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JUSTICE SCALIA'S DUE PROCESS TRADITIONALISM APPLIED TO TERRITORIAL JURISDICTION: THE ILLUSION OF ADJUDICATION WITHOUT JUDGMENT†

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*It is revolting to have no better reason for a rule of law than that
so it was laid down in the time of Henry IV.¹*

*Tradition. Without our traditions, our lives would be as shaky
as—as a fiddler on the roof!²*

I began my legal career as a law clerk to an appellate court judge. On my first day on the job the chief administrator of the court summoned my fellow clerks and me to an orientation. He ended the orientation with a story, perhaps apocryphal. It seems that the court bailiff, who had occupied the position for many years, was very much a creature of habit. One of the bailiff's duties was to call to order the court's daily oral argument sessions. He did this by crying out the following command for silence and attention, the first word of which, repeated three times, has been invoked since the thirteenth century and the entire body of which, we were told, had been proclaimed without fail before every session of the court in its history: "Oyez! Oyez! Oyez! This honorable court is now in session. All who have business before this honorable court come round and gather near. God save the United States and this honorable court."³

Although he had opened thousands of court sessions and presumably had long since committed the words of the command to

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¹ OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 187 (1920).

² JOSEPH STEIN, JERRY BOCK & SHELDON HARNICK, *FIDDLER ON THE ROOF* 9 (1964).

³ See 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 334 (4th ed. 1771); *THE OXFORD ENGLISH DICTIONARY* 2048 (compact ed. 1971).

memory, the bailiff, perhaps fearful of embarrassment if his powers of recollection were suddenly to fail him, had typed onto a notecard the command which he dutifully read verbatim at the appointed time. One day, however, a court clerk with whom the bailiff had been feuding, aware of the bailiff's habitual reliance on the notecard, got hold of it and decided to make a slight alteration in the text, changing a word in the final sentence. Thus, when the bailiff next rose to convoke the proceedings he solemnly beseeched God, not to "save the United States *and* this honorable court" but rather, reading directly from the card, entreated the Almighty to "save the United States *from* this honorable court."

Although there was apparently some tongue-in-cheek speculation by court wags that the bailiff had finally gotten it right after all those years, he was reported to have been considerably chagrined by his error. And our assembled group of fledgling lawyers all enjoyed a good chuckle at his expense.

I remembered this story while thinking about Justice Scalia's jurisprudence and specifically his approach to interpreting the Due Process Clause.⁴ I wondered whether he could have shared the laugh. This is not to denigrate the Justice's sense of humor; on the contrary, he is by many accounts quite personable (unless, according to Judge Kozinski, he is promised but not served his favorite pizza).⁵

⁴ There are, of course, two due process clauses in the Constitution—one in the Fifth Amendment and one in the Fourteenth Amendment. They differ linguistically only in that the former applies to the federal government and the latter to the states. When I refer in the text to the "Due Process Clause," I mean the Due Process Clause of the Fourteenth Amendment unless otherwise indicated. The reason for focusing on the Fourteenth Amendment is that the cases in which Justice Scalia discusses due process involve state action, although he gives no indication that his view of due process under the Fifth Amendment is any different.

The Supreme Court has held that the Fourteenth Amendment imposes limitations on the exercise of personal jurisdiction by the states. *See infra* text accompanying notes 190–95. The Court has not addressed the issue of whether the Fifth Amendment imposes similar limitations on the federal government. For an argument that the Court should recognize such limitations, see Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1 (1984). Professor Fullerton's argument has recently been substantially undercut, however, by the amendments to FED. R. CIV. P. 4, which authorize nationwide service of process in federal question cases. It seems unlikely that the Court in the future will hold unconstitutional exercises of jurisdiction it has authorized by rule, although it might strike down particular assertions of jurisdiction it deems to be especially exorbitant.

