's accepting jurisdiction does not offend any property right of the defendant because the mere accepting of jurisdiction does not affect the defendant's substantive defenses. Second, the Supreme Court has recently acknowledged that a plaintiff does have a property interest in his claim and the denial of a forum to adjudicate that claim can violate due process. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428–29 (1982); see also *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965, 2973 (1985). Finally, if defendants have some “liberty interest” which is affected by the place of litigation, why is the same not true of plaintiffs?

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

232. *Id.* at 713 (Powell, J., concurring); see *Burstein v. State Bar*, 693 F.2d 511 (5th Cir. 1982).

233. See, e.g., *Calder v. Jones*, 465 U.S. 783 (1984); *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985); see also *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1031 (O'Connor, J., for the plurality), 1036 (Brennan, J., concurring in part and in the judgment) (1987) (although the Court was split on the application of this standard to the facts of the particular case, there was no disagreement that knowing “contacts” were necessary).

party and instead try to accommodate the interests of both parties. In *Burger King*, the Court stated that a relevant factor in assessing jurisdiction is “the plaintiff’s interest in obtaining convenient and effective relief,” and even indicated that where this or other considerations were particularly compelling, it might require “a lesser showing of minimum contacts than would otherwise be required.”²³⁴ Nonetheless, the threshold inquiry remains whether the defendant “purposefully established minimum contacts within the forum.”²³⁵ Thus, the primary focus continues to be the relationship between the forum and one party (the defendant), not a balancing of the respective rights of the two parties.²³⁶

IV. CONCLUSION

Pennoyer is in many ways an extraordinary case. As the facts and Judge Deady’s opinion demonstrate, this case would have been an excellent vehicle for a more narrowly focused Supreme Court opinion dealing with the problem of notice. Justice Field, however, elected to write an opinion that went far beyond the actual case before him, but that conformed to his natural law philosophy and his views on substantive due process. Ironically, personal jurisdiction doctrine seems to be the longest surviving remnant of Field’s approach to the fourteenth amendment. In the area of state economic regulation, the Court has largely rejected substantive due process, and even in those areas in which the doctrine retains vitality, the court has become increasingly circumspect in its delineation of the scope of the liberty interests protected by substantive due process.²³⁷ By contrast, in the area of personal jurisdiction, although the test applied by the Court has

234. *Burger King*, 105 S. Ct. at 2184; see also *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1034 (1987) (noting that the plaintiff had little interest in litigating the case in the forum).

235. *Burger King*, 105 S. Ct. at 2184. Recently, in *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965, 2975 (1985), the Court acknowledged that the fourteenth amendment protects persons, not merely defendants. In that case the issue was whether a state court had personal jurisdiction over unnamed plaintiff class members with no connection with the state. The Court held that the state did have personal jurisdiction over all the plaintiff class members and explained that “a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.” *Id.* at 2975.

236. This approach contrasts with the approach in other areas of procedural due process in which the Court has recognized that the rights of the defendant are not absolute and that some balance must be struck between the rights of the defendant and the rights of the plaintiff. For example, in the area of notice, the Court has indicated that extraordinary measures need not be taken, even though the result may be that the defendant never learns of the suit against him. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Likewise, the Court has appeared to move toward a balancing of plaintiffs’ and defendants’ interests in the area of prejudgment attachment. See *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); Leubsdorf, *supra* note 226, at 610–11.

237. See *supra* notes 213–14 and accompanying text.

changed over the years, the doctrinal underpinning of territorial power, articulated in dicta 100 years ago, remains largely intact and unquestioned. Justice Field would surely be pleased.