Pennoyer's Limited Legacy: A Reply to Professor Oakley

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INTRODUCTION

In 1990 I wrote an article arguing that the Due Process Clause of the United States Constitution's Fourteenth Amendment does not set strong limitations on state court jurisdictional assertions.[1] I criticized the Supreme Court's "minimum contacts"[2] jurisprudence, and suggested that the Court replace it with a test focusing on whether the defendant faced a "practical inability to defend."[3] I contended, *inter alia*, that the constitutionalization of personal jurisdiction was not, as usually believed, suddenly brought about[4] by *Pennoyer v. Neff*.[5] My purpose was to suggest that the time had come to rethink the role that due process plays as the foundation of jurisdiction.

I argued that *Pennoyer* was amenable to two readings, one of which I called the "expansive" view and the other the "limited" view.[6] The expansive view is the conventional one which postulates that *Pennoyer* imposed direct limitations on personal jurisdiction. Under this view, any assertion of personal jurisdiction beyond the common law jurisdictional principles[7] violated due

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[1] Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990).

[2] The phrase comes from the Supreme Court's famous opinion in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[3] Borchers, *supra* note 1, at 99.

[4] *Id.* at 31-51.

[5] 95 U.S. 714 (1877).

[6] Borchers, *supra* note 1, at 38.

[7] The common law divided jurisdiction into in personam and in rem. In personam actions were founded either upon personal, in-state service of the summons, the defendant's appearance in court without contesting jurisdiction, or the defendant's domicile in the state. In rem actions were founded upon attachment of defendant's in-state

process. In contrast, the limited view asserts that *Pennoyer* invoked due process to guarantee defendants an opportunity to contest jurisdiction, but not to formulate the contents of jurisdictional rules and impose them on state courts. Under this view, states constitutionally could pass statutes expanding their jurisdictional reach beyond the common law. However, because of the pre-*Pennoyer* and *Pennoyer* interpretation of full faith and credit principles, any resulting judgment that exceeded the common law jurisdictional boundaries could be denied recognition in another government's court.[8]

I argued that *Pennoyer* left the question of which view was authentic in "splendid ambiguity."[9] I referred to the expansive view as plausible, and noted that the *Pennoyer* dissent apparently adopted it.[10] I nonetheless maintained that post-*Pennoyer* case law did not settle on the expansive view until the Supreme Court's 1915 decision in *Riverside & Dan River Cotton Mills v. Menefee*,[11] and that in the interim both views had support. In 1995, the editors of the *U.C. Davis Law Review* invited me to participate in a symposium honoring *International Shoe Co. v. Washington*'s[12] fiftieth anniversary, for which I submitted a paper restating some of my historical assertions and refining my proposed jurisdictional standard.[13] Professor John Oakley also participated and, in his paper, takes issue with me on many historical points.[14]

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property, accompanied by constructive notice, often by publication. In rem actions differed from in personam actions in that the former were limited in effect to determining the parties' rights in the property and were of very limited preclusive effect. *See generally* Borchers, *supra* note 1, at 32. In this article, when I use the phrase "common law" jurisdictional principles, I refer to this set of norms.

[8] *See, e.g.*, D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850) (holding New York judgment entered under New York's "joint debtors" statute should be denied recognition in Louisiana federal court because statute allowed for entry of judgment against all co-debtors based upon in-state service of only one of debtors).

[9] Borchers, *supra* note 1, at 43.

[10] *Id.* at 39.

[11] 237 U.S. 189 (1915).

[12] 326 U.S. 310 (1945).

[13] Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561 (1995).

[14] John B. Oakley, *The Pitfalls of "Hint and Run" History: A Critique of Professor Borchers's "Limited View" of* Pennoyer v. Neff, 28 U.C. DAVIS L. REV. 591 (1995).

Professor Oakley graciously refers to my original article as "thoughtful" and "influential," but based upon an ultimately "flawed" though "seductive" argument.[15] In particular, Professor Oakley maintains that my historical analysis reflects "an instrumental approach to historical inquiry that treats history as an exercise in rhetoric rather than the search for historical truth."[16] In contrast to my position, Professor Oakley contends that the record unambiguously supports only the expansive view, and that he can claim the mantle of objective "truth" and dispose of my position as "revisionist history."[17]

More is at stake than who is right in our interpretation of a 120-year-old Supreme Court opinion. Professor Oakley contends that my "instrumentalism" might undercut other constitutional rights. Because he believes *Pennoyer* authentically tied state court jurisdiction to due process, he argues that it cannot be deconstitutionalized without jeopardizing our constitutional structure.[18] My view is that *Pennoyer* did not unambiguously tie jurisdiction to due process, and that jurisdictional due process is merely a weird protuberance which the Supreme Court could amputate without endangering the body of constitutional law. As *Erie Railroad Co. v. Tompkins*[19] rejected a century-old doctrine partly because of its perceived historical infirmity,[20] so too could today's Court dismantle the edifice of constitutionalized state court jurisdiction.

I begin by thanking Professor Oakley, whose article contains much valuable information. His research prompted me to make additional inquiries that improved my understanding of post-*Pennoyer* case law. Furthermore, it is flattering that a scholar of his reputation would devote 163 pages to respond to his former student's argument.

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[15] *Id.* at 593-94.

[16] *Id.* at 594.

[17] *Id.* at 593.

[18] *Id.* at 753.

[19] 304 U.S. 64 (1938), *cert. denied*, 305 U.S. 637 (1938).

[20] *Id.* at 77-78. I actually disagree with *Erie* on the validity of the *Swift* doctrine's historical underpinnings, but not with its desire to reexamine the historically anomalous doctrine. *See* Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 86-110 (1993).

Yet, reluctantly, I must disagree with him. Professor Oakley's jurisprudential program, which asserts that even the most difficult of legal problems reduce to a singular right answer, and his belief in a purely objective theory of legal history,[21] have caused him to discount or ignore important information. *Pennoyer* did not clearly link due process and jurisdiction, and the matter remained unsettled long after.

Although there is a musty quality to our debate, it has modern implications. There are strong pragmatic justifications for rejecting constitutionalized state court jurisdiction. If I am correct that the fundamental role of the Due Process Clause as a limitation on jurisdiction remained in doubt for four decades after *Pennoyer*, then there is no historical impediment to rejecting it as the source of jurisdictional law. The current chaotic state of American jurisdictional law, coupled with its weak historical underpinnings, calls for its replacement with something more sensible. In my view, the matter of whether American jurisdictional law will make any real progress hangs in the balance. As long as state court jurisdiction remains tied to the Constitution, the best that we can hope for is incremental improvement. Real reform will come only when the subject is uncoupled from the Constitution.

Part I of my reply to Professor Oakley considers the *Pennoyer* opinion. It rejects his contention that the limited view of *Pennoyer* is implausible, devoid of content and foreclosed by the opinion. Part II considers post-*Pennoyer* authority. It demonstrates, contrary to Professor Oakley's conclusion, that post-*Pennoyer* authority supported the limited view for 37 years.

I. *PENNOYER*

Professor Oakley makes several arguments regarding my treatment of *Pennoyer*. His principal objections, however, are that the limited view has no content and therefore is implausible, and that the opinion's text foreclosed it. I address these in turn.[22]

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[21] *E.g.*, Oakley, *supra* note 14, at 595, 748-52.

[22] Professor Oakley also argues that the *Pennoyer* decision was consistent with the earlier decision in Galpin v. Page, 85 U.S. (18 Wall.) 350 (1873), a case not cited by the *Pennoyer* majority. Oakley, *supra* note 14, at 645-70. I respond to his arguments about *Galpin* accordingly. *See infra* notes 63, 65, 75 and 79 and accompanying text (responding to

A. The Limited View

Professor Oakley professes confusion about what I meant by the limited view of *Pennoyer*. I do not believe that this criticism is justified, but do not doubt his good faith and am happy to clarify.

The expansive view of *Pennoyer* is the conventional one that the Due Process Clause incorporated common law jurisdictional principles and imposed them on the states.[23] The limited view is that after *Pennoyer*, the Constitution provided "an avenue for challenging a state's exercise of personal jurisdiction in all cases, whether or not recognition of the judgment was sought interstate or intrastate, but [that] the Due Process Clause [did not] dictate the contents of those rules of jurisdiction."[24] Although I think that this formulation is tolerably clear, a hypothetical may better illustrate the difference.[25]

Suppose a state passed a statute allowing in personam jurisdiction over non-resident defendants based upon *out-of-state* service of the summons.[26] That statute clearly would exceed the

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Oakley's arguments about *Galpin*). Oakley also raises some collateral objections, related more directly to an article authored by Professor Perdue. *See* Oakley, *supra* note 14, at 671-83; Wendy C. Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479 (1987). I respond to those points *infra* at note 91.

[23] Borchers, *supra* note 1, at 38-39.

[24] *Id.* at 40.

[25] Apparently Professor Oakley's difficulties in understanding what I meant stem from a sentence in my original article that appears well after my discussion of the two views. Oakley, *supra* note 14, at 619. In the course of discussing Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915), I criticized the Supreme Court's summary rejection of the opinion below of the North Carolina Supreme Court. In *Menefee*, the North Carolina Supreme Court adopted the limited view. Menefee v. Riverside & Dan River Cotton Mills, 76 S.E. 741, 743 (N.C. 1912). The Supreme Court argued that this would only "postpone" an inevitable due process challenge to the judgment. *Menefee*, 237 U.S. at 195-96. As I argued in my original paper, this is clearly wrong; the difference between the views "is the difference between allowing the judgment some effect (intrastate recognition) or no effect." Borchers, *supra* note 1, at 50. It is this quoted sentence that gives Professor Oakley trouble, and perhaps the problem is my use of the term "recognition." What I meant to refer to was the ability of a court to enforce one of its own judgments without the necessity of presenting the judgment to another court. My view of the "limited view" is the one that Professor Oakley calls the "no limits" limited view. Oakley, *supra* note 14, at 618. Professor Oakley eventually settles on this as my "preferred" view. *Id.* at 621. As I explain in the text, the label "no limits" is misleading, because this view does have substantial content.

[26] 2 HENRY C. BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 902 (1st ed. 1891)(describing such statutes).

boundaries of common law jurisdiction because in personam jurisdiction depended upon *in-state* service. Under the expansive view of *Pennoyer*, such a statute would be unconstitutional, and any resulting judgment would be unenforceable in any court. Under the limited view, however, the rendering state court could order execution against the defendant's in-state property during the judgment's life, provided that the defendant had a fair opportunity to contest jurisdiction under state law. In other words, under the limited view of *Pennoyer*, a state court could enforce one of its own judgments even if the common law did not provide a jurisdictional basis for that judgment. Even under the limited view, however, another government's courts would deny such a judgment recognition based on the full faith and credit principles developed in *Pennoyer* and pre-*Pennoyer* cases.[27]

Professor Oakley contends that the limited view added nothing to a judgment debtor's arsenal, and therefore is implausible and "empty."[28] This argument is incorrect, and even if it were correct it would not render the limited view of *Pennoyer* implausible.[29] To explain his position, Professor Oakley constructs a "parable" of two hypothetical litigants, Nuff and Annoyer,[30] which is modeled on *Pennoyer*'s facts. Oakley modifies *Pennoyer*'s facts so that the judgment debtor (Nuff) brings his trespass case in an Oregon state, instead of federal, court. Oakley's hypothetical modification of *Pennoyer* is significant because placing the

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[27] *See, e.g.*, D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850).

[28] Oakley, *supra* note 14, at 622.

[29] It is a bit odd that Professor Oakley maintains that the codification of a common law concept as constitutional law renders it implausible. As I discuss below, the limited view could well have rendered state practices unconstitutional. *See infra* note 32. But as I also note below, the due process paragraph in *Pennoyer* specifically mentioned attacks on state judgments for lack of subject matter jurisdiction. *Pennoyer*, 95 U.S. at 732-33; *see also infra* note 83. The content of state subject matter jurisdiction doctrine is a matter of state law. *See generally* Edson R. Sunderland, *Problems Connected with the Operation of a State Court System*, 1950 WIS. L. REV. 585, 585-89 (discussing various legislative schemes for apportioning state subject matter jurisdiction). I assume that Professor Oakley does not contend that *Pennoyer* constitutionalized the content of state subject matter jurisdiction. In Oakley's view, then, *Pennoyer*'s invocation of subject matter jurisdiction in the due process paragraph was merely a "restatement" of existing law. Oakley, *supra* note 14, at 622. He argues that this is a fatal defect in my position, without noting that his view of *Pennoyer* is open to the same objection. I discuss the subject matter jurisdiction problems further at *infra* notes 82-84 and accompanying text.

[30] Oakley, *supra* note 14, at 622-26.

second lawsuit (the trespass action) in the same court as the first lawsuit eliminates any full faith and credit aspect to the case. But, as Oakley points out, a litigant in Nuff's position could argue, even without a due process or full faith and credit right to contest jurisdiction, that Annoyer's sheriff's deed was void because the judgment violated state jurisdictional law. Because the limited view would not provide Nuff with any rights he did not already have, Professor Oakley argues that it is "empty."

This example does not demonstrate the limited view's emptiness any more than the existence of some desegregated schools in 1955 demonstrates *Brown v. Board of Education*'s[31] "emptiness." Showing *one* case in which a constitutional principle is irrelevant does not demonstrate its irrelevance in *every* case. It requires little imagination to envision state rules denying a defendant's right to argue a violation of state jurisdictional law.[32] Thus, although it is true that the limited view postulates a less dramatic effect on state practice than the expansive view

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[31] 349 U.S. 294 (1955).

[32] *See, e.g.*, Peralta v. Heights Medical Center, Inc., 485 U.S. 80 (1988) (rejecting Texas rule of civil procedure providing that defendant could not collaterally attack default judgment without first showing meritorious defense to underlying claim). *Peralta* resembles Professor Oakley's *Annoyer v. Nuff* hypothetical: the judgment was both rendered and attacked in the same state court, although *Peralta* was a case dealing with notice, not personal jurisdiction. Oakley, *supra* note 14, at 622-26. But had the *Peralta* defendant wanted to raise an objection to personal jurisdiction, a rule like the Texas rule voided in *Peralta* would violate due process under the limited view because a defendant, unable to make the threshold showing of a meritorious defense, would be precluded from showing that the Texas state courts failed to follow their own jurisdiction.

Another possibility is one developed by Professor Oakley. Oakley, *supra* note 14, at 628-29 n.122. Many states used to treat jurisdictional recitals as conclusive and bar collateral attacks. The Supreme Court rejected this rule in full faith and credit cases. *See* Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1874) (holding that Full Faith and Credit Clause does not prevent inquiry into jurisdiction of judgment-rendering court). Treating the jurisdictional recitals as conclusive would, in many cases, make it practically impossible for a defendant to demonstrate that a state failed to follow its own rules of jurisdiction. Professor Oakley seeks to preclude me from raising this argument, contending that any effort on my part to do so would have "the salty smell of a salvage job." Oakley, *supra* note 14, at 628-29 n.122. Not so. I stated in my original article that the limited view "intended for defendants to have at least one chance to ensure that a state followed its own rules of jurisdiction, whatever those rules might be." Borchers, *supra* note 1, at 40. I did not survey every device by which a state might deny a defendant this right, because my concern was with tracing the entire development of jurisdiction, not just jurisdiction in this period. Borchers, *supra* note 1.

(hence my choice of the term "limited"), Oakley's suggestion that it would have no effect is incorrect.