⁵ *See* Alex Kozinski, *My Pizza with Nino*, 12 CARDOZO L. REV. 1583–85 (1991). Judge Kozinski tells a story about the particularity of Justice Scalia's preference in pizza as a funny but not unrevealing insight into his jurisprudence. The two jurists agreed to a lunch date, Justice Scalia agreeing to come to Judge Kozinski's chambers on the express condition that Judge Kozinski send out for pizza from Justice Scalia's favorite pizza parlor. The lunch went

Indeed, his amiability was said to have aided his confirmation to the Supreme Court.⁶ My question instead is whether he could have indulged the premise without which none of us would have found the story funny: that the bailiff's error was harmless. That premise strikes me now, as I am sure it would have then, as unexceptionable. What difference did it make to the court's conduct of its business that the bailiff mistakenly said "from" instead of "and?" For that matter, what difference would it have made had the bailiff been ill that day and the command not been uttered at all?

The answer, of course, is "none." But self-evident though that answer may be, it depends, at least in part, upon an understanding as to the nature of due process, widely shared until now. Due process has been thought to embody notions of fundamental fairness.⁷ The bailiff's mistake was harmless—and therefore amusing—because it had no impact upon the court's mission of adjudication; in no way did it compromise the fairness of the proceedings.

In a series of opinions over the past several years, however, Justice Scalia has begun to take issue with our settled understanding of proper due process analysis.⁸ In Justice Scalia's estimation, due process is to be assessed not with reference to notions of fundamental fairness, but rather by looking to traditional practice. That is, the issue of whether a particular procedure comports with due

swimmingly, although, as Judge Kozinski tells it, the pizza was mediocre. The next time they met for lunch, Judge Kozinski decided to educate Justice Scalia's palate by ordering pizza from the best place in town as determined by *Washingtonian* magazine. Seeing the pizza was not from his favorite parlor, however, Justice Scalia adopted a grave expression and refused to eat it.

The moral of the story, according to Judge Kozinski, is that Justice Scalia says exactly what he means—the pizza must come from this restaurant and no other—just as he believes statutes and the Constitution say exactly what they mean. It is not up to the interpreter either of the Constitution or a pizza order to decide for himself that some alternative might do the job equally well or better. For an interesting account of the biographical roots of Justice Scalia's jurisprudence, see George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 *YALE L.J.* 1297 (1990). Regarding Justice Scalia's textualist approach to interpretation see the authorities collected *infra* note 30.

⁶ See, e.g., Kozinski, *supra* note 5, at 1585; James E. Wyszynski, Jr., *In Praise of Judicial Restraint: The Jurisprudence of Justice Antonin Scalia*, 1989 *DET. C.L. REV.* 117, 131; Ruth Marcus, *Judge a Favorite With Conservative Lawyers, Activists*, *WASH. POST*, June 18, 1986, at A1, A15; Ronald J. Ostrow, *Style and Personality Called Contagious; Scalia Described As Persuasive, Affable*, *L.A. TIMES*, June 18, 1986, at 1.

⁷ The fairness principle was recognized in the context of territorial jurisdiction in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). For an interesting discussion of the values inherent in procedural due process and the manner in which they should be implemented, see Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 *YALE L.J.* 455 (1986).

⁸ See *infra* Part IB.

process is to be resolved primarily (albeit in a select number of cases not exclusively) by looking to its pedigree. If a state practice enjoyed wide historical recognition at the time the Fourteenth Amendment was adopted, then it is immunized from constitutional scrutiny, irrespective of the Court's current view of its equity.⁹

Justice Scalia justifies his historical approach as necessary to prevent judges from infusing the Due Process Clause with their own values.¹⁰ This article is a critique of both Justice Scalia's approach to due process and of his justification for that approach. I argue, in essence, that Justice Scalia's appeal to tradition is unworkable and subversive of the rule of law. It is unworkable because the specification of the scope of a relevant historical practice inevitably requires making a judgment about the meaning of due process unless even insignificant departures from tradition are to be deemed of constitutional magnitude. It is subversive of the rule of law, because the description of adjudication as consisting merely in the application of historical traditions excuses the need to justify the value judgments which are actually being made and would otherwise be difficult to defend.

This article proceeds in two parts. Part I describes Justice Scalia's due process traditionalism generally and then focuses specifically upon his explication of due process in the context of territorial jurisdiction.¹¹ The topic of territorial jurisdiction is a fruitful backdrop against which to explore his due process jurisprudence because the case in which he articulates his views most fully, *Burnham v. Superior Court*,¹² is a territorial jurisdiction case, because there is a decent historical record against which to test his conclusions and, perhaps most importantly, because territorial jurisdiction is a sufficiently apolitical topic that it permits a relatively dispassionate inquiry into jurisprudential methodology free from undue concern about substantive outcomes. Part II criticizes Justice Scalia's traditionalism.¹³ I argue that his approach does not cabin judicial discretion in the manner in which he contends it does because a relevant tradition cannot be either identified or defined without reference to values external to the tradition. I endeavor to show further that value-free adjudication in the way Justice Scalia describes it is an

⁹ See *infra* Part 1B.

¹⁰ See *infra* Part 1B.

¹¹ See *infra* notes 15–211 and accompanying text.

¹² 110 S. Ct. 2105 (1990).

¹³ See *infra* notes 212–71 and accompanying text.

illusion, and that traditionalism is merely a subterfuge to permit the smuggling into the adjudicatory process of a political agenda without attempting to defend it. The article concludes with a brief discussion of what the proper role of tradition in due process jurisprudence ought to be.

The scale of my enterprise here is, in a sense, modest. I do not propose an affirmative theory of constitutional interpretation in rejoinder to Justice Scalia's defense of traditionalism, as phrased in an axiom he borrows from electoral politics, that "You can't beat somebody with nobody."¹⁴ I merely hope to demonstrate that, if what it takes to be a "somebody" in constitutional theory is to render discretionary value judgments unnecessary, then traditionalism is a "nobody."

I. JUSTICE SCALIA'S DUE PROCESS TRADITIONALISM

A. *A Methodological Curb on Judicial Discretion: Originalism Implemented Through Categorical Rules*

The elevation of Justice Scalia to the Supreme Court has been a boon for legal academics. Although his tenure as a Justice dates only to 1986, entire symposia have already been devoted to his jurisprudence and decisions.¹⁵ This scholarly attention stems in part from Justice Scalia's increasing role as the precipitator of the Court's political transformation from liberal to conservative. It is also attributable to the power and eloquence of his rhetoric which, as Judge Posner observed concerning Justice Cardozo, may have as much or more to do with establishing a judicial reputation as the substance of a judge's ideas.¹⁶ Perhaps most significant, though, is the way in which Justice Scalia purports to go about doing his job. More so than any Supreme Court Justice in recent memory, Justice Scalia claims to apply a specific methodology of decision-making to

¹⁴ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989).

¹⁵ E.g., Symposium, *The Jurisprudence of Justice Antonin Scalia*, 12 CARDOZO L. REV. 1583 (1991); *The Future of Personal Jurisdiction: A Symposium on Burnham v. Superior Court*, 22 RUTGERS L.J. 559 (1991). Other articles discussing Justice Scalia's jurisprudence include: Beau J. Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 LA. L. REV. 623 (1991); Gregory C. Cook, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853 (1991); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37 (1991).

¹⁶ RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 56-57 (1990).

resolve cases and to apply his method irrespective of the outcome it leads to in a particular case. For academics who devote themselves to theorizing about adjudication, the increasingly influential adjudicatory methodology of a sitting Supreme Court Justice can hardly be ignored.

Justice Scalia has expounded his general jurisprudence most thoroughly in a pair of lectures he delivered in a lecture series dedicated to the memories of two of his distinguished predecessors on the Court, William Howard Taft and Oliver Wendell Holmes, Jr. In his Taft lecture, published as an essay entitled "Originalism: The Lesser Evil," Justice Scalia, as the title suggests, identifies original intent as the touchstone of constitutional interpretation.¹⁷ He does not, however, defend originalism by applying originalist methodology. That is, he does not contend that the framers either subscribed to originalism or mandated it in the Constitution. He instead contends that originalism is necessary to curb judicial discretion because "the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law."¹⁸ Any nonoriginalist account of the Constitution, such as an appeal to fundamental values, is unacceptable because judges inevitably will view their own values as fundamental, thereby facilitating the "judicial personalization" of the law.¹⁹

In his Holmes lecture, entitled "The Rule of Law as a Law of Rules,"²⁰ Justice Scalia describes his preferred methodology for implementing originalism. Again, his concern is with "personal discretion to do justice," which he contrasts with the "general rule of law."²¹ The former is to be circumscribed by the articulation of categorical rules to be extended as far as possible, leaving an ever more narrow field upon which discretion may operate. While recognizing that some residual discretion may be ineradicable, those cases are, for Justice Scalia, "a regrettable concession of defeat—an acknowledgement that we have passed the point where 'law,' properly speaking, has any further application."²² Where judges turn, for example, to the totality of the circumstances as the prin-

¹⁷ Scalia, *supra* note 14 at 862–63.

¹⁸ *Id.* at 863.

¹⁹ *Id.*

²⁰ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

²¹ *Id.* at 1176.

²² *Id.* at 1182.

ciple for decision, they are finding facts rather than expounding law.

Of course, judges bent upon enshrining their own values in the law could do so via the elaboration of categorical rules. Indeed, they will have the very incentive to opine categorically that Justice Scalia identifies in support of a rule-based jurisprudence: they will constrain inferior judges bound to follow their lead far more effectively than if they render a narrow decision limited to the case's particular facts. In Justice Scalia's eyes such judges would be acting improperly, however, because rules unanchored by the text of the Constitution or a statute are nothing more than legislation. Justice Scalia's "general rule of law" is thus inseverably tethered to originalism.²³

For Justice Scalia, then, the judicial craft consists most essentially in ascertaining the precise nature of the original understanding of a constitutional or congressional command and implementing the command via the most categorical rule fashionable. Original judicial sin occurs when judges elevate their personal predilections to the status of law, an all but irresistible temptation unless methodologically constrained. Originalism implemented through categorical rules is the methodology necessary to curb temptation and keep the sinning in check.

B. *Originalism Applied to Due Process: Traditionalism*

The difficulty faced by an originalist in interpreting the Constitution varies inversely with the specificity of the constitutional provision to be construed. The more specific the provision, the less the need to consider more than its language in order to ascertain its meaning. There is little reason to consult the Federalist Papers to conclude, for example, that an eighteen-year-old cannot be elected President consistently with Article II.²⁴ In contrast, the more

²³ Scalia, *supra* note 14, at 855.

²⁴ U.S. CONST. art. II, § 1, cl. 5. I choose the example of the under-aged President advisedly. Although it would seem improbable, there is, in fact, a rather spirited academic controversy as to whether the constitutional requirement that the President be thirty-five or older is as clear as it seems. Cf. Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250, 255 (1989) (all meaning depends upon context, and a context can be envisioned, e.g., the death of everyone over twenty, in which the thirty-five or older requirement should properly be ignored); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 536 (1983) (the age requirement might be understood as "a percentage of average life expectancy . . . or as a minimum number of years after puberty"); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1174 (1985)

open-textured the provision at issue, the greater the necessity of resorting to something more than textual exegesis alone to locate its meaning.²⁵

For a good originalist such as Justice Scalia, that "something more" is historical evidence of meaning at the time of ratification. Done well, the task of uncovering the contemporaneous understanding of the Constitution in 1789 is arduous and fraught with peril. Proper interpretation requires first surmounting the hermeneutical hurdle of laying aside current knowledge and perspectives to enable the modern interpreter to "enter the minds" of those who acted in another age.²⁶ Then, assuming that the perspectives of the past are accurately reproducible without suffering undue distortion from being viewed through the lens of modernity, the actual historical record itself must be assembled and assayed. As Justice Scalia suggests, this evaluation requires the review of a massive amount of material: the expressed views of the delegates to the Constitutional Convention and the members of the First Congress, the state ratification debates, the background understanding against which the framers were working (British practice and the state constitutions) and more.²⁷ It also requires some assessment of the material's reliability.²⁸

Justice Scalia acknowledges, even takes pains to highlight, these shortcomings of originalism. Indeed, the difficulty of its application, together with an unwillingness to follow it to its logical extreme (e.g., upholding a statute imposing flogging as a punishment if the historical record revealed that flogging was not viewed as violative

(the age requirement might be understood as referring to a level of maturity); with Kenney Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203, 1207-08 (1985) (while there may be "arguments" against the presidential age requirement, there are no *good* arguments); and Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 420 (1985) ("the weird hypothetical cases [offered by the deconstructionists] are wildly counterfactual"). While my own view is that the case of the under-aged President is in fact an "easy case" and therefore unqualifiedly illustrates the assertion in the text, the conclusion would follow equally well if the case were merely "easier" than a case which involved ascertaining the meaning of due process.

²⁵ By an "open-textured" constitutional provision, I mean a provision that addresses the subject of its concern broadly, implying (or indeed creating) the need for later interpretation to bring it to life in specific situations. See H.L.A. HART, *THE CONCEPT OF LAW* 132 (1961) (discussing the "open texture of law"). The quintessential examples of such a provision are the due process and equal protection guarantees of the Fourteenth Amendment. Open-texturedness is obviously a relative quality and a matter of degree. As I observe *infra* Part IC, Justice Scalia views the Due Process Clause, for example, as having a far more concrete meaning than the Supreme Court has historically afforded it.

²⁶ See ROBIN G. COLLINGWOOD, *THE IDEA OF HISTORY* 282-302 (1946).

²⁷ Scalia, *supra* note 14, at 856.

²⁸ *Id.*

of the Eighth Amendment at the time of its ratification), lead Justice Scalia to label himself but a "faint-hearted" originalist.²⁹ Despite this concession, Justice Scalia ignores an additional, at least equally important defect of originalism. If the originalist undertaking is to be of any use to a judge faced with the adjudicatory exigency of actually deciding a specific case, then once a properly conducted historical review is complete there must still be some principle against which to rank the various competing "original" views which are likely to emerge, or to command an outcome if history is silent.

Although he has not discussed this problem in either his lectures or his opinions, Justice Scalia cannot be unaware of it. On the contrary, his "textualist" approach to reading statutes, which emphasizes the words of a statute alone as the key to interpretation, is explicitly premised upon the alleged impossibility of sorting through conflicting claims of meaning in the legislative history of mere statutes.³⁰ Yet it is far easier to pass upon a legislature's purpose in enacting a statute than it is to decide what the framers and ratifiers intended in a provision of the Constitution. In most instances the statute will be of more recent vintage, and accordingly there will be little or no need to step back into a different era to understand it. Moreover, most legislative history comes reliably pre-packaged in the form of committee reports and floor debates published in the Congressional Record, easing the task of assembling the necessary historical materials for review and obviating the concern with accuracy. And, of course, the Constitution for the most part was purposely scripted far more broadly than are statutes.

Justice Scalia's implicit solution to the problem of interpreting open-textured constitutional provisions such as the Due Process Clause in the face of an ambiguous or nonexistent historical record is to substitute "tradition" for original intent. It is impossible to advance this assertion with complete confidence, however, because Justice Scalia does not say so directly. Nevertheless, in several opin-

²⁹ *Id.* at 864.

³⁰ Justice Scalia has consistently decried the consultation of legislative history in the interpretation of statutes in lieu of relying on the plain meaning of the text. *See, e.g., Sullivan v. Finkelstein*, 110 S. Ct. 2658, 2667 (1990) (Scalia, J., concurring); *Begier v. Internal Revenue Serv.*, 110 S. Ct. 2258, 2267-68 (1990) (Scalia, J., concurring); *Taffin v. Levitt*, 110 S. Ct. 792, 800-03 (1990) (Scalia, J., concurring). His "textualist" theory of interpretation has received considerable critical attention from the members of the legal academy. *See, e.g.,* Eskridge, *supra* note 15; Greenberger, *supra* note 15; Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 *CARDOZO L. REV.* 1663 (1991); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 *CARDOZO L. REV.* 1597 (1991).

ions over the last few years he has identified and defended tradition as the touchstone of his due process jurisprudence, relying on the same discretion-limiting rationale with which he justifies originalism.³¹

Justice Scalia's most recent discussion of due process is contained in his concurrence in *Pacific Mutual Life Insurance Co. v. Haslip*.³² The issue in *Haslip* was whether excessive jury discretion in awarding punitive damages violates the Due Process Clause of the Fourteenth Amendment. The majority of the Court strongly implied that in certain instances it might, but went on to uphold an Alabama jury's punitive damages award of more than four times the amount of compensatory damages. The Court reasoned that notwithstanding the magnitude of the award, the jury's discretion had been adequately limited by the trial court's instructions and the possibility of review by the trial and appellate courts.³³

Justice Blackmun observed in the majority opinion that punitive damages were a traditional part of state tort law, citing Blackstone and several eighteenth-century British and American cases.³⁴ He noted that the Alabama practice of instructing the jury as to the proper basis for awarding punitive damages, subject to post-verdict review of the jury's decision, comported with the traditional common law approach.³⁵ Had Justice Blackmun stopped at that point and validated Alabama procedure as consistent with tradition, Justice Scalia would not have found it necessary to concur. But Justice Blackmun continued. Quoting from an earlier case, *Williams v. Illinois*,³⁶ he wrote, "[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack. . . ."³⁷ Thus, while the firmly rooted status of jury discretion in awarding punitive damages in Anglo-American law was relevant in the eyes of the majority, it alone was not dispositive. There might come a case, Justice Blackmun observed, where a jury's decision was so extreme as to "jar one's constitutional sensibilities."³⁸ At that point the Court

³¹ See *infra* Parts IB and IC. In addition to the cases cited therein, see, e.g., *Schad v. Arizona*, 111 S. Ct. 2491, 2505 (1991) (Scalia, J., concurring).

³² 111 S. Ct. 1032, 1046 (1991).

³³ *Id.* at 1046.

³⁴ *Id.* at 1041-42.

³⁵ *Id.* at 1043.

³⁶ 399 U.S. 235 (1970).

³⁷ *Haslip*, 111 S. Ct. at 1043.

³⁸ *Id.*

would consider the matter again, even if its sensibilities had not been sufficiently jarred in the case before it.

Justice Scalia took the majority to task for failing to affirm the validity of jury-assessed punitive damages categorically as consistent with "our living tradition," disparaging the Court's fact-specific decision as a "jury-like verdict."³⁹ He surveyed the history of punitive damages in England and in this country, concluding that they were well established, if controversial, prior to the adoption of the Fourteenth Amendment.⁴⁰ Jury discretion to determine the amount of an award he saw as resting upon an equally firm footing. This tradition of jury discretion over punitive damages by itself (with the incidental observation that it did not violate any provision of the Bill of Rights), he concluded, "necessarily constitutes 'due' process."⁴¹ No further inquiry into the "fairness" or "reasonableness" of the Alabama procedure was required or, for that matter, permitted.

For a jurist who stresses the need to investigate carefully the original understanding of a constitutional provision as the key to interpretation, Justice Scalia's discussion of the Due Process Clause in his opinion is remarkably perfunctory. While he rehearses the history of punitive damages at some length, he addresses the meaning of due process in a mere two paragraphs. Even then, his focus is almost as much upon its etymology as its meaning in the Constitution. Thus he cites the conventional wisdom, which relies on the view expressed by Sir Edward Coke in the second part of his *Institutes*, that the phrase "due process of law" is derived from the phrase "the Law of the Land" in Chapter 29 of the Magna Carta.⁴² That latter phrase, according to Justice Scalia's account of Coke's view,

³⁹ *Id.* at 1046, 1054 (Scalia, J., concurring).

⁴⁰ *Id.* at 1047-48 (Scalia, J., concurring).

⁴¹ *Id.* at 1047 (Scalia, J., concurring).

⁴² *Id.* at 1048-49 (Scalia, J., concurring). See also EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAW OF ENGLAND* 50 (1642). Chapter 29 of the reissue of the Magna Carta by Henry III in 1225, as cited by Coke (Chapter 39 in the original Magna Carta of 1215), provides: "No Freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land." COKE, *supra*, at 45. There were several fourteenth-century statutes which included the phrase "due process of the law" or similar references to due process which Coke equated with "the Law of the Land" in Chapter 29. For a discussion of those statutes, see Keith JUROW, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 266-71 (1975); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses* (pt. 2), 14 CREIGHTON L. REV. 735, 738-42 (1981).

referred to procedures customarily available under English law.⁴³ References to "the law of the land" in turn occur in several state constitutions which, in light of the wide dissemination of Coke's views among the colonists, should be understood as incorporating English procedure.⁴⁴ From this, Justice Scalia implies that when the framers included the phrase "due process of law" in the Fifth Amendment, they intended to incorporate customary English procedures including, presumably, jury-assessed punitive damages.⁴⁵

Even an originalist of strong heart, however, let alone a self-described faint-hearted believer as Justice Scalia, should blush at relying on a historical record this sketchy, strung together as it is with little more than conjecture. As an initial matter, several scholars have suggested that Coke's equation of "due process" with "the Law of the Land" was mistaken.⁴⁶ Coke's was certainly not the original understanding of due process of law, which apparently first meant only proper *service of process*,⁴⁷ a meaning which Judge Easterbrook would prefer to ascribe to it even today.⁴⁸ Justice Scalia thus assumes that the framers, who were indisputably conversant with Coke's views, acted upon them uncritically. Perhaps they did, although there is nothing in the ratification debates which says so explicitly.⁴⁹

⁴³ *Haslip*, 111 S. Ct. at 1049; see COKE, *supra* note 42, at 50.

⁴⁴ *Haslip*, 111 S. Ct. at 1049. See HERMINE HERTA MEYER, *THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT* 128-49 (1977); RICHARD L. PERRY & JOHN C. COOPER, *SOURCES OF OUR LIBERTIES* 5-8 (1959); Whitten, *supra* note 42, at 745-55.

⁴⁵ *Haslip*, 111 S. Ct. at 1049.

⁴⁶ 2 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1103-04 (1953); JUROW, *supra* note 42, at 271-75; MEYER, *supra* note 44, at 128-40; C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27, 44-46 (1914).

⁴⁷ JUROW, *supra* note 42, at 271-75. Justice Scalia acknowledges that the historical record supports this understanding. *Haslip*, 111 S. Ct. at 1048.

⁴⁸ Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 90-100. Judge Easterbrook's view that due process today should be understood as limited to service of process, or that it was so understood by the framers of the Fourteenth Amendment, is convincingly refuted in Redish & Marshall, *supra* note 7. Raoul Berger also takes a position similar to Judge Easterbrook's. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 197 (1977).

⁴⁹ In fairness to Justice Scalia, there is also nothing which suggests that the colonists did not rely on Coke's views. There is no serious scholarly disagreement that they were familiar with Coke's position. See, e.g., RODNEY MOTT, *DUE PROCESS OF LAW* 88-90 (1926) (remarking that the colonists relied upon Coke). But cf. Easterbrook, *supra* note 48, at 96 (asserting that "Coke was a solitary voice in English law[,] but nonetheless acknowledging that his views were widely known in the Colonies). There are, in reality, two different questions which could be asked here. One question is what due process meant in the fourteenth century; the other is what the drafters and ratifiers of the Constitution understood it to mean. For an *originalist*, the former question is irrelevant; all that is pertinent is what due process meant at the time of ratification. For a *traditionalist*, however, it is not so clear that the understanding

The more serious problem with Justice Scalia's rendition of history is that it misdescribes Coke's position. In the words of Professor Whitten, Coke did not regard due process as "refer[ring] to any specific procedure, but only to a general requirement of regular procedure whereby a defendant might have the opportunity to be heard in defense."⁵⁰ Justice Scalia's reliance upon Coke as authority to understand due process as authorizing or requiring any particular practice, such as a method of awarding punitive damages, is accordingly unwarranted. Coke was more concerned with the general availability of procedure than with its content. Because, as Justice Scalia observes, there is no discussion of the meaning of due process in the records of the adoption and ratification of the Fifth Amendment,⁵¹ let alone a specific reference to punitive damages, there is, accordingly, no basis for concluding that the framers intended due process to apprehend anything about punitive damages. Moreover, even if they had, there would still have to be some type of showing that the understanding of due process did not change between the ratification of the Fifth Amendment in 1791 and the ratification of the Fourteenth Amendment in 1868.⁵²

Justice Scalia also looks to the Court's prior decisions as a window on the meaning of due process. While for most other judges the consultation of precedent under the command of *stare decisis* is routine, for Justice Scalia it is unusual. As Professor Burt has observed, Justice Scalia commonly vests judicial opinions with little independent authority, viewing them as "merely judge-talk and not necessarily law."⁵³ This denigration of precedential authority is a corollary of originalism; a prior opinion is entitled to respect pre-

of due process in medieval England should be ignored. Perhaps we should revert to what due process *traditionally* (and in this instance *originally*) meant. This difficulty is one aspect of the problem of identification of a relevant tradition, which I discuss in detail *infra* Part II.

⁵⁰ Whitten, *supra* note 42, at 743-44 (emphasis deleted); see also MOTT, *supra* note 49, at 123 (observing that the colonists "looked upon due process of law as a guarantee which had a wide, varied, and indefinite content").

⁵¹ *Haslip*, 111 S. Ct. 1032, 1049 (1991).

⁵² Although, as discussed in more detail *infra* note 193, the topic of due process apparently received little more attention in the debates over ratification of the Fourteenth Amendment than it received in the debates concerning the Fifth Amendment, there is an additional reason not to import the eighteenth-century understanding of due process into the nineteenth century. The Fourteenth Amendment Due Process Clause is a restriction upon the authority of the states rather than the federal government, and it is entirely possible that its state ratifiers did not object to limitations on the federal government that they were unwilling to place upon themselves.

⁵³ Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1687 (1991).

cisely and only to the extent to which it rests upon a proper grasp of original intent. Indeed, overruling past decisions in the service of originalism at times seems to be Justice Scalia's understanding of the central duty of his job description.⁵⁴

Prior decisions are thus theoretically of limited relevance to adjudication, either unworthy of adherence if they do not track original intent or essentially surplusage if they do (aside from the rare instance where an erroneous but well-entrenched past decision is worth abiding by because the cost of its correction exceeds the damage it currently causes).⁵⁵ That Justice Scalia chooses to rely upon precedent extensively in *Haslip* is, therefore, an implicit acknowledgment of the limits of originalism. He turns to precedent nonetheless because several of the Court's earlier cases ostensibly lend support to the traditionalism on which he falls back.

A considerable portion of his opinion in *Haslip* is devoted to a survey of the Supreme Court's standards for due process analysis as articulated in its decisions over the last 150 years. He first cites *Murray's Lessee v. Hoboken Land & Improvement Co.*,⁵⁶ which identified "settled usages and modes of proceeding existing in the common and statute law of England," preferably replicated in this country as well, as the backdrop against which to evaluate a challenged procedure.⁵⁷ Under the rule of *Murray's Lessee*, if a practice was well settled at common law, then by affording it, the government necessarily provides due process. He next discusses *Hurtado v. People of California*.⁵⁸ In that case Mr. Hurtado argued, citing *Murray's Lessee*, that California's failure to prosecute him by grand jury indictment denied him due process because of the grand jury's firm common law roots.⁵⁹ The Supreme Court disagreed, holding that while a practice firmly anchored in the common law was *ipso facto* permissible, it was not thereby rendered indispensable.⁶⁰ Justice Scalia's pithy summary of *Hurtado* simultaneously captures his own approach to due process as well:

⁵⁴ Professor Strauss has observed that Justice Scalia called for overruling five important precedents in a period of a little over a month shortly after arriving at the Court and that his calls for overturning cases he thinks were wrongly decided have not diminished. See David A. Strauss, *Tradition, Precedent and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1699 (1991).

⁵⁵ See, e.g., *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2298-99 (1989) (Scalia, J., concurring in