Professor Oakley raises another objection to the limited view related to his *Nuff v. Annoyer* hypothetical. He argues:

> [W]hat nonresident seeking to invalidate a personal judgment by default upon constructive service of process would choose to sue in state court, when the federal courts, as "tribunals of different sovereignty, exercising a distinct and independent jurisdiction," would be free to follow the expansive view of *Pennoyer* in the guise of full faith and credit principles, if not of due process of law?[33]

Apparently, Oakley contends here that the practical difference between the expansive and limited views would be non-existent. He argues that if sued under a constructive or substituted service statute, a non-resident judgment debtor could always run to federal court to restrain or undo enforcement of the state judgment. The result, according to Professor Oakley, is that under the limited view, a judgment rendered under that statute would be practically unenforceable even within the rendering state.

To this there are several rejoinders. First, a non-resident defendant's ability to invoke the federal court's authority would depend upon fully diverse parties as well as a judgment exceeding the statutory amount in controversy.[34] Because of liberalized joinder rules, spurred by New York's adoption of the Field Code in 1848,[35] having non-resident defendants, yet non-diverse parties, was certainly possible. A judgment that did not exceed the

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[33] Oakley, *supra* note 14, at 630 (quoting *Pennoyer*, 95 U.S. at 732-33).

[34] *See* 28 U.S.C. §1332 (1988) (requiring diversity of parties between any plaintiff and any defendant); *see also* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806) (holding that diversity statute does not allow jurisdiction in cases of joint plaintiffs and joint defendants). From the Republic's earliest days, the diversity statute had a substantial amount in controversy requirement. The original Judiciary Act of 1789 set the amount at $500, and within a decade of *Pennoyer* it was $2000. CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS 190 (5th ed. 1994). Federal subject matter jurisdiction would not have been available under the then-recently-adopted federal question statute. *Id.* at 100-01 (indicating statute passed in 1875). Under the limited view, a judgment entered in compliance with a state jurisdictional statute and enforced by the courts rendering it would present no colorable conflict with any constitutional provision. Thus, any attempted federal lawsuit to restrain enforcement of such a judgment would not be cognizable on a federal question jurisdiction theory.

[35] Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of an Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 9-10 (1989).

statutory amount in controversy required for diversity jurisdiction was equally possible.[36]

Second, many judgment debtors could not obtain federal court relief even if federal subject matter jurisdiction existed. In *Pennoyer*, Neff had the good fortune that the judgment was enforced against realty.[37] But if a state judgment were enforced against personalty, a federal conversion suit would offer no relief if the purchaser and property disappeared after the sheriff's sale.

Third, not all courts interpreted *Pennoyer*'s principles to apply only to non-residents.[38] Thus, even in simple cases of one plaintiff suing one defendant in state court, there remained a significant class of judgment debtors without recourse to federal court, but with a colorable argument that *Pennoyer*'s principles had been violated.[39] For several reasons, then, Professor Oakley's argument that any judgment debtor would have had access to federal court to enforce *Pennoyer*'s principles simply is not accurate.[40]

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[36] *See supra* note 34 and accompanying text.

[37] *Pennoyer*, 95 U.S. at 714 (describing property as "land situated in Multnomah County, Oregon.").

[38] *See, e.g.*, De La Montanya v. De La Montanya, 44 P. 345, 346-48 (Cal. 1896) (stating that *Pennoyer* required in-state personal service for domiciliaries); Raher v. Raher, 129 N.W. 494, 500-01 (Iowa 1911) (stating that *Pennoyer* is intended to be applicable both to residents and non-residents).

[39] Another such possibility is suggested by Professor Oakley's *Nuff v. Annoyer* hypothetical. Oakley, *supra* note 14, at 622-26. A judgment debtor who was a non-domiciliary when the state court judgment was entered might later change his domicile to become non-diverse. Diversity of citizenship is measured at the time of the filing of the lawsuit, not at the time of the underlying events. *See, e.g.*, Freeport-McMoRan, Inc. v. K.N. Energy, Inc., 498 U.S. 426, 428 (1991).

[40] *See, e.g.*, Kane v. Cook, 8 Cal. 449, 455 (1857) (holding that other states' judgments were unenforceable outside of that state's boundaries); Lutz v. Kelly, 47 Iowa 307, 310 (1877) (stating in dicta that in-state and out-of-state effect of judgment founded upon constructive service statute is different); Melhop & Kingman v. Doane & Co., 31 Iowa 397, 402-03 (1871) (delineating case law which holds that judgments are unenforceable in another state without other state obtaining jurisdiction); Weaver v. Boggs, 38 Md. 255, 261-62 (1873) (explaining that judgment enforceable in F-1 may be denied recognition in F-2 if entered in violation of common law jurisdictional principles); Folger v. Columbian Ins. Co., 99 Mass 267, 273 (1868) (stating same in dictum); Ewer v. Coffin, 1 Cush. 23, 26-28 (Mass. 1848) (holding same); Winston v. Taylor, 28 Mo. 82, 86-87 (1859) (holding same); Price v. Hickok, 39 Vt. 292 (1866) (holding same). As discussed *supra* note 29, even if one assumes that the only effect of *Pennoyer* was to codify state practice, this objection is also open to Professor Oakley's reading of *Pennoyer*.

Thus, Professor Oakley has not succeeded in showing that the limited view is implausible on its face. It is, to be sure, a more limited construction of *Pennoyer* than the conventional one, but it is neither absurd nor self-contradictory. And, quite contrary to Professor Oakley's hyperbolic assertions, the limited view is not a product of my "own invention."[41]

Of course, the limited view seems unfamiliar now, but it prevailed prior to *Pennoyer*.[42] The limited view has become unfamiliar because of the expansive view's eventual triumph in 1915 and the concomitant merger of jurisdictional and judgment enforcement standards.[43] International litigators still encounter broad jurisdiction and narrow recognition rules,[44] and English courts in the *Pennoyer* era refused to recognize many judgments that were enforceable in the rendering courts.[45] As I discuss below, this notion of non-corresponding jurisdictional and judgment-recognition rules retained vitality well after *Pennoyer*.[46] Only the limited view would have allowed states the freedom to pass and enforce jurisdictional statutes exceeding the common law jurisdictional limits. The fact that states continued, long after *Pennoyer*, to pursue such practices fits only with my theory that the limited view was plausible.[47] But before considering state practice, let us turn to Professor Oakley's argument that the *Pennoyer* opinion established the expansive view and permitted no other.

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[41] Oakley, *supra* note 14, at 601.

[42] *See* cases cited *supra* note 40 (holding that out of state judgments may not be enforced).

[43] Oakley, *supra* note 14, at 594.

[44] Friedrich K. Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1205 (1984).

[45] *See, e.g.*, Schibsby v. Westenhotz, 6 L.R.-Q.B. 155, 163 (1870) (ruling that French judgment based upon French domicile of plaintiff not recognized in English court despite undoubted enforceability in France). Story, whose treatise the *Pennoyer* majority cited and quoted copiously, specifically referred to this European disjunction between jurisdiction and judgment-recognition. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 539, 546, 546a (7th ed. 1872).

[46] *See infra* notes 92-154 and accompanying text (discussing post-*Pennoyer* state practice).

[47] *See infra* notes 97-154 and accompanying text (discussing state courts that followed limited view).

B. The Pennoyer *Opinion*

After arguing that the limited view is implausible on its face, Professor Oakley next argues that the *Pennoyer* opinion forecloses the limited construction that I propose. He goes to considerable lengths to dissect the opinion in an attempt to demonstrate that the only possible reading is that which endorses the expansive view.[48] The following chart may help explain my position that the limited view is a plausible interpretation of the decision.

	F-1	F-2
Case 1	State A	State B
Case 2	State A	Federal B
Case 3	State A	Federal A
Case 4	State A	State A

"F-1" and "F-2" (the conventional short hand for the first and second forum) represent judgment-rendering and judgment-recognizing courts, respectively. A judgment taken from a state court ("State A") presents four possibilities. The judgment's effect might be litigated in a sister state court (Case 1), a federal court situated in another state (Case 2), a federal court situated in the same state (Case 3), or the rendering state's court (Case 4).[49] A judgment debtor's attack on F-1's judgment might involve one or both of two issues: whether the judgment violated either F-1's state jurisdictional law or its common law principles.[50]

Well before *Pennoyer*, the law was pretty well settled in Cases 1 and 2. The Full Faith and Credit Clause itself is directed to Case 1[51] and its implementing legislation extended its principles to Case 2 (and seemingly Case 3, although let us hold off on that point for a moment).[52] Quite early on, the Supreme Court in-

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[48] Oakley, *supra* note 14, at 631-44.

[49] With regard to Case 4, I mean for this to encompass both a situation in which the judgment debtor makes a collateral attack on the judgment for lack of jurisdiction in the same state court system rendering the judgment, and the circumstance in which a state allows for a special appearance to directly attack jurisdiction, and the defendant avails himself of that opportunity.

[50] *See* discussion *supra* note 7 (defining common law principles).

[51] U.S. Const. art. IV, § 1 (providing that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

[52] Act of May 26, 1790, ch. 11, 1 Stat. 122, *as amended by* Act of March 27, 1804, ch. 56,

terpreted the Full Faith and Credit Clause and its implementing legislation to reverse the common law principle that foreign judgments had only "evidentiary" effect.[53] However, decisions interpreting the Full Faith and Credit Clause and statute, in Cases 1 and 2, refused to enforce judgments entered in violation of F-1's state jurisdictional law.[54]

The more significant principle, in Cases 1 and 2, was that a judgment entered in violation of common law jurisdictional principles could be denied enforcement in F-2, even if it complied with F-1's state jurisdictional law. For instance, in *D'Arcy v. Ketchum*[55] (a Case 2), the Supreme Court held that it was error for a Louisiana federal court to enforce a New York state court judgment under New York's "joint debtors" statute. The statute allowed a court to enter a judgment against *all* co-debtors as long as *one* was served in-state.[56] Although the judgment conformed to New York law (and thus would have been enforced by a New York state court),[57] the Supreme Court held that the exercise of jurisdiction violated the common law principle requiring in-state service of all defendants.[58] Before *Pennoyer*, the Supreme Court decided a fair number of Cases 1 and 2, usually to ascertain whether the judgment taken from F-1 conformed with common law principles.[59] Thus, prior to *Pennoyer*, in Cases

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2 Stat. 298 (current version at 28 U.S.C. § 1738 (1988)).

[53] *See, e.g.*, Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813) (interpreting Full Faith and Credit Clause to alter rule that foreign judgments were merely evidentiary).

[54] *See, e.g.*, Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 469-70 (1873) (allowing collateral attack on judgment because judgment entered in violation of F-1 state law requiring hearing to take place in county in which vessel is seized).

[55] 52 U.S. (11 How.) 165 (1850).

[56] *Id.* at 173-74.

[57] *Id.*

[58] *Id.* at 174-76.

[59] *See, e.g.*, Habich v. Folger, 87 U.S. (20 Wall.) 1 (1873) (holding that when F-1 was New York state court and F-2 was Massachusetts state court, judgment was enforceable in F-2 because F-1 had jurisdiction); Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866) (holding that where F-1 was Kentucky state court and F-2 was Mississippi state court, Mississippi statute refusing enforcement of F-1's judgment was in violation of Full Faith and Credit Clause because F-1 judgment entered on common law jurisdictional basis); Shields v. Thomas, 59 U.S. (18 How.) 253 (1855) (holding that where F-1 was Kentucky state court and F-2 was Iowa federal court, F-1's judgment must be enforced by F-2 when entered on common law basis of jurisdiction); D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850) (holding that where F-1 was New York state court and F-2 was Louisiana federal court, F-2 cannot enforce judgment entered on jurisdictional basis not recognized by common law);

1 and 2, a judgment entered in F-1, either in violation of F-1's state jurisdictional law or the common law principles, was vulnerable to attack in F-2.

Case 3 was less clear. As a matter of literal construction of the full faith and credit implementing legislation, Case 3 should be treated identically with Cases 1 and 2. The statute placed "every court within the United States" under a duty to give state court proceedings the faith and credit "they have by law or usage in the courts of such State . . . ," and a federal court situated in the same state is a "court within the United States."[60] The Court in several instances faced a Case 3, but whether F-2 (the federal court sitting in F-1's state) gave effect to the judgment turned on whether F-1's *state law* of jurisdiction had been satisfied.[61] The Court did not take the next step, in a Case 3, of holding that a judgment entered in *compliance* with F-1's state jurisdictional law could be denied enforcement in F-2 for violating common law jurisdictional principles.[62] For instance, noth-

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Hampton v. M'Connel, 16 U.S. (3 Wheat.) 234 (1818) (recognizing possibility of plea to jurisdiction even in cases covered by Full Faith and Credit Clause); *see also* Lutz v. Kelly, 47 Iowa. 307 (1877) (challenging default judgment from another state as violation of common law jurisdictional principles); Weaver v. Boggs, 38 Md. 255 (1873) (stating that suit cannot be maintained from Pennsylvania court judgment on returns of *nihil* to two writs of *scire facias*, when defendant was citizen and resident of another state); Folger v. Columbian Ins. Co., 99 Mass. 267 (1868) (stating that New York Supreme Court judgment that corporation is dissolved is not entitled to faith and credit in Massachusetts); Price v. Hickok, 39 Vt. 292 (1866) (declaring that judgment for debt rendered in Massachusetts against citizen of Vermont is not enforceable).

[60] *See* sources cited *supra* note 51 (citing full faith and credit implementation statute).

[61] Galpin v. Page, 85 U.S. (18 Wall.) 350, 369-73 (1873); Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 318, 321 (1870); Deery v. Cray, 72 U.S. (5 Wall.) 795, 806-07 (1866); Harvey v. Tyler, 69 U.S. (2 Wall.) 328, 345-48 (1864); Nabby v. The State Bank, 53 U.S. (12 How.) 371, 383-84 (1851); Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336, 348-50 (1850); Voorhees v. United States Bank, 35 U.S. (10 Pet.) 449, 469-73 (1836); Steele's Lessee v. Spencer, 26 U.S. (1 Pet.) 550, 559 (1828); Elliott v. Lessee of Peirsol, 26 U.S. (1 Pet.) 328, 340 (1828); Kempe's Lessee v. Kennedy, 9 U.S. (5 Cranch) 173, 185 (1809).

[62] A suggestion that the common law principles might become an independent ground for collateral attack in a Case 3 appeared occasionally in earlier cases, as in *Elliott*, where the Court stated: "We know nothing in the organization of the circuit courts of the Union, which can contradistinguish them from other courts, in this respect." *Elliott*, 26 U.S. at 340. But the phrase "in this respect," as shown by the Court's discussion immediately thereafter, meant with regard to challenging F-1's judgment under F-1's jurisdictional law. *Id.* There is also, perhaps, such a suggestion in Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870), in which the Court discussed the subject of jurisdiction in general, common law terms. *Id.* at 316-17. But *Cooper* gave effect to the judgment, and concluded its opinion (and its discussion of jurisdiction) stating "we believe this to be the law, *as held by the courts of*

ing in the Supreme Court's[63] opinion in *Galpin v. Page*[64] (the Case 3 immediately preceding *Pennoyer*) recognized non-compliance with common law principles as an *independent* ground for a federal court to deny effect to one of its home state's judgments.[65]

Tennessee [F-1]." *Id.* at 321 (emphasis added).

[63] As Professor Oakley notes, *see* Oakley, *supra* note 14, at 665, the full faith and credit language that appears in *Pennoyer* reproduces the language in Justice Field's circuit opinion in *Galpin* almost verbatim. Galpin v. Page, 9 F. Cas. 1126, 1131 (C.C.D. Cal. 1874) (No. 5,206). Field, as was the case in *Pennoyer*, failed to cite any authority as directly supporting his "different sovereignty" rationale. *Id.* at 1131-32. He did cite authority for the proposition that the application of full faith and credit principles does not prevent an inquiry into jurisdiction. *Id.* at 1132. This differs, however, from holding that full faith and credit principles are applicable in Case 3. Field's failure to cite any direct authority in Case 3 was surely because, as discussed in the text, the Supreme Court Case 3 opinions were all decided on state law grounds. Field's sensitivity to the possible difference in Supreme Court treatment of Case 2 and Case 3 is actually clearer in his circuit opinion in *Galpin*. Here is his more extended rationale offered in the circuit opinion in *Galpin*:

> The circuit court of the United States for the district of California has the same authority to examine into the jurisdiction of a state court of California, when its judgment is produced, as the circuit court of the United States for the district of New York has, when the same judgment is produced before that tribunal. All the circuit courts of the United States have the same relation to the state courts . . . .

Id. at 1132.

[64] 85 U.S. (18 Wall.) 350 (1873).

[65] *Galpin*, 85 U.S. at 369 ("When, therefore, by legislation of a State constructive service of process is substituted . . . every principle of justice exacts a strict and literal compliance"); *id.* at 373 (F-1's decree invalid because "the provisions [of the state service statute] mentioned were not strictly pursued"). Professor Oakley devotes considerable space to *Galpin*, and his extensive treatment of it is one of the most interesting portions of his article. Oakley, *supra* note 14, at 645-70. I asserted in my original article that there were some strong parallels between *Galpin* and *Pennoyer*, and that I thought the rationales of *Galpin* and *Pennoyer* to be at odds, although not their results. Borchers, *supra* note 1, at 38, 43. I further hypothesized that the *Pennoyer* opinion (which does not cite *Galpin*) might have, in an earlier draft, included a citation to *Galpin* that was eventually omitted. Borchers, *supra* note 1, at 38. I based this on the fact that Justice Hunt's dissent in *Pennoyer* stated that *Galpin* "is cited in hostility to the views that I have expressed." *Pennoyer*, 95 U.S. at 743 (Hunt, J., dissenting). Oakley points out that Hunt might have been referring to the parties' briefs, a possibility that I had not considered. Oakley, *supra* note 14, at 670. Oakley's explanation seems more plausible, although it still seems odd to me that the *Pennoyer* majority opinion ignored *Galpin* despite the common authorship of the two. It seems all the more odd when, Field, then sitting as a Circuit Judge, wrote the *Galpin* opinion on remand. *Galpin*, 9 F. Cas. at 1126. I consider the remanded opinion in *Galpin* elsewhere. *See supra* note 63 and *infra* note 79 and accompanying text (discussing *Galpin*).

In any event, I stand by my fundamental point that there is a tension between *Galpin* and *Pennoyer*. As a Case 3, *Galpin*'s treatment of the question of jurisdiction as a matter of

Oakley correctly suggests that language in *Pennoyer* supports the expansive view, but wrongly insists that the expansive view is the *only* view supported by the opinion's text. Because *Pennoyer* was a Case 3, understanding Case 3 full faith and credit law on *Pennoyer*'s eve is important to making sense of the opinion as well as comprehending why the limited view is plausible. The *Pennoyer* Court was aware that many of the decisions which it relied upon to expound jurisdictional principles were either Cases 1 or 2.[66] The *Pennoyer* Court stated: "In several of the cases, the decision has been accompanied with the observation that a personal judgment thus recovered [in violation of the common law principles] has no binding force without the State in which it is rendered, implying that in such State it may be valid and binding."[67] Professor Oakley evidently sees this paragraph as supportive of his thesis, for he quotes it.[68] But it seems clear from the reference to the judgments in the relied-upon cases having been taken "without the State," that the *Pennoyer* Court was considering transposing the reasoning of Cases 1 and 2 to Case 3.

F-1's state law was consistent with earlier cases of the same ilk. *See* cases cited *supra* note 61 (discussing whether federal court gave effect to judgment turned on whether state law of that jurisdiction had been satisfied). *Galpin*, again consistently with other cases, held that F-1's judgment was not entitled to any effect in F-2 (the neighboring federal court) without "strict and literal compliance with the statutory [jurisdictional] provisions." *Galpin*, 85 U.S. at 369. *Galpin*'s language clearly implied that "strict and literal compliance" with a statute exceeding the common law principles would be sufficient, in a Case 3, to allow the judgment effect in F-2.

[66] Included in this group were Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873), *discussed in Pennoyer*, 95 U.S. at 730; The Lafayette Ins. Co v. French, 59 U.S. (18 How.) 404 (1855), *discussed in Pennoyer*, 95 U.S. at 730; D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850), *discussed in Pennoyer*, 95 U.S. at 729. State cases cited included Kilburn v. Woodworth, 5 Johns. 37 (N.Y. Sup. Ct. 1809), *discussed in Pennoyer*, 95 U.S. at 731, and the famous Massachusetts case of Bissell v. Briggs, 9 Mass. 462 (1813), *discussed in Pennoyer*, 95 U.S. at 731. All of these were either Cases 1 or 2. The *Pennoyer* majority also cited Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870), *discussed in Pennoyer*, 95 U.S. at 724-25 — a Case 3 — and Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336 (1850), *discussed in Pennoyer*, 95 U.S. at 724 — another Case 3. *Cooper* gave effect to F-1's judgment, and was resolved ultimately on state law grounds. *See supra* note 62 and accompanying text (discussing *Cooper*). *Boswell* also was resolved on state law grounds. *Boswell*, 50 U.S. at 348-50.

[67] *Pennoyer*, 95 U.S. at 732.

[68] Oakley, *supra* note 14, at 612-13.

The Court began the transposition by stating:

> [I]f the court has no jurisdiction over the person of the defendant by reason of his non-residence, and, consequently, has no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to first principles of justice, — it is difficult to see how the judgment can legitimately have any force within the State.[69]

According to the conventional wisdom that Oakley endorses, this passage reinforced the expansive view of *Pennoyer*. But as a Case 3, whatever *Pennoyer* said about Case 4 was by extrapolation. Extending the principles of Cases 1 and 2 *just* to Case 3 was a significant step. Quite plausibly, therefore, when *Pennoyer* spoke of "force within the State," it addressed only this extension to Case 3, because in such a case F-2 is "within the state."

The rest of the paragraph continued:

> The language used can be justified only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within the State where rendered; and that, therefore, it could be called into question only when its enforcement was elsewhere attempted. In later cases, this language is repeated with less frequency than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any State of this Union as contrary to first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not to be entitled to any respect in the State where rendered.[70]

Again, here, the references to "within the State where rendered" may well have been aimed at the feature of Case 3 that distinguishes it from Cases 1 and 2; in a Case 3, F-2 is indeed "within the state."

Pennoyer's next paragraph begins, as Professor Oakley notes,[71] with the introductory clause "[b]e that as it may . . . ."[72] What "that" means is unclear, for the previous paragraph described two phenomena: first, the language in the earlier cases indicat-

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[69] *Pennoyer*, 95 U.S. at 732.

[70] *Id.*

[71] Oakley, *supra* note 14, at 612-13.

[72] *Pennoyer*, 95 U.S. at 732.

ing that application of the common law rules depended upon F-2 sitting in another state, and second, the later less frequent repetition of such language. The resigned tone, however, indicated a reference to the phenomenon cast in the less approving light: the notion that the common law principles applied only if recognition were sought in a court physically situated in another state. The *Pennoyer* majority then continued, in what I believe to be its most significant passage:

> [T]he courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the State courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give the judgments of the State courts only the same faith and credit which the courts of another State are bound to give them.[73]

This passage is crucial because it casts a backward flare on the previous references to judgments being recognized "within the state." By explicitly referring to federal courts as courts of "different sovereignty" than their state court neighbors, the Court swung open the door to federal court full faith and credit challenges to their home state court's judgments. The significance of this development is that *Pennoyer*'s references to challenges "within the state" might plausibly have pointed only to full faith and credit, not due process, principles. *Pennoyer*, however, cited no authority for this "different sovereignty" theory, nor could it, because each earlier Case 3 determined jurisdiction by state law.[74]

But again, the "different sovereignty" theory affects only Case 3, not Case 4, because Case 4 involves F-1 and F-2 of the same sovereignty. It is here that the expansive and limited views part. The *Pennoyer* Court allowed for an attack on an F-1 judgment rendered in violation of the common law jurisdictional principles in Case 3. This transposition of the principles developed in Cases 1 and 2 to Case 3 is at the very least *a* holding of

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[73] *Id.* at 732-33.

[74] Much of this "different sovereignty" language comes from Field's circuit opinion in *Galpin*, but no authority on this exact point is cited there either. Galpin v. Page, 9 F. Cas. 1126, 1131-32 (C.C.D. Cal. 1874) (No. 5,206). *See supra* note 65 and accompanying text; *see also supra* note 61 (citing cases decided on state law).

Pennoyer.[75] It is a significant holding, but it is a holding based entirely upon full faith and credit principles, not due process.

The difficulty, then, is not what *Pennoyer* said about Case 3, but how it affects Case 4. What, if anything, *Pennoyer* meant to say about Case 4 appeared in the next paragraph — the first to invoke the Due Process Clause.[76] However, any reference to Case 4 or the Due Process Clause was dictum, both because *Pennoyer* was a Case 3 and because the Oregon state court rendered its judgment before the Fourteenth Amendment's ratification.[77] Under the expansive view, *Pennoyer*'s due process dictum

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[75] As Professor Oakley acknowledges, it is at least ambiguous whether the *Pennoyer* majority interpreted the Oregon jurisdictional statute to extend beyond the common law in allowing jurisdiction. *See* Oakley, *supra* note 14, at 643. If one reads the statute as having authorized the judgment in F-1 (the Oregon state court), then the "different sovereignty" theory is the holding of *Pennoyer*. If one reads *Pennoyer* as having construed the Oregon statute in conformity with the common law principles of jurisdiction, the "different sovereignty" theory is one of two alternative holdings. I disagree with Professor Oakley that reading the *Pennoyer* Court as having construed the Oregon Code in conformity with the common law principles of jurisdiction renders the "different sovereignty" theory dictum. Oakley, *supra* note 14, at 641. This seems to me to be a classic example of an alternative holding in which each is a sufficient basis for the disposition, yet one renders the other unnecessary.

[76] Pennoyer v. Neff, 95 U.S. 714, 733 (1877). Another block quotation of *Pennoyer*'s due process paragraph is not going to clarify matters. But, for ease of reference, here it is:

> 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 that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning 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.

Id. at 733.

[77] Professor Oakley is correct to point out an error in my original paper, Oakley, *supra* note 14, at 635, namely, my assertion that Justice Field had probably "overlooked" the timing problem. Borchers, *supra* note 1, at 37-38. I have retreated from this claim. *See* Borchers, *supra* note 13, at 570. Field could have reasonably invoked the Due Process Clause in dicta without worrying about timing, as it was unnecessary for the disposition of

allowed the judgment debtor[78] in Case 4 to resist successfully the enforcement of a judgment rendered in violation of the common law principles of jurisdiction, even if authorized by F-1's state legislature. Similarly, under the limited view, the judgment debtor could raise the common law principles if the judgment's effect came into question in *another* government's court. As long as the judgment's effect was determined only in the rendering state courts, however, the judgment debtor was entitled only to a reasonable opportunity to challenge it on state law jurisdictional grounds.

Contrary to Professor Oakley's assertions, an institutionally responsible, competent court might have understood *Pennoyer*'s due process paragraph in the limited fashion for several reasons.[79] First, the paragraph's references to "jurisdiction" and

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the case. The matter of timing is still necessary, however, to conclusively classify the due process discussion as dictum. Had F-1's judgment been rendered after the ratification of the Fourteenth Amendment, then under the expansive view, the correct classification would be as one of three alternative holdings.

[78] I use "judgment debtor" here loosely, because this also clearly encompasses a situation in which the state allows for a special appearance to directly contest jurisdiction.

[79] Professor Oakley writes as if the question were Justice Field's personal view and goes to great lengths to defend his intellectual capacities, noting that he graduated first in his class at Williams and so on. Oakley, *supra* note 14, at 633 n.142. I have been guilty of some of this writing as well, as if Field's personal views were especially significant. *See, e.g.*, Borchers, *supra* note 1, at 44 (noting Field's authorship of post-*Pennoyer* decisions).

There is an important point here, however. It is not part of my jurisprudence that the subjective intentions of the authors of appellate opinions (which, with the exception of lone dissents, speak for multiple members of the court) are entitled to any special weight. Professor Oakley agrees that subjective intentions are irrelevant for legislation, for he writes that "[l]egislation is an institutional act, not a personal epistle." Oakley, *supra* note 14, at 673. However, Oakley takes the opposite view with regard to appellate opinions. Oakley, *supra* note 14, at 749 n.515. Appellate courts, however, are multimember institutions, just like legislatures. Under Oakley's proposal, are the memoirs of a retired appellate judge to be accorded the same weight as her reported opinions? Should law clerks be called to testify as to the "real" meaning of ambiguous opinions? This is a proposal fraught with mischief. The relevant document for interpreting appellate opinions is the opinion; the private preferences of its author should count for nothing unless they appear in the opinion's text.

Conceivably, Field's private preference would have been for the expansive view of *Pennoyer*. Professor Oakley places a great deal of emphasis on Field's opinion on remand in *Galpin*, 9 F. Cas. 1126. Oakley, *supra* note 14, at 666-67. The more interesting matter is the contrast with his opinion as a trial judge (writing, of course, only for himself) on remand in *Galpin*. On remand in *Galpin*, Field spoke with a fair degree of clarity about invalidating state legislation expanding state court jurisdiction. *Galpin*, 9 F. Cas. at 1133. But contrasting this with the more cryptic language in *Pennoyer*, 95 U.S. at 733, suggests that Field could

"such judgments" were not unambiguous references only to the common law principles and judgments entered in violation thereof. *Pennoyer* may well have interpreted the Oregon jurisdictional statute to codify the common law, and Professor Oakley reluctantly agrees that this is a possibility.[80] So when *Pennoyer* said that proceedings without "jurisdiction do not constitute due process of law,"[81] the reference could well have been to jurisdiction defined by state law. And the "due process" reference could well have been a constitutional mandate for some process to determine whether there was jurisdiction under state law.

Second, the due process paragraph mentioned challenges based both on personal and subject matter jurisdiction.[82] Because state court subject matter jurisdiction is a matter of state law, *Pennoyer*'s subject matter reference can only mean to guarantee the defendant a chance to challenge a judgment on state law grounds.[83] The same was plausibly true for the personal jurisdiction reference in the same sentence.[84]

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not, or would not, get agreement on a clear statement from the Supreme Court.

[80] Oakley, *supra* note 14, at 643. I think it quite plausible, indeed probable, that the *Pennoyer* Court did so read the statute. In contrast to the avowedly unresolved reading of the Oregon notice statute, the concluding reference to the jurisdictional statute begins with the sentence: "Construing this . . . provision to mean . . . ." *Pennoyer*, 95 U.S. at 720. This seems a tolerably clear statement that what follows is, in fact, the Court's construction of it.

[81] *Pennoyer*, 95 U.S. at 733.

[82] *Id.* I owe this point to a discussion with Professor Wendy C. Perdue of Georgetown University Law School.

[83] As discussed *supra* at note 32, this is the conclusive rejoinder to Professor Oakley's arguments from the *Nuff v. Annoyer* hypothetical, even if one grants his point that the limited view merely "restate[d]" the rights of judgment debtors under state law. Oakley, *supra* note 14, at 622. On Oakley's account, the reference to state rules of subject matter jurisdiction in this paragraph merely "restate[d]" existing law, unless Professor Oakley takes the wildly implausible view that *Pennoyer* constitutionalized the rules of state subject matter jurisdiction. Assuming this is not Oakley's position, he does not explain why it is plausible that *Pennoyer* codified state practice with regard to subject matter jurisdiction, yet so reading it with regard to personal jurisdiction renders the opinion "empty." Oakley, *supra* note 14, at 622.

[84] There is nothing implausible about such an arrangement. For example, in Goldberg v. Kelly, 397 U.S. 254 (1970), the Supreme Court held that a state welfare recipient is entitled to an oral hearing before benefits are discontinued. *Id.* at 264. The Court was not saying that a level of welfare benefits was constitutionally guaranteed; it expressly disclaimed that view. *See* Dandridge v. Williams, 397 U.S. 471 (1970) (holding state can decide how much money to apportion to families). The *Goldberg* court held that once a state set the benefit levels and eligibility by statute, an oral hearing to determine whether the statutory criteria for discontinuance existed became a constitutional obligation. Under the limit-

Third, the due process paragraph was dictum. While Professor Oakley argues that this did not impugn the assertedly singular plausibility of the expansive view,[85] it has long been a truism that dicta in appellate opinions are entitled to less weight than holdings.[86] One way to give *Pennoyer*'s due process dictum less weight is to adopt the narrowest reasonable construction — the limited view.

Pennoyer was not a good vehicle for declaring unconstitutional all state jurisdictional statutes extending beyond the common law. To convert such a declaration into a holding would probably have required a Case 4, but *Pennoyer* was a Case 3. But even as a Case 3, *Pennoyer* was deficient because Oregon's jurisdictional statute probably conformed to the common law. Because the Oregon statute and the common law probably did not differ, *Pennoyer*'s generic references to "jurisdiction" and specific principles such as in-state service[87] were ambiguous as between state, common, and constitutional law.

Reasonable courts reading *Pennoyer* might also have approached the due process dictum cautiously because of the expansive view's breadth. Professor Oakley argues that the expansive view was merely a corollary of *Pennoyer*'s application of full faith and credit principles to Case 3, but this is clearly incorrect. Many state court judgments entered under constructive service statutes could not have been, for legal or practical reasons, impeached in a collateral federal case.[88] Reading *Pennoyer* expansively would have gone far beyond the already significant step of incorporating full faith and credit principles into Case 3. Moreover, reading *Pennoyer* expansively would, as a practical matter, have obliterated the significance of its application of full faith and credit principles to Case 3 because no innovative analysis was required to hold that a judgment void in F-1 was void

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ed view, the *Pennoyer* Court was making a similar assertion. State law could define the state court's jurisdictional limits, but once so defined, a judicial proceeding to challenge a judgment under those standards became a constitutional necessity.

[85] Oakley, *supra* note 14, at 644.

[86] *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (stating that dicta have less weight than holdings).

[87] *Pennoyer*, 95 U.S. at 733.

[88] *See supra* notes 34-40 and accompanying text (discussing several possibilities when it would be impossible to achieve federal subject matter jurisdiction).

in F-2.[89] Given this, courts of this era might well have waited for clearer authority before invalidating many state jurisdictional statutes. For those courts, the limited view was a plausible, more moderate option.[90]

None of this denies the expansive view's plausibility. Professor Oakley demonstrates, and I concur both here and in my original article, that courts reading *Pennoyer* had incentives to read it expansively. One incentive was to unify the standards for direct and collateral challenges to state judgments. But plausibility and inevitability are not the same, and I stand by my argument that *Pennoyer* admitted of both readings.[91]

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[89] Full faith and credit principles still would be necessary in cases like *Pennoyer* in which the state court judgment was entered before the ratification of the Fourteenth Amendment, unless one postulates retroactive application for the Amendment. *Pennoyer* was decided almost a decade after ratification and was from a fast-dying breed of cases. In cases in which the state court judgment was entered after ratification, the expansive reading of *Pennoyer* would have rendered its extension of full faith and credit principles to Case 3 trivial.

[90] As argued above, the limited view truly was more moderate and "limited," and existed during this era. *See supra* note 32 and accompanying text (stating that limited view would allow defendant chance to ensure that states followed their jurisdictional rules). Assuming, arguendo, that the limited view merely was a codification of an already universal right to challenge jurisdiction under state law. This does not render the limited view of *Pennoyer*'s due process language implausible. Remember, the due process language is, even by Professor Oakley's account, dictum. Oakley, *supra* note 14, at 644. Even giving *Pennoyer* the limited reading, and making the assumption that the limited reading only codified a pre-existing right to challenge jurisdiction under state law, does not render this reading implausible. The *Pennoyer* opinion already had a holding: the incorporation of full faith and credit principles into Case 3. One of the problems with writing dicta in appellate opinions is that dicta are, by definition, addressed to non-problems — at least in the context of that case. The fact that the problem is non-existent in that case may mean that, as it turns out, the problem does not exist in any case. I thus do not believe that an institutionally responsible, competent court reading *Pennoyer* would have been forced to reject the limited view even if it proved only a codification of pre-existing state law. Moreover, even in Professor Oakley's account *Pennoyer*'s references to state subject matter were merely a codification of existing state practice. *See supra* notes 29 and 83 and accompanying text.

[91] Professor Oakley takes issue with me on three other points related to the text of the *Pennoyer* opinion. One is the omission of any citation to *Galpin*, a point I address elsewhere. *See supra* note 65 and accompanying (discussing *Galpin*). Two others are quite collateral to the central themes of our debate, and actually relate much more directly to an article written by Professor Wendy Perdue. *See* Oakley, *supra* note 14, at 670-83 (citing and discussing Perdue, *supra* note 22). First, in my original article, I stated that the *Pennoyer* Court had not cited any authority for the proposition that in rem jurisdiction depended on pre-judgment attachment. Borchers, *supra* note 1, at 35 n.108. Professor Perdue makes a similar assertion. Perdue, *supra* note 22, at 498. On reflection, this does appear to have been an overstatement. In particular, the block quotation at the bottom of page 728 of the official report supports the pre-judgment attachment requirement, although the necessity of this require-

II. POST-*PENNOYER* AUTHORITY

To bolster my contention that the limited view is plausible, my original article and symposium paper pointed to language in post-*Pennoyer* Supreme Court decisions consistent only with the limited view. On several occasions, the Supreme Court recognized a significant difference between a judgment's effect in the

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ment for in rem cases continued to be controversial even after *Pennoyer*. *See, e.g.*, Quarl v. Abbott, 1 N.E. 476, 478-79 (Ind. 1885) (holding in rem judgment can be enforced within state even against property not attached prior to judgment); Strom v. Montana Cent. Ry. Co., 84 N.W. 46, 47 (Minn. 1890) (holding action may be maintained against foreign corporation based upon property in state without need for pre-judgment attachment thereof); Rice, Stix & Co. v. Peteet, 1 S.W. 657, 657-58 (Tex. 1886) (holding pre-judgment attachment not required for in rem jurisdiction under Texas attachment statute).

The second point of whether *Pennoyer* argued that there was in personam jurisdiction relates much more directly to Professor Perdue's article. Perdue, *supra* note 22, at 498. Here are Professor Perdue's comments, which I find more persuasive than Professor Oakley's:

> As Oakley notes, Judge Deady asserts in the lower court opinion that "[i]t is admitted on all hands that such a judgment is not binding in personam." It is obviously true that whatever may have been argued below . . . doesn't [establish] what was argued in the Supreme Court. Of course, having conceded an argument below, Pennoyer might be bound by that concession in the Supreme Court. Pennoyer's brief is not a model of clarity. His argument for jurisdiction was intertwined with his argument that compliance with the state statutory requirements could not be collaterally attacked. Oakley is also correct that Pennoyer's brief does not explicitly say it is eschewing reliance on in personam jurisdiction — it simply asserts that there is jurisdiction without differentiating between the two types. Oakley finds it "amazing" that if Pennoyer were relying only on in rem [jurisdiction] that he didn't . . . once mention that term. I, in contrast, find it surprising (though nothing in the area of personal jurisdiction amazes me) that in light of Deady's comment, if Pennoyer did not [mean to] concede [the lack of] in personam that he was not clearer on that point.
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> More important than the question of how to interpret Pennoyer's brief, is what Field himself said. At the beginning of the opinion, Field describes the Oregon statute. He quotes a portion of the statute which denies jurisdiction "[u]nless he [the defendant] appear in the court, or be found within the State, or be a resident thereof, or have property therein; and, in the last case, only to the extent of such property at the time the jurisdiction attached." 95 U.S. at 720. Thus, Field believed that Oregon did not authorize jurisdiction over non-residents, who [did not] have property in the state and who were served outside the state. To the extent the opinion purports to decide whether Oregon could authorize jurisdiction over non-residents, who were served outside the state and who had no [in state] property, that part of the opinion must surely be considered dicta.

See Letter from Wendy C. Perdue to Patrick J. Borchers (April 28, 1995) (on file with author).

rendering state court and courts of "[an]other government."[92] Professor Oakley seeks to minimize the import of this language.[93] He also maintains that decisions in many states,[94] especially those of New York[95] acknowledged the binding force of *Pennoyer*. All of this, Professor Oakley contends, demonstrates that the limited view is "essentially fictitious."[96] Professor Oakley's position, however, does not survive close scrutiny.

A. Goldey, Conley, *and the New York Decisions*

The United States Supreme Court's decisions in *Goldey v. Morning News*[97] and *Conley v. Mathieson Alkali Works*[98] were two cases upon which I relied, and their interplay with the New York state court decisions deserves close attention for several reasons. First, these cases figure prominently in Professor Oakley's paper.[99] Second, the Empire State was and is a leading commercial center, and its state courts, especially the Court of Appeals, enjoyed an unparalleled reputation for excellence.[100] Third, the interplay between the New York jurisdictional law and Supreme Court decisions presents an excellent opportunity to examine the roles of state and federal doctrine.

In the immediately post-*Pennoyer* era, the jurisdictional rule that presented the most frequent clashes between state and federal doctrine was section 432 of the New York Code of Civil Procedure. This statute provided for service on various corporate officers.[101] In pre-*Pennoyer* cases, the New York Court of Ap-

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[92] Borchers, *supra* note 1, at 46 n.168 (quoting Goldey v. Morning News, 156 U.S. 518, 521 (1895)); Borchers, *supra* note 13, at 570-74.

[93] *See* Oakley, *supra* note 14, at 712-15 (questioning applicability of *Goldey* as exemplifying limited view).

[94] *Id.* at 745 n.504.

[95] *Id.* at 714-17.

[96] *Id.* at 747.

[97] 156 U.S. 518 (1895).

[98] 190 U.S. 406 (1903).

[99] Oakley, *supra* note 14, at 712-17.

[100] *See* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 3 (1990) (referring to period leading up to Cardozo's 1916 appointment to New York Court of Appeals: "In part reflecting New York's commercial preeminence, in part the quality of its personnel, the New York Court of Appeals was the nation's most distinguished common law tribunal . . . .").

[101] *See Conley*, 190 U.S. at 409-10 (quoting N.Y. CODE CIV. PROC. §§ 432, 1780).

peals construed it to allow for in personam jurisdiction over out-of-state corporations if a corporate officer could be served within the state, even if his presence was casual.[102] In other words, New York had adopted a kind of "corporate tag" jurisdiction. In-state "tagging" of an officer with a summons was sufficient for jurisdiction over the corporation.

Pope v. Terre Haute Car and Manufacturing Co.[103] presented the Court of Appeals' first post-*Pennoyer* opportunity to address this doctrine. *Pope* involved a particularly stark exercise of corporate tag jurisdiction because the defendant corporation did no New York business and its president was served "on his way to a seaside resort."[104] Counsel for the defendant corporation, citing *Pennoyer*, challenged the service's constitutionality.[105] There was no doubt that under the federal test, which was identical to the common law test, corporate tag jurisdiction would not pass muster.[106] Thus, *Pope* succinctly posed the question of whether, as the expansive view postulates, *Pennoyer* applied directly to state courts. If it did, the New York rule would be unconstitutional. If it did not, as the limited view postulates, *Pennoyer*'s principles would become relevant only if the judgment were presented to another government's courts.

Contrary to the expansive view, *Pope* rejected *Pennoyer*'s application and upheld the service. In fact, the court rejected territorial restraints on its jurisdiction.[107] Answering the defendant's citations to *Pennoyer*, the Court of Appeals concluded its opinion with two terse sentences: "A judgment to be rendered in an action thus commenced against a foreign corporation will be valid for every purpose *within this State,* and can be enforced against any property found within this State. *Its effect elsewhere*

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[102] *See, e.g.*, Hiller v. Burlington & Miss. R.R., 70 N.Y. 223, 225 (1877) (upholding service on corporation though officer "temporarily in this state in the pursuit of his own business").

[103] 87 N.Y. 137 (1881).

[104] *Id.* at 139.

[105] *Id.* at 137-38. Apparently because of a typographical error, Neff's name is spelled "Nett", but the citation to 5 Otto. 714 leaves no doubt that the citation is to *Pennoyer.*

[106] The Supreme Court's cases demanded that the defendant transact some substantial business in the state. *See* Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855). *Lafayette* is discussed in Borchers, *supra* note 1, at 29-30. *Lafayette* and kindred cases were cited by the defendant. *Pope*, 87 N.Y. at 138.

[107] *Pope*, 87 N.Y. at 140 (equating jurisdiction with fair notice).

need not now be determined."[108] Therefore, as long as the exercise of jurisdiction satisfied the New York legislature, it satisfied the New York Court of Appeals — the limited view's essence.

Professor Oakley does not cite *Pope*, but he does refer to other Court of Appeals decisions.[109] But before considering the subsequent New York cases, let us turn to the United States Supreme Court's response to *Pope*. *Goldey v. Morning News*[110] and *Conley v. Mathieson Alkali Works*.[111] *Goldey* is factually similar to *Pope*. The plaintiff attempted to sue an out-of-state corporation by in-state service of the corporate president.[112] The case, originally brought in the New York state courts, was removed to federal court on diversity grounds.[113] The Court noted the service's validity under New York law[114] and *Pope*'s incompatibility with the federal cases.[115] It held that a federal court sitting in diversity was not required to follow local jurisdictional rules at odds with the common law. But the Court was careful *not* to disturb the *Pope* rule in state court.

In describing the rules of personal and constructive service, the Court stated that "[w]hatever effect a constructive may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government."[116] The Court further explained that when judgment "is rendered in one State against two partners jointly, after serving notice upon one of them only . . . the judgment is of no force or

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[108] *Id.* at 140 (emphasis added).

[109] *See* Oakley, *supra* note 14, at 714-17.

[110] 156 U.S. 518 (1895).

[111] 190 U.S. 406 (1903). The Supreme Court dealt with the *Pope* rule in one other case. *See* Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U.S. 407 (1905). That case, consistent with *Goldey* and *Conley*, held that jurisdiction in a case removed from a New York state to federal court required compliance both with state law, and the Supreme Court's "doing business" standard. *Id.* at 413. Equally consistent with both *Goldey* and *Conley*, and with the limited view, the Court was careful to limit the scope of the "doing business" rule to federal court: "In order that a *Federal court* may obtain jurisdiction over a foreign corporation the corporation must, among other things, be doing business in the State." *Id.* (emphasis added) (citations omitted). On the facts of *Pennsylvania Lumbermen's*, the Court had "no difficulty" holding that the defendant satisfied this test. *Id.* at 415.

[112] *Goldey*, 156 U.S. at 520.

[113] *Id.* at 518-19.

[114] *Id.* at 520.

[115] *Id.*

[116] *Id.* at 521 (citations omitted).

effect in a court of *another State, or in a court of the United States,* against the partner who was not served with process.[117] Regarding corporate tag, the Court stated:

> [A] judgment rendered in a court of one State, against a corporation neither incorporated nor doing business within the State, *must be regarded as of no validity in the courts of another State, or of the United States,* unless service of process was made in the first State upon an agent appointed to act there for the corporation.[118]

Finally, emphasizing *Pennoyer*'s "different sovereignty" theory, the *Goldey* court stated:

> The principle which governs the effect of judgments of one State in the courts of another State is equally applicable in the Circuit Courts of the United States, although sitting in the State in which the judgment was rendered. *In either case, the court the service of whose process is in question, and the court in which the effect of that service is to be determined, derive their jurisdiction and authority from different governments.*[119]

Like *Goldey, Conley* was tried in a New York federal court,[120] and the plaintiff relied upon New York's section 432 to assert jurisdiction.[121] The Supreme Court again rejected this attempt and repeated the *Goldey* language, stressing the difference between the operation of a judgment in the courts of the "same government" versus "[an]other government."[122]

Professor Oakley brushes off this language like "lint on a trouser cuff, and with no more significance."[123] This colorful metaphor overlooks *Pope. Goldey* and *Conley* clearly considered and analyzed the New York Court of Appeals opinion in *Pope.* Against the backdrop of *Goldey*'s citation to *Pope,*[124] the Supreme Court's "same government"/"other government" dichotomy clearly reiterated *Pope*'s final sentences and New York's authority to employ the corporate tag rule.

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[117] *Id.* (emphasis added) (citations omitted).
[118] *Id.* at 521-22 (emphasis added).
[119] *Id.* at 522 (emphasis added) (citations omitted).
[120] *Conley,* 190 U.S. at 407.
[121] *Id.* at 409-10.
[122] *Id.* at 411.
[123] Oakley, *supra* note 14, at 715-16.
[124] *Goldey,* 156 U.S. at 520.

These cases clearly support the limited view. The Supreme Court cannot be accused of ignoring *Pennoyer*, for *Goldey* thrice cited it in the crucial passage. All of this renders untenable Professor Oakley's assertion that a right-thinking judge could only understand *Pennoyer* expansively. *Pope* was a limited view case, and *Goldey* and *Conley*, far from rejecting *Pope*, treated the New York Court of Appeals' view approvingly and respectfully.

While not citing *Pope*, Professor Oakley does cite another New York Court of Appeals decision, *Grant v. Cananea Consolidated Copper Co.*[125] He argues that *Cananea Consolidated* adopted the expansive view,[126] thereby disproving my assertion that *Goldey* endorsed the limited view.[127] Subsequent events in New York,

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[125] 189 N.Y. 241 (1907).

[126] He argues:

> [W]e do not have to debate dictionary meanings or resort to an Ouija board in order to gain a better understanding of *Goldey*'s significance. Given New York's divergence from federal authority on this point, contemporary New York judges could be expected to exploit their freedom from the Due Process Clause if that were what *Goldey* meant to permit.

Oakley, *supra* note 14, at 714.

[127] *Id.* at 714-15. Professor Oakley also invokes *In Re* Estate of Killan, 65 N.E. 561 (N.Y. 1902), as demonstrating that the expansive view had taken hold in New York as of 1902. Oakley, *supra* note 14, at 714-15 n.388. This is an extraordinarily unlikely reading of *Killan*, particularly in view of the New York courts' nearly unwavering commitment to the limited view up to 1916. *See infra* notes 135-53 and accompanying text. In any event, *Killan* is a case predominantly, and perhaps exclusively, about state law.

Mary Killan died in 1898, leaving a small estate. *Killan*, 65 N.E. at 561. Late in 1899, proceedings were instituted before a Surrogate's Court to distribute the estate. Five claimants, all purporting to be cousins, appeared and claimed their intestate share of the estate. In 1901, nearly a year after the Surrogate's decree, one Martin Killan appeared and claimed to be the decedent's brother. *Id.* If true, this would have given him priority over the cousins in the intestate distribution scheme. Martin filed a separate action against the administrator of the estate for his share of the estate. *Id.* The Surrogate dismissed the action, but made findings, which the majority of the Court of Appeals treated as crucial, to the effect that Martin "was neither cited nor did he appear [and] . . . . that the decree made therein is entirely inoperative as to this claimant." *Id.* The Surrogate nevertheless dismissed the independent action, holding that the proper procedure would have been for Martin to have made a motion to reopen the original proceedings. *Id.* at 561-62.

As the dissent pointed out, the real issue was the administrator's double liability if Martin could prove that he was the brother of the decedent. *Id.* at 569 (O'Brien, J., dissenting). Although the dissent hotly disputed the worth of the crucial finding that Martin was never "cited," *id.* at 567-68, the majority treated the Surrogate Court's proceeding as conclusively establishing that Martin was not served as a matter of state law. *Id.* at 562. The majority's solution to the administrator's double liability demonstrated that *Killan* has nothing to do with due process limits on jurisdiction:

however, provided devastating evidence contrary to Professor Oakley's thesis.

Pope, *Goldey*, and *Conley* showed that the New York and federal jurisdictional rules for foreign corporations were very different.

An administrator is not left in the helpless and unprotected position that is assumed to be the case in the argument of the respondent. The Code of Civil Procedure provides for his ample protection by permitting him to sue out a citation running against persons unknown. *A citation properly issued under these provisions binds unknown next of kin precisely as if they were named therein.*

Id. at 563 (emphasis added) (citation omitted). Because Martin was not so bound he was entitled to an independent action collaterally attacking the decree, as opposed to the procedure of attempting to reopen the original proceeding. A motion to reopen was insufficient, in the majority's view, because its propriety depended upon the discretion of the Surrogate, while an independent action did not. *Id.* at 564.

Professor Oakley points to the portion of the *Killan* opinion which cited the Supreme Court's decision in Scott v. McNeal, 154 U.S. 34 (1894), as evidence that the New York Court of Appeals was adopting the expansive view of *Pennoyer*. Oakley, *supra* note 14, at 714-15. This is not plausible. First, as I discuss later, *Scott* did not endorse the expansive view. *See infra* notes 166-90 and accompanying text. Second, the portion of *Scott* that discussed New York case law, did so for the purpose of uncovering the common law rule as to the effect of intestacy proceedings with regard to the property of a person later discovered to be living. *See Scott*, 154 U.S. at 43-44 (discussing New York case law which tended to support validity of letters of administration upon estate of living person). *Scott* investigated the common law "necessity-of-death" rule because the original probate decree was taken from a territorial court obligated by territorial statute to follow the common law. *Id.* at 47-48. The *Scott* Court concluded that the New York rule (announced in case of Roderigas v. East River Sav. Inst., 63 N.Y. 460 (1875), that such proceedings do bind later-discovered "decedent") was severely in the minority. *Id.* at 43. The Court of Appeals was apparently prompted to state in *Killan* that *Roderigas* had been "expressly overruled." *See Killan*, 65 N.E. at 563-64. The Court of Appeals did credit the Due Process Clause with "overruling" its earlier doctrine, but the significance of *Scott* was that due process required a judgment be entered in accordance with local rules of competence. *See infra* notes 166-90 and accompanying text (discussing *Scott* more fully). *Scott* and *Roderigas*, therefore, debated the question of a Surrogate court's competence to determine rights in an estate if the supposed "decedent" later turns up alive. This is quite removed from the question in *Killan* of authority over later-appearing, non-resident claimants to the estate.

Thus, if the Due Process Clause was invoked for anything in *Killan*, it was for the proposition that the absent party must be given an unfettered opportunity to demonstrate a lack of jurisdiction under state law. Whatever the *Killan* court's dictum about due process meant, it cannot have meant that due process sets territorial limits on jurisdiction that are more restrictive than those set by state law, because the majority specifically stated that it would have bound the absentee claimant had the citation for "unknown" claimants been made in the form allowed for by New York state law. *Killan*, 65 N.E. at 563.

If the expansive view held sway after *Goldey* and *Conley*, the New York courts should have toed the federal, not the state, line. But on numerous occasions the Empire State's courts reaffirmed *Pope* and disavowed federal doctrine.[128] This brings us back to *Cananea Consolidated*,[129] the case that Professor Oakley maintains enshrined the expansive view in New York.

Cananea Consolidated involved, as had *Pope*, *Goldey*, and *Conley*, an assertion of corporate tag jurisdiction.[130] In *Cananea Consolidated*, the defendant vigorously pressed the argument that *Pope* must yield as inconsistent with the federal cases. A divided Appellate Division (New York's intermediate appellate court) accepted the defendant's argument.[131] Justice Clarke, writing for the majority, concluded that "we are bound to follow the decisions of the Supreme Court of the United States even if they are in direct opposition to decisions of the Court of Appeals, which otherwise would be controlling."[132] Justice Ingraham dissented, taking the limited view. He reasoned that the "question presented is not whether a judgment entered in this action is to be enforced as against the defendant *outside the State of New York*,"[133] and concluded:

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[128] Johnston v. Mutual Reserve Life Ins. Co., 93 N.Y.S. 1048, 1057-58 (App. Div. 1905); Buell v. The Baltimore & O.S.W.R. Co., 57 N.Y.S. 111, 114 (App. Div. 1899); Persons v. Buffalo City Mills, 51 N.Y.S. 645, 647 (App. Div. 1898). *Johnston* was an interesting case involving recognition of a judgment from North Carolina which, like New York, had a corporate tag doctrine. The Appellate Division specifically recognized the authority of *Pope*, 93 N.Y.S. at 1058. The court reasoned that North Carolina could, under *Goldey*, enforce the judgment within its own borders. *Id.* at 1057-58. This position, of course, is consistent only with the limited view. The court then concluded that it ought recognize the judgment on the basis of "comity," because of the similarity of New York's and North Carolina's rules. *Id.* at 1058. The court reasoned that the Full Faith and Credit Clause did not prevent it from doing so, apparently on the theory that it was actually giving the judgment more effect than necessary. *Id.* In so doing, it anticipated the position taken by a New York court much later that applying New York's rules of preclusion, which allow for non-mutual collateral estoppel, was permissible in the case of Texas judgment. Texas did not allow for non-mutual estoppel, but a New York decision would later reason that giving the judgment more effect than necessary presented no difficulty. Hart v. American Airlines, 304 N.Y.S.2d 810 (Sup. Ct. 1969). In any event, *Johnston*'s due process analysis is consistent only with the limited view.

[129] 82 N.E. 191 (N.Y. 1907).

[130] Grant v. Cananea Consol. Copper Co., 102 N.Y.S. 642, 643 (App. Div.), *rev'd*, 82 N.E. 191 (N.Y. 1907).

[131] *Id.* at 646.

[132] *Id.*

[133] *Id.* (Ingraham, J., dissenting) (emphasis added).

> I do not understand that the decision of the Supreme Court of the United States [including *Pennoyer*] cited by Mr. Justice CLARKE [sic] in the prevailing opinion interferes with the right of the state of New York to grant a judgment against a foreign corporation where process has been served in accordance with its laws, and which could be enforced in this state. For that reason, I think the court should maintain jurisdiction, leaving the effect of the judgment to be determined when such a judgment is obtained.[134]

This alone deals a serious blow to Professor Oakley's position. If the limited view were, as Professor Oakley contends, my "own invention,"[135] it would not have divided a court so revered as the First Department of that era. But as damaging as the divided Appellate Division opinion is to Professor Oakley's position, later developments prove worse yet.

In the Court of Appeals,[136] plaintiff's counsel, relying on the dissent below, argued that the Supreme Court decisions became relevant only if the judgment were presented to another court.[137] Counsel for the defendant corporation, relying on the expansive view of *Pennoyer*, argued that the Court of Appeals decisions must yield to federal doctrine.[138] Responding to the argument that Code of Civil Procedure section 432 is "violative of the [Due Process Clause],"[139] the Court of Appeals said: "This we cannot admit."[140] The court explained the justifications for section 432, including the rationale that New Yorkers "should be permitted to apply to the courts for relief, rather than be compelled to follow their debtors into foreign jurisdiction[s]."[141] It continued: "[i]t must be conceded that, in so far as the service of process is concerned, the decisions of our own court are not in entire accord with those of the Supreme Court of the United States."[142] Regarding the difference in the views of the two courts, the court characterized *Pope* as the "safer and

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[134] *Id.*
[135] Oakley, *supra* note 14, at 601.
[136] 82 N.E. 191 (N.Y. 1907).
[137] *Id.* at 193.
[138] *Id.*
[139] *Id.* at 192.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 193.

wiser rule to follow."[143] Concluding that "we shall *in this case* recognize and *attempt* to follow the rule laid down by the federal court,"[144] the Court of Appeals nevertheless *reversed* the Appellate Division and upheld the service.[145]

It is perhaps possible, as Oakley argues, to see *Cananea Consolidated* as endorsing the expansive view. But this seems unlikely. The Court of Appeals stated only that it was "attempt[ing]" "in this case" to follow the federal doctrine. Its reference to the New York rule's superiority was hardly indicative of abandonment, and Oakley's thesis is difficult to square with the court's statement that it did not consider section 432 unconstitutional.

Whatever tenuous plausibility that there might be to Oakley's reading of *Cananea Consolidated* disappears once one considers later New York cases. Just three years after *Cananea Consolidated*, the First Department again confronted section 432 and the doctrine of corporate tag in *Sadler v. The Boston and Bolivia Rubber Co.*[146] The court, citing *Pope*, noted that "[t]his question [of corporate tag's validity] is one upon which the decision of the federal courts and the courts of this state have been in irreconcilable conflict for many years."[147] The corporate defendant pressed *Pennoyer* and the other Supreme Court cases, and argued that *Cananea Consolidated* bound the New York courts to follow Supreme Court precedent. But the First Department rejected this argument, followed *Pope* and upheld the service. Directly rejecting Oakley's thesis, New York's intermediate appellate court reasoned:

> We are unable to find in [*Cananea Consolidated*] any indication of an intent to recede from the rule announced in the *Pope* case, where that rule is applicable. The application of the federal rule [in *Cananea Consolidated*] [wa]s especially and significantly limited to the particular case under consideration . . . it means nothing more than that the facts of that case brought it even within the rule adhered to by the federal courts.[148]

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[143] *Id.*

[144] *Id.* (emphasis added).

[145] *Id.* at 194.

[146] 125 N.Y.S. 405 (App. Div. 1910).

[147] *Id.* at 406.

[148] *Id.* at 407.

Significantly, the same Justice Clarke who wrote the First Department's opinion in *Cananea Consolidated* (holding for the expansive view) *concurred* in a separate opinion in *Sadler* stating that he believed himself now bound to the *limited* view.[149]

So persuasive was the First Department's opinion in *Sadler* that the Court of Appeals unanimously affirmed without opinion.[150] Lower court cases after *Cananea Consolidated* and *Sadler* referred to *Pope* as "settled law."[151] In fact, apparently every New York judge to consider *Cananea Consolidated* understood it to affirm *Pope*'s limited view.[152] New York did not give up

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[149] *Id.* at 407-08 (Clarke, J., concurring).

[150] Sadler v. The Boston and Bolivia Rubber Co., 95 N.E. 1139 (N.Y. 1911).

[151] *See, e.g.*, Mallory v. Virginia Hot Springs Co., 141 N.Y.S. 961, 961 (App. Div. 1913) (asserting that action based on corporate tag can be "unquestionably maintainable"); Smith v. Western Pac. Ry. Co., 139 N.Y.S. 129, 135 (App. Div. 1912) (Clarke, J.) (citing *Pope* as "settled law"); Henry v. Chartered Co., 128 N.Y.S. 436, 438 (Sup. Ct. 1911) (Lehman, J.) (stating that conflict between state and federal decisions is not over "whether a foreign corporation is subject to jurisdiction" of court); *see also* Grubel v. Nassauer, 103 N.E. 1113, 1114 (N.Y. 1913) (citing *Pennoyer* immediately after stating: "it is settled that a judgment for money recovered in one state without personal service of process on the defendant in that state cannot be enforced *without the state*." (emphasis added)). Federal courts sitting in New York also noted the divergence between state and federal authority, but for the most part accepted the situation calmly. *See, e.g.*, Ostrander v. Deerfield Lumber Co., 206 F. 540, 545 (N.D.N.Y. 1913) (stating that "it is now settled that service on an officer of a foreign corporation in the state of New York, held good by the courts of that state under the Code of Civil Procedure, is not necessarily good under federal law"); Phelps v. Connecticut Co., 188 F. 765, 766 (C.C.N.D.N.Y. 1911) (noting: "This service of the summons and complaint on the defendant under the decisions of our Court of Appeals was good in the state court . . . . However, the holdings in the federal courts are the very opposite" and therefore granting defendant's motion to dismiss); Venner v. Great Northern Ry. Co., 153 F. 408, 412 (C.C.S.D.N.Y. 1907) (referring to jurisdiction in federal trial courts: "such service . . . confers no such jurisdiction, even though the statutes and decisions of the highest courts of the state say it does."), *aff'd*, 209 U.S. 24 (1908); Lathrop-Shea & Henwood Co. v. Interior Constr. & Improvement Co., 150 F. 666, 670 (C.C.W.D.N.Y. 1907) (after discussing New York state court interpretation of Code of Civil Procedure § 432, citing *Pennoyer* for the following: "federal courts are the sole judges of their own jurisdiction, which manifestly is derived from a government differing from that which clothes the state tribunals with judicial power."), *rev'd*, 215 U.S. 246 (1909); Good Hope Co. v. Railway Barb Fencing Co., 22 F. 635, 636-37 (C.C.S.D.N.Y. 1884) (asserting that "service of process upon an agent of a foreign corporation while merely casually present in the state is not equivalent to a personal service upon an individual in conferring jurisdiction upon a court to render a personal judgment; and such a judgment would be treated as void for want of jurisdiction *by other tribunals than those of the state where it was obtained*." (emphasis added)). *But see* Bentlif v. London & Colonial Fin. Corp., 44 F. 667, 668 (C.C.S.D.N.Y. 1890) (suggesting that *Pennoyer* directly applied to state courts).

[152] *See supra* note 151 and accompanying text.

Pope's limited view until 1916, in a case written by Judge Cardozo. He made clear that the turning point in the constitutionalization of New York jurisdictional law was not *Pennoyer*, *Goldey*, or *Conley*. Instead, Justice Cardozo cited *Menefee*, the case I identified in my original article as the one finally establishing the expansive view.[153]

As the New York cases show, the limited view retained vitality for thirty-seven years after *Pennoyer*. If the limited view was "wishful thinking,"[154] it was wishful thinking by that era's most prestigious state court.

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[153] As I noted in my original article, *Menefee* considered a North Carolina rule identical to New York's *Pope* rule. Borchers, *supra* note 1, at 49-51. In *Bagdon v. Philadelphia and Reading Coal and Iron Co.*, Cardozo skillfully managed to uphold jurisdiction over an out-of-state corporation by construing its appointment of an agent under New York law as an express assent to jurisdiction, thereby avoiding the question of whether the corporation met the Supreme Court's "doing business" standard. 111 N.E. 1075, 1076 (N.Y. 1916). Cardozo acknowledged the death of the *Pope* rule and his opinion casts a bright flare on the issue of how the *Pope* rule was finally put to rest:

> It is true that even the president of a foreign corporation may be here without bringing the corporation itself within this jurisdiction. He must be here "officially, representing the corporation in its business" (Conley v. Mathieson Alkali Works, 190 U.S. 406; Kendall v. American Automatic Loom Co., 198 U.S. 477; Goldey v. Morning News, 156 U.S. 518). To give judgment in violation of that rule is to condemn the corporation unheard, and to ignore the essentials of due process of law. Dicta to the contrary in Grant v. Cananea Consol. Copper Co. (189 N. Y. 241) must yield to the later decision in Riverside & Dan River Cotton Mills v. Menefee (237 U.S. 189, 192).

Bagdon, 111 N.E. at 1077.

Cardozo's summary is important in two respects. First, he clearly interpreted *Cananea Consolidated*, as had every other New York judge, not in the manner suggested by Professor Oakley, but rather as rejecting direct due process limitations on the *Pope* rule. *Id.* Otherwise, his juxtaposition of the "dicta to the contrary" statement about *Cananea Consolidated* with the citations to *Goldey* and *Conley* would be at worst misleading, and at best meaningless. Second, Cardozo clearly saw *Menefee* as the case responsible for the downfall of the *Pope* rule. *Id.*

Other courts also saw *Menefee* as the reason for the downfall of the *Pope* rule. *See, e.g.*, Sears, Roebuck & Co. v. Cromey, 26 N.Y.S.2d 687, 689 (Sup. Ct. 1941) (holding court had jurisdiction over domestic corporation and overruling special appearance to set aside service of summons for lack of jurisdiction); Kohn v. Wilkes-Barre Dry Goods Co., 246 N.Y.S. 425, 430-31 (Sup. Ct. 1930) (granting motion to vacate service of summons); National Furniture Co. v. William Spiegelman & Co., 189 N.Y.S. 449, 450 (Sup. Ct. 1921) (holding corporation was "doing business" within state and therefore denying motion to quash service), *aff'd*, 190 N.Y.S. 831 (1921). *See generally* Henry M. Day & Co. v. Schiff, Lang & Co., 278 F. 533, 535 (S.D.N.Y. 1921) (stating that "[t]he process of receding from the doctrine of *Pope v. Terre Haute Car Co.* is still going on").

[154] Oakley, *supra* note 14, at 594.

B. Other United States Supreme Court Cases

In my original article I identified several Supreme Court cases other than *Goldey* and *Conley* that resonated with the limited view.[155] Professor Oakley takes issue with me on them, and where the Court's language admittedly supported the limited view, he dismisses it as "confused"[156] or "delphic."[157] I will not prolong my reply by reviewing each one of these other cases, because *Goldey* and *Conley*, and their interplay with New York's *Pope* rule, make my point that the limited view was alive and well decades after *Pennoyer*.

I must, however, address the two Supreme Court cases that Professor Oakley faults me for not considering in detail, as he claims they established the expansive view at an earlier date than I originally identified.[158] The first is *York v. Texas*.[159] The *York* petitioner was a defendant in the Texas state courts.[160] He attempted a special appearance, but the state courts held that recent Texas state statutory amendments prohibited direct jurisdictional attacks.[161] The petitioner argued that this Texas state procedure violated the federal Due Process Clause. Yet the Supreme Court disagreed and held that a state may pass "legislation simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court . . . ."[162] The opinion says little more, does not cite *Pennoyer*, and contains no language supportive of the expansive view.

I am not sure why Professor Oakley thinks that *York* supports the expansive view. *York* could not have established the expansive view, for it held that the Texas procedure did not violate due process. Perhaps Professor Oakley's position is that *York* established the expansive view because the Court heard the case,

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[155] Borchers, *supra* note 1, at 43-46.

[156] Oakley, *supra* note 14, at 704.

[157] *Id.* at 706.

[158] *Id.* at 706-08.

[159] 137 U.S. 15 (1890); Oakley *supra* note 14, at 723 n.429 (noting that my original article did not cite *Scott*).

[160] *York*, 137 U.S. at 16.

[161] *Id.* at 18, 20.

[162] *Id.* at 20-21.

which would have required some colorable argument that a federal right was in jeopardy.[163] But assuming that this is Oakley's contention, *York* no more favors the expansive than the limited view. Responding to the petitioner's argument that the Texas procedure denied him a fair opportunity to contest jurisdiction, the Court stated that:

> [i]f [the petitioner had defaulted, instead of appearing and] the judgment had been pleaded as defensive to any action brought by him, he would have been free to deny its validity. There is nothing in the opinion of the [Texas] Supreme Court or in any of the statutes of the State, of which we have been advised, gainsaying this right.[164]

The Supreme Court evidently thought the Texas procedure passed constitutional muster because it gave the defendant a chance to contest jurisdiction (albeit collaterally). This is, of course, the role that the limited view postulates for the Due Process Clause.[165]

Professor Oakley also criticizes me for not considering *Scott v. McNeal*.[166] Oakley hypothesizes that I ignored *Scott* because it involved recognition of a judgment by a court of another government, F-1 having been a Washington territorial court and F-2 a Washington state court.[167] This is indeed a good reason, but I had a better one: *Scott* was not a personal jurisdiction case, and even if it was, it did not support the expansive view. *Scott* involved a person who disappeared for more than seven years and

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[163] *See also* WRIGHT, *supra* note 34, at 779 (discussing Supreme Court's appellate jurisdiction between 1789 and 1914); *cf.* Oakley, *supra* note 14, at 707 n.369 (stating "the Supreme Court . . . decided whether there was a right to a special appearance on the assumption that it was essential to the outcome . . . .").

[164] *York*, 137 U.S. at 21.

[165] Of course, *York* does not explicitly say that this is all that the Due Process Clause does, so it is not my contention that *York* is a case that by itself supports the limited view. But what it does say is fully consistent with the limited view, and there is nothing in the text of this brief opinion that appears to me to even plausibly suggest that the Due Process Clause has the additional role of setting territorial limits on state courts. I also do not understand how the language that Professor Oakley cites from the *York* case — to the effect the parties conceded that the out-of-state service upon the defendant gave the Texas state courts no jurisdiction — advances his cause. Oakley, *supra* note 14, at 707 n.369. That concession simply routes us back to the question of why the Supreme Court heard the case at all, which is just as easily explained by the limited view as the expansive.

[166] 154 U.S. 34 (1894).

[167] Oakley, *supra* note 14, at 733.

then, after his estate was probated, returned to claim his property.[168] Scott, the supposed decedent, returned to sue the parties who derived their title from purchasers of real property at the estate sale conducted by a Washington territorial probate court.[169] He brought his trespass suit in a Washington state court (Washington became a state in the interim[170]) claiming that the defendants' deed was void because the territorial court lacked "jurisdiction."[171] The case was appealed to the Washington state supreme court, which held for the defendants because it found that the territorial probate court's proceedings were valid, notwithstanding Scott's decidedly "undeceased" status.[172]

The United States Supreme Court held for Scott.[173] There are at least two possible ways to read *Scott*. First, one can read it as a subject matter jurisdiction case in which the Washington state courts denied Scott due process by failing to sustain a challenge on that basis. Second, one can read it as a personal jurisdiction case in which the state courts denied Scott due process by failing to sustain Scott's challenge to the decree as violating the territorial law of personal jurisdiction. My preference is for the first reading, but it does not matter; neither impeaches the limited view.

Scott dripped with references to subject matter jurisdiction. According to the official summary, the "writ of error . . . assigned for error that the probate proceedings . . . were without jurisdiction over the *subject-matter*, and absolutely void; and that . . . the judgment of the Supreme Court of the State . . . deprived him of his property without due process of law . . . ."[174] A good deal of the *Scott* opinion was devoted to summarizing the common law as to the validity of probate proceedings disposing of property of a live person — a summary made necessary by a Washington territorial enactment incorporating the common law of England.[175] Concluding that the

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[168] *Scott*, 154 U.S. at 39.

[169] *Id.* at 36-37.

[170] Oakley, *supra* note 14, at 734.

[171] *Scott*, 154 U.S. at 37.

[172] Scott v. McNeal, 31 P. 873 (Wash. 1892).

[173] *Scott*, 154 U.S. at 51.

[174] *Id.* at 37 (emphasis added).

[175] *Id.* at 39-43 (summarizing common law rule); *id.* at 47 (noting § 1 of Washington

weight of authority was that a probate court did *not* have such competence, the *Scott* Court stated that before death, the probate court did not have jurisdiction.[176]

There can be no doubt that *Scott* investigated this necessity-of-death rule under Washington *territorial* law. The Court stated: "In light of the common law, the exclusive original jurisdiction, conferred by § 1299 [of the *Territorial* Code] upon the probate court in the probate of wills . . . is limited to the estates of persons deceased . . . ."[177] Other passages refer with equal clarity to territorial law: "Under such a statute [as that in force in the territory of Washington], according to the overwhelming weight of authority, . . . the jurisdiction of the court to which is committed the control and management of the estates of deceased persons . . . does not exist or take effect before death."[178] This language clearly refers to subject matter jurisdiction (consider the phrase "exclusive original jurisdiction"), just as the writ of error assumed. Probate courts always have been considered courts of specialized competence.[179] When the Court spoke of death as a jurisdictional prerequisite for the territorial probate courts, it was speaking about their competence, not their territorial jurisdiction.

This does not explain why the case reached the United States Supreme Court on due process grounds, and both Professor Oakley[180] and the Supreme Court[181] worried about this problem. The *Scott* Court concluded that it could decide for itself the appropriate construction of the *territorial* jurisdictional provision because of the claimed conflict with the Constitution.[182]

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territorial enactment incorporates common law).

[176] *Id.* at 47.

[177] *Id.*

[178] *Id.* at 48.

[179] *E.g.*, BLACK, *supra* note 26, at § 633. As the discussion in Black's treatise shows, there was some disagreement as to whether probate courts were courts of "limited" jurisdiction in the specialized sense of them being courts of "record." Black concluded that the majority rule was that they were courts of record, but there clearly was no debate that they had less-than-comprehensive subject matter jurisdiction. *Id.* (noting probate court orders are conclusive "when acting within the scope of its peculiar jurisdiction").

[180] Oakley, *supra* note 14, at 735.

[181] *Scott*, 154 U.S. at 45-46.

[182] *Id.* The *Scott* opinion gave the appearance of conflating the interpretation of a statute with whether it violates a federal right. Oakley notices this problem as well, but his solution to it is extremely strained. He argues that when *Scott* referred to its independent

right to "construct" (territorial) law, it really meant that it was determining whether the law violated the Constitution. Oakley, *supra* note 14, at 735. He argues that this must be *Scott*'s meaning, because otherwise the Supreme Court would be bound by the "contrary view of *state* law by the supreme court of the state . . . ." *Id.* at 735 (emphasis added). This premise is faulty. Territorial courts are created by the federal government. 1 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE 26 (rev. ed. 1995). The Washington Supreme Court and the United States Supreme Court were not disagreeing about Washington state law, they were disagreeing about territorial law. Washington's admission resolution made the Washington state courts "the successor" to pending local cases in the territorial courts. 25 Stat. 683 (1889). But *Scott* was a case in which the usual rules about state courts being the final authorities on state law would appear to have no application, because the Washington Supreme Court was interpreting another government's (the territory's) law. The institution with the superior vantage point on question of Washington territorial law would be the United States Supreme Court, not the Washington Supreme Court, because the former had appellate authority over the Washington territorial courts from 1853 forward. 10 Stat. 176 (1853).

Oakley's reading of *Scott*, aside from beginning from this faulty premise, does not fit with the text of the opinion. *Scott* was interested in determining what the common law rule was because the territorial law incorporated common law, and the Supreme Court made an express finding that nothing in territorial Washington law purported to alter this common law rule. *Scott*, 154 U.S. at 48 (declaring "under *such a statute* [as that in force in the territory], according to the overwhelming weight of authority . . . the jurisdiction of the court . . . does not exist or take effect before death.") (emphasis added). This is, purely and simply, statutory interpretation.

I assume that Professor Oakley's rejoinder to my view that *Scott* is consistent with the limited view would be that because the Washington state courts actually investigated the question of jurisdiction under territorial law, their conclusion, even if mistaken, ought be enough to satisfy the limited view. Therefore, I assume his argument runs, by agreeing to hear the case at all, and deciding that the judgment of the Washington Supreme Court was unconstitutional, the Court saw a role for due process larger than that contemplated by the limited view. This argument fails to take account of the peculiar posture of the *Scott* case. In an ordinary Case 4, a state court can be presumed to have correctly interpreted its own law of jurisdiction; indeed, its state law interpretation, as in *York*, is conclusive. *York*, 137 U.S. at 19. Thus, under the limited view, the due process interest in a Case 4 is vindicated by giving the defendant a fair opportunity to contest jurisdiction under state law principles. But, as I note in the text, *Scott* could not possibly have had a hearing in the territorial courts on the question of jurisdiction, unless he had a time machine. The only realistic alternative, then, was the Washington state courts. But unlike the ordinary Case 4, in which there is every reason to defer to F-2's interpretation of its own law of jurisdiction, the Washington state courts would not necessarily be in a superior position to the Supreme Court to interpret territorial law.

Therefore, at most *Scott* was saying that under these circumstances in which the F-1 "disappears," a party has a constitutional right to a reasonably accurate reading of F-1's local law jurisdiction. This is not an unheard of situation. In choice of law, the Supreme Court has occasionally held that the joint operation of the Due Process and Full Faith and Credit Clauses requires a state to apply a law other than its own. *E.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985) (holding that application of Kansas law by Kansas supreme court was so unfair as to exceed constitutional limits); Home Ins. Co. v. Dick, 281 U.S. 397, 398 (1930) (noting that states may not abrogate rights of those beyond their borders, with no ties to their state, by imposing its laws on them). In those circumstances,

At this point, *Scott* stated that "no judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party," and then quoted a good bit of *Pennoyer*'s due process dictum — including, significantly, *Pennoyer*'s subject matter jurisdiction reference.[183]

Professor Oakley points to this as evidence that *Scott* was really a personal jurisdiction case, and represented the "expansive view on a grand scale"[184] because the Court was declaring that mere recognition of a judgment by the Washington Supreme Court in violation of the common law principles violated due process, even though the territorial court was (obviously) not subject to the Fourteenth Amendment. This, he argues, actually means *Scott* went beyond the expansive view of *Pennoyer*, and invalidated decrees rendered *prior* to the Fourteenth Amendment.[185]

The sheer implausibility of Professor Oakley's line of argumentation should give one pause. Here again, Professor Oakley fails to note *Pennoyer*'s side-by-side references to personal *and* subject matter jurisdiction. *Pennoyer* said that enforcement of a state court judgment rendered without subject matter jurisdiction, defined of necessity by state law, is a violation of the defendant's due process rights.[186] Regarding subject matter jurisdiction, this can *only* mean that a defendant gets a fair opportunity to demonstrate a violation of F-1's local rules of subject matter jurisdiction.[187] While Professor Oakley's theory of *Scott* cannot explain why the Supreme Court inquired into the nice-

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there is also a constitutional right to a reasonably accurate appraisal of that law. *See, e.g.*, Pennsylvania Fire Ins. Co. v. Gold Issue Mining and Milling Co., 243 U.S. 93, 96 (1917) (noting that state complied with its duty to apply sister state's law by engaging in "candid" evaluation of it); *see also* Sun Oil Co. v. Wortman, 486 U.S. 717, 744 (1988) (O'Connor, J., dissenting) (arguing that Kansas state court's efforts at interpreting Texas, Louisiana and Oklahoma state law were so unsatisfactory as to be unconstitutional). This is surely a more satisfactory reading of *Scott*, as it makes sense of the Supreme Court's efforts to interpret for itself territorial law and avoids all of the weird problems of retroactivity presented by Oakley's proposed reading. The fundamental point here is that *Scott* cannot possibly be a case that holds that the Due Process Clause sets territorial limits on state courts. At most it holds that state courts, in limited circumstances, have a duty to accurately read F-1's local law of jurisdiction.

[183] *Scott*, 154 U.S. at 46 (quoting *Pennoyer*, 95 U.S. at 733).

[184] Oakley, *supra* note 14, at 740.

[185] *Id.*

[186] *Pennoyer*, 95 U.S. at 733.

[187] Oakley, *supra* note 14, at 622.

ties of the territorial law,[188] *Pennoyer*'s overlooked subject matter jurisdiction language makes sense of it. When *Scott* said that Moses Scott's corporeal existence deprived the territorial probate court of "jurisdiction," it simply allowed him to attack the earlier decree of the Washington territorial court on subject matter jurisdiction grounds — defined, of course, by territorial law. Because *territorial enactment* bound the territorial court to follow the necessity-of-death rule, proof that he was the living Moses Scott was sufficient to upset that decree. It made a great deal of sense to say that the Washington state courts were under a due process duty to allow him to make that showing. Without a time machine, Scott could not have presented the matter to the territorial court that issued the decree. *Scott* simply followed *Pennoyer*'s dictum that a party gets a chance to show that F-1 entered its judgment in violation of *its* rules of subject matter jurisdiction.[189]

That is my preferred reading of *Scott.* But even if *Scott* is a personal jurisdiction case, it makes no difference. The territorial enactments required the Washington territorial court to follow the common law.[190] If one indulges in the assumption that necessity of death is a rule of personal jurisdiction, then the Supreme Court's investigation of the common law rule determined whether the territorial probate court had personal jurisdiction *as defined by the F-1's law.* Again, without a time machine, Moses Scott could not challenge the decree in the territorial court, and Washington's state courts were the only alternative. Under the limited view, Scott needed a chance to demonstrate that F-1's courts failed to follow their own jurisdictional rules.[191] The Su-

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[188] *Scott*, 154 U.S. at 47-48.

[189] The point made earlier about why, under the peculiar circumstances of a "disappearing" F-1, it was appropriate for the Supreme Court to make the further investigation of what those rules of jurisdiction were, is equally applicable here. *See supra* note 182 and accompanying text.

[190] *Scott*, 154 U.S. at 47.

[191] Again, the point made *supra* note 182 is equally applicable here. In a Case 4, under the limited view, F-2 meets its due process obligation by giving the judgment debtor a chance to contest jurisdiction under state law, and its reading of (its own) state law is conclusive. *E.g.*, York v. Texas, 137 U.S. 15, 19 (1890). But in the unusual case of the "disappearance" of the court system rendering the judgment, thereby pressing the Washington state courts into service, the Supreme Court has no reason to defer to the Washington Supreme Court's reading of territorial law, hence its independent investigation into the

preme Court's decision in *Scott*, even if it was a personal jurisdiction decision, was an affirmation of his limited view due process right to demonstrate that he was indeed alive, and that the territorial courts lacked jurisdiction under *territorial* law.

None of this even remotely established *Scott* as an expansive view case. Quite to the contrary, *Scott* was stating, like *York* before it, that a defendant gets a chance to show that the rendering court lacked jurisdiction under its own rules. Under *York*, it was enough that a defendant be allowed to default and collaterally attack the judgment in the rendering court, but Moses Scott did not have that luxury. By the time he reappeared, the Territory of Washington had been replaced by a state. He had a constitutional right to have the territorial judgment set aside if he could show it was entered in violation of the *territorial* law of jurisdiction. *Scott*'s innovation, if any, was to create under these unusual circumstances a due process right to an independent reading of F-1's jurisdictional law. This is light years from holding that the Due Process Clause renders state court recognition of any decree (from any court, at any time) unconstitutional if entered on a non-common law jurisdictional basis.[192]

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contents of F-1's (the Washington territory's) law of jurisdiction. *Scott*, 154 U.S. at 47-48.

[192] Professor Oakley's "time lag" hypothesis as an alternative explanation for the language supportive of the limited view in Supreme Court cases is wholly unpersuasive. Oakley, *supra* note 14, at 744. Essentially, Professor Oakley's position appears to be that the Supreme Court decided in *Pennoyer* that due process was a direct restraint on state court jurisdiction, but tried to keep it under wraps until the doctrine of adverse possession had quieted the title of invalid judicial sales. *Id.* at 744-45. Professor Oakley's hypothesis, however, is inspired in large part by his misreading of *Scott*, which in his view would have applied *Pennoyer*'s expansive view even to state court judgments rendered before the adoption of the Fourteenth Amendment. *Id.* at 740. Moreover, this concern with security of land titles does not fit with the Supreme Court's "other government" versus "same government" language in *Goldey* and similar cases because this language still might have invited challenges to land titles in which the parties were fully diverse and the amount in controversy requirement satisfied. *See supra* note 110-19 and accompanying text. Rather, the convincing explanation is the one that I offered, which is that *Pennoyer* was capable of two different readings, and that genuine uncertainty persisted until 1915 as to what, if any, direct limits the Due Process Clause set. If, as Oakley insists, the expansive view of *Pennoyer* was the only and the obviously correct one, what good would have come from the Supreme Court's efforts to keep it quiet later on? The efforts to keep it quiet would have had a chance for success only if the Court's language in *Pennoyer* did not settle the matter by itself.

C. Treatises and Case from Other States

Treatises from that era also shed light on the matter. In an era in which case law was less accessible than now, it is hard to overstate the importance of scholarly attempts to synthesize the law. Professor Henry Campbell Black penned the first edition[193] of his influential two-volume treatise on judgments in 1891, right in the middle of the critical period.[194] Black was a prolific writer[195] best known today as the original author of *Black's Law Dictionary.*

Black shared the limited view of *Pennoyer.* In discussing statutes allowing constructive service on non-residents, he wrote:

> A judgment rendered in one state against a resident of another state, who was not served with process and did not appear in the action . . . is not valid *out of the state where rendered,* although the attempt to acquire jurisdiction may have been in a mode (*e.g.*, publication of summons in a newspaper) recognized as sufficient and valid by the laws of that state; and such absence of jurisdiction will defeat an action on such a judgment *in any other state.*[196]

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[193] Black also authored a second edition, published in 1902. HENRY C. BLACK, A TREATISE ON THE LAW OF JUDGMENTS (2d ed. 1902). At least with regard to its treatment of *Pennoyer,* Black's treatise changed very little. In one section, Black added a sentence summarizing the Supreme Court's decision in Dewey v. City of Des Moines, 173 U.S. 193 (1899). 1 BLACK, *supra* § 227, at 338. Evidently, he did not regard *Dewey* as important for that section repeated verbatim (and again cited *Pennoyer*) the following: "[A] personal judgment . . . rendered against a non-resident upon a species of constructive service only, in an action to which he did not appear, *is limited in its effects to the state or country where rendered, and elsewhere is a mere nullity.*" 1 BLACK, *supra* § 227, at 339 (emphasis added). *Pennoyer* was cited in two new sections in the second edition, but both times for its application of full faith and credit principles to Case 3. 2 BLACK, *supra* §§ 938c, 939.

[194] BLACK, *supra* note 26.

[195] *See, e.g.*, HENRY C. BLACK, CONSTRUCTION AND INTERPRETATION OF THE LAWS (2d ed. 1911); HENRY C. BLACK, LAW OF JUDICIAL PRECEDENTS (1912); HENRY C. BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW (4th ed. 1927); HENRY C. BLACK, A TREATISE ON THE RESCISSION OF CONTRACTS AND CANCELLATION OF WRITTEN INSTRUMENTS (1916); HENRY C. BLACK, THE RELATIONSHIP OF THE EXECUTIVE POWER TO LEGISLATION (1919).

[196] 2 BLACK, *supra* note 26, § 906, at 1086 (emphasis added). Black repeated this assertion and the citation to *Pennoyer* in his 1902 second edition. 2 BLACK, *supra* note 193, § 906.

In support he offered a massive string citation that *included Pennoyer.*[197]

This was not an isolated statement. In the section on "Extra-Territorial Service of Process," Black cited *Pennoyer* and other cases for the following: "[S]ervice of process in another state, though authorized by the laws of the forum, gives no authority to render a personal judgment which will have any force or vitality *beyond the state where the action was brought.*"[198] The section on "Judgments against Non-Residents" cited *Pennoyer* as supporting the assertion that "a personal judgment . . . rendered against a non-resident upon a species of constructive service only, in an action to which he did not appear, *is limited in its effects to the state or country where rendered,* and *elsewhere* is a mere nullity."[199]

Black's statements indisputably support the limited view. By citing *Pennoyer* in fifteen sections[200] (making it one of the most frequently referenced authorities), Black clearly indicated that he thought it an important case, but largely for its common law jurisdictional restatement[201] and full faith and credit hold-

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[197] 2 BLACK, *supra* note 26, § 906, at 1086 n.241. Black also cited many state cases making this distinction. *See* Pickett v. Ferguson, 45 Ark. 177 (1885) (restraining party from proceeding in courts of another state); Ewer v. Coffin, 1 Cush. 23 (Mass. 1848) (considering nominal attachment sufficient for state jurisdiction and judgment from that state, but it does not justify another state's enforcement of judgment against defendants); Price v. Hickok, 39 Vt. 292 (1866) (finding judgment from attachment not personally binding on defendant when judgment is enforced in state other than where rendered). Many (but certainly not all) of the state cases cited by Black pre-dated *Pennoyer,* but the fact that Black cited them in a footnote that included a citation to *Pennoyer* is further evidence that Black saw *Pennoyer* as not disturbing the pre-*Pennoyer* state practice.

[198] 2 BLACK, *supra* note 26, § 905 (emphasis added). Black repeated this assertion and the citation to *Pennoyer* in his 1902 second edition. 2 BLACK, *supra* note 193, § 905.

[199] 1 BLACK, *supra* note 26, § 227 (emphasis added). Black repeated this assertion and the citation to *Pennoyer* in his 1902 second edition. 1 BLACK, *supra* note 193, § 227.

[200] 1 BLACK, *supra* note 26.

[201] 2 BLACK, *supra* note 26, § 904 n.231. In this section, including the citation to *Pennoyer,* Black again stated that an attempt to expand an *in rem* judgment beyond the attached property "is to be treated as a nullity *by a court in another state* which is called upon to enforce it by action . . . ." *Id.* at § 904 (emphasis added).

There is a passage in another section of Black's treatise that might be read in isolation as endorsing the constitutionalization of the requirement of pre-judgment attachment for in rem cases. Black referred to some state cases allowing in rem jurisdiction against all property within the state, whether attached or not. 1 BLACK, *supra* note 26, § 231. He then stated: "But this position was successfully controverted in the important and leading case of *Pennoyer v. Neff,* and the rule established that such a judgment . . . is simply and entirely

ing.[202] Professor Black certainly did not ignore *Pennoyer*, and he did adopt the limited view of it.

Black's major competitor was Professor Abraham C. Freeman, whose treatise went through five editions. The most pertinent for our purposes are the third edition published in 1881[203] and fourth in 1892.[204] Unlike Black, Freeman advanced the expansive view. But confident as he was in his reading of *Pennoyer*, he still wondered whether it would catch on:

> If the construction to the Fourteenth Amendment . . . given in several recent cases,[205] meets with general acquiescence, it would seem that all questions regarding the jurisdiction of courts over the persons against whom they pronounce judgment, must ultimately be determined in the national courts, or at least according to the principles there recognized and applied; and, therefore, that the wide dissimilarity heretofore existing in the different States must ultimately disappear.[206]

The same passage, with the same qualifications and citations, appeared in the 1892 edition[207] showing that fifteen years after *Pennoyer*, Freeman still doubted whether the expansive view would "meet[] with general acquiescence." Only the 1925 fifth edition, with another author's revisions, replaced the "[i]f . . . meets with general acquiescence" phrase with unqualified language.[208] The Black-Freeman conflict is strong evidence of the

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void for all purposes." *Id.* If this were all that Black said about *Pennoyer*, it might appear that he adopted the expansive view. This, however, would be extremely hard to square with his discussion of *Pennoyer* elsewhere, including his further discussion of pre-judgment attachment in § 904 noted immediately above. There is a more comfortable way to construe Black's comments than to conclude that he was inconsistent. His discussion in § 231 appears to speak of *Pennoyer* in common law terms. Prior to Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), the Supreme Court was an important source of common law. Black's references to the contrary doctrine having been "successfully controverted" (as opposed to "overruled" or "overthrown") and to *Pennoyer* as an "important and leading case" (as opposed to the last word) are consistent with treating *Pennoyer* as an important exposition on the common law principles.

[202] 2 BLACK, *supra* note 26, § 901.

[203] ABRAHAM C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS (3d ed. 1881).

[204] ABRAHAM C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS (4th ed. 1892).

[205] Freeman cited only two cases, one of which was *Pennoyer*. *See also* Belcher v. Chambers, 53 Cal. 635 (1879) (taking expansive view).

[206] FREEMAN, *supra* note 203, § 561 (footnote omitted).

[207] FREEMAN, *supra* note 204, § 561.

[208] ABRAHAM C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS 2811 (5th ed. 1925) ("Under the construction given to the Fourteenth Amendment to the Constitution [citing *Pennoyer* and *Belcher*] . . . .").

limited view's vitality, and Freeman's continued use of qualifying language until 1925 suggests that he did not see the expansive view as the indisputably correct one.

The conflict between treatise writers over the limited view extended beyond the field of judgments. Seymour Thompson's multi-volume work on corporate law,[209] written nearly contemporaneously with the Supreme Court's decision in *Goldey v. Morning News*,[210] is instructive on corporate tag jurisdiction. Thompson reported that it was a "firmly settled" principle of American law that corporate tag jurisdiction was not available, "*except where changed by statute.*"[211] In support of this proposition, he cited, *inter alia*, both *Goldey*'s lower federal court and Supreme Court incarnations.[212] He went on to say that service on a corporate officer does not confer jurisdiction unless the corporation was "doing business" in the state, "*always provided that the local statute law has not changed the practice.*"[213] He cited the New York decisions, including *Pope*, as among those reflecting a "changed" state practice.[214] Thompson's understanding of *Goldey* and state jurisdictional law mirrored New York's until *Menefee*: the corporate tag rule depended on local statutes, not Supreme Court doctrine.[215] Thompson's conclusion conflicted with Professor Beale's, however, whose one-volume treatise reasoned that later Supreme Court decisions "overruled" New York's *Pope* doctrine.[216] Nevertheless, the mere fact that these

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[209] SEYMOUR D. THOMPSON, COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS (1895).

[210] 156 U.S. 518 (1895).

[211] 6 THOMPSON, *supra* note 209, § 8030 (emphasis added).

[212] *Id.* at § 8030 n.1.

[213] *Id.* (emphasis added).

[214] *Id.* at § 8030 n.2.

[215] *See supra* notes 124-51 and accompanying text (holding corporate tag rule depended on local statutes).

[216] JOSEPH H. BEALE, JR., THE LAW OF FOREIGN CORPORATIONS AND TAXATION OF CORPORATIONS BOTH FOREIGN AND DOMESTIC § 270 (1904). Beale's treatise assumed, incorrectly, that *Goldey* and *Conley* had caused the New York courts to abandon the *Pope* rule. *Id.* ("The present doctrine in New York appears to be that if the corporation is in fact doing business in the State, service of process on an officer temporarily within the State is sufficient; . . . ."). Beale cited two cases as supporting this assertion: Weston v. Citizens' Nat'l Bank, 71 N.Y.S. 827 (App. Div. 1901) and Porter v. Sewall Safety Car-Heating Co., 7 N.Y.S. 166 (Sup. Ct. 1889). *Weston* was a case in which the Appellate Division held that corporate officers, in the state for purposes related to litigation, had waived their normal immunity

noted scholars were in conflict over the matter is evidence of the limited view's plausibility.

Scholarly non-unanimity paralleled a state court split. Some state decisions took the expansive view of *Pennoyer*.[217] But as we have already seen,[218] the New York Court of Appeals, the most important and prestigious state court of that time, took the limited view and so did others.[219] Other state decisions treated

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from service. *Weston*, 71 N.Y.S. at 829-30. There is casual dictum about the service having been premised upon the corporation doing business, but in light of the holding and the rationale, it is pure obiter. *Id.* at 829. Beale's citation to *Porter* is puzzling, as it is a classic application of the *Pope* rule, the corporate officer having been served on a pleasure trip to Saratoga. *Porter*, 7 N.Y.S. at 166. Beale also failed to note post-*Goldey* authority reaffirming *Pope*. *See, e.g.*, Buell v. Baltimore & O.S.W.R.R., 57 N.Y.S. 111 (App. Div. 1899) (upholding service of process upon president of recently consolidated corporation); Persons v. Buffalo City Mills, 51 N.Y.S. 645 (App. Div. 1898) (upholding service of process upon former corporate treasurer). Beale, writing in 1904, was of course unaware that the Court of Appeals would reaffirm the *Pope* doctrine later. *See, e.g.*, Sadler v. Boston & Bolivia Rubber Co., 125 N.Y.S. 405 (App. Div. 1910), *aff'd*, 95 N.E. 1139 (N.Y. 1911) (upholding constitutionality of civil procedure code permitting service upon nonresident treasurer of foreign corporation temporarily within state).

[217] *See* Oakley, *supra* note 14, at 745 n.504 (citing six cases); *see also* Smith v. Colloty, 55 A. 805 (N.J. 1903) (finding jurisdiction over nonresident defendant who appears generally or makes defenses upon merits after being served with summons); Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co., 123 N.W. 640 (Wis. 1909) (upholding service of process upon secretary of foreign corporation served in state while conducting corporate business).

[218] *See supra* notes 125-50 and accompanying text (supporting limited view).

[219] The clearest example, aside from New York, that I have been able to locate is the North Carolina state courts. In Jester v. Baltimore Steam Packet Co., 42 S.E. 447 (N.C. 1902), the North Carolina Supreme Court followed *Pope*, and took the limited view, reasoning that the Supreme Court decisions did not bind it. North Carolina consistently adhered to *Jester*. *See, e.g.*, McDonald v. MacArthur Bros., 69 S.E. 832, 833 (N.C. 1910) (following *Jester* in dicta); Johnson v. Grand Fountain of United Order of True Reformers, 47 S.E. 463, 464 (N.C. 1904) (following *Jester*). This would be the prevailing view in North Carolina through Menefee v. Riverside & Dan River Cotton Mills, 76 S.E. 741 (N.C. 1912). In *Menefee*, the North Carolina high court cited the *Goldey* language regarding recognition in the courts of the "same government" versus "[an]other government." *Id.* at 743. The North Carolina Supreme Court refused to hold its statute unconstitutional on due process grounds, and noted that "[w]hat opportunity or method the plaintiff may have to enforce his judgment is not before us now for consideration." *Id.* *Menefee* was reversed by the Supreme Court decision that finally enshrined the expansive view of *Pennoyer*. Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915). Both *Menefee* decisions are discussed in Borchers, *supra* note 1, at 49-51. Language supportive of the limited view appears in the decisions of other state courts. *See, e.g.*, Amsbaugh v. Exchange Bank of Maquoketa, 5 P. 384, 387 (Kan. 1885) (considering whether to recognize Iowa judgment founded upon "abode" service of former Iowa domiciliary: "Would the service be such a *personal* service upon him that it would bind him *personally* in other jurisdictions outside of the state of Iowa?"); Guenther v. American Steel Hoop Co., 76 S.W. 419, 420 (Ky. 1903) (considering

personal jurisdiction as entirely a matter of statutory construction,[220] and many construed their statutes contrary to *Pennoyer*'s principles.[221] Finally, some decisions, while adopting the expansive view, recognized that other decisions suggested a contrary rule, all of which is further evidence of the limited view's plausibility.[222]

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direct attack on state court jurisdiction and rejecting because defendant was doing business in-state, but offering as alternative rationale that "the question [is not] now raised as to what effect should be given the judgment beyond the confines of this state . . . ."); Hochstein v. James W. Hill & Co., 82 A. 171, 172 (N.H. 1912) (refusing to enforce New York judgment rendered under *Pope*, court referred to disjunction between in-state and out-of-state enforcement by citing *Goldey* and stating: "[I]t does not follow that the judgment obtained by default upon such service is valid and binding *in another state*, and enforceable there against the defendant in an action of debt.") (emphasis added); *see also* Grover & Baker Sewing Mach. Co. v. Radcliffe, 137 U.S. 287, 295 (1890) (noting Maryland and Pennsylvania courts recognize "the distinction between the validity of a judgment rendered in one State, under its local laws on the subject, and its validity in another State."); De La Montanya v. De La Montanya, 44 P. 345, 351 (Cal. 1896) (McFarland, J., dissenting) (suggesting that *Pennoyer* was unclear on whether it had unified standards for direct and collateral attacks).

[220] *See, e.g.*, Johnson v. Westerfield's Admin., 135 S.W. 425, 426-27 (Ky. 1911) (upholding service of process on resident who served as agent of tugboat company engaged in business in state); Daniels v. Detroit, Grand Haven & Milwaukee Ry. Co., 128 N.W. 797, 799-800 (Mich. 1910) (citing Michigan long-arm statute in upholding service of process upon agent of Canadian corporation); Davis v. Jacksonville Southeastern Line, 28 S.W. 965, 966-67 (Mo. 1894) (citing New York's *Pope* decision with approval); Klopp, Bartlett & Co. v. Creston City Guar. Waterworks Co., 52 N.W. 819, 820-21 (Neb. 1892) (citing Nebraska long-arm statute in upholding service of process upon agent of Iowa corporation); Bristol v. Brent, 110 P. 356, 358-60 (Utah 1910) (upholding service of process based on Utah statute authorizing service upon persons in charge of in-state branch office of foreign business).

[221] *See, e.g., Klopp*, 52 N.W. at 820 (upholding constitutional validity of Nebraska service rule allowing in personam jurisdiction over corporation based upon in-state service of officer if action based on contract with in-state party; decision could not be announcing rule of constitutional law unless anticipating developments in "minimum contacts" law by 70 years); Strom v. Montana Central Ry. Co. 84 N.W. 46 (Minn. 1890) (holding as matter of state law that action may be maintained against foreign corporation for personal injuries suffered outside state so long as foreign corporation owns property in state; no requirement for pre-judgment attachment of property); Rice v. Peteet, 1 S.W. 657, 657-58 (Tex. 1886) (noting that pre-judgment attachment not required for in rem jurisdiction under Texas attachment statute); Quarl v. Abbott, 1 N.E. 476 (Ind. 1885) (holding that in rem judgment can be enforced within state even against property not attached prior to judgment).

[222] *See, e.g.*, Matthews v. Montreal Mining Co., 150 N.W. 127, 129-30 (Mich. 1914) (noting disparity in rulings on constitutionality of service statutes); Raher v. Raher, 129 N.W. 494, 500-01 (Iowa 1911) (discussing English and French use of statutory provisions and applicability in U.S., but dismissing them as unconstitutional); Kemper-Thomas Paper Co. v. Shyer, 67 S.W. 856, 858-59 (Tenn. 1902) (stating that some state decisions supported limited view, but rejecting it as illogical); De La Montanya v. De La Montanya, 44 P. 345,

I have not demonstrated the limited view's hegemony, nor was this my purpose. Conceivably, a state-by-state head count would show the expansive view leading in adherents when *Menefee* was decided. But the weight of authority is irrelevant to my argument that the limited view was plausible rather than, as Professor Oakley contends, an "invention with no detectable footing in fact."[223]

CONCLUSION

Professor Oakley's article stimulates but does not persuade. I am grateful that he took my original article seriously enough to write an extended response, and his powerful rhetoric has pressed me to offer a more refined and complete statement of my position. But notwithstanding the urgency with which he advances his arguments, I stand by my contention that *Pennoyer* did not settle the question of whether the Due Process Clause limited the territorial reach of state courts, and that the case which did so was *Riverside & Dan River Cotton Mills v. Menefee.*[224]

Professor Oakley sees clarity in the historical record that close inspection reveals to be a mirage. A pervasive theme in Professor Oakley's article is his belief in a unitary historical "truth" and a singularly correct "right answer" to even the most difficult of legal problems.[225] Yet, problems of legal history can be extraordinarily complex, especially a question of what meaning to attach to a Supreme Court opinion penned nearly a century and a quarter ago. Many legal problems have singularly correct answers, but not all. Whether *Pennoyer* established due process as a direct limitation on state court jurisdiction is one of those difficult questions that does not have a singularly correct answer.

Professor Oakley marshals evidence supporting the plausibility of the expansive view. But having determined that the expansive view is plausible, he is required, by both his judicial philosophy and his belief in a purely "objective" institution of legal history,

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348 (Cal. 1896) (noting that statements in Supreme Court decisions supported limited view, but concluding that they were dicta).

[223] Oakley, *supra* note 14, at 748.

[224] 237 U.S. 189 (1915).

[225] *E.g.*, Oakley, *supra* note 14, at 595, 748-52.

to deny the plausibility of any competing view. Consequently he discounts or ignores powerful contrary evidence.

Professor Oakley claims that I took an entirely "instrumentalist" approach and engaged in "revisionist history."[226] Essentially he argues that my "limited view" of *Pennoyer* was a clever construct, concocted by gluing together small bits of the historical record, all to advance my pragmatic program of constitutionally deregulated state court jurisdiction. However, Professor Oakley has not substantiated this claim. I do not believe legal writers are free to reinvent the historical record to advance their reform programs, and I engaged in no such revisionism. Contrary to his assertions, the limited view was plausible in light of the *Pennoyer* opinion, and had substantial support long after that decision.

Progress will not be made by hyperdulia at the altar of conventional wisdom. Professor Oakley speaks eloquently of the individual rights of the long-dead Marcus Neff,[227] but ignores the Kay Robinsons of our time who after being burnt in her deathtrap car on an Oklahoma freeway, encountered the Kafkaesque complexities of constitutionalized state court jurisdiction[228] which the Supreme Court contrived without any effort at comparative research.[229] Even modest efforts in this vein would have revealed that our European neighbors have made strides towards a sensible scheme of jurisdictional regulation which makes our byzantine system look like a product of the dark ages.[230] If the only consequence of our uncritical acceptance of past learning were befuddled academics, it would not be cause for concern. But real peoples' lives and interests hang in the balance. While the Supreme Court fiddles with the mini-

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[226] *Id.* at 595, 749.

[227] *Id.* at 752.

[228] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[229] *See generally* Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 COLO. L. REV. 1 (1993) (suggesting that confusing case law and internal disagreements create criticism of court).

[230] Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121 (1992).

mum contacts test,[231] tort victims,[232] child support claimants,[233] and deceived investors[234] burn. And if our collective false consciousness about *Pennoyer*'s role binds us to this system, we need to obliterate it before it is too late.

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[231] *Compare World-Wide*, 444 U.S. at 293-94 (noting minimum contacts contains element of "interstate federalism") *with* Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 n.10 (1982) (stating minimum contacts are solely an element of "individual liberty").

[232] *World-Wide*, 444 U.S. at 296 (holding no jurisdiction in products liability action in state where injury occurred).

[233] *See, e.g.*, Kulko v. Superior Court, 438 U.S. 908 (1978) (holding no jurisdiction in child support action in home state of children).

[234] *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186 (1977) (holding no jurisdiction in shareholder's derivative action in state of incorporation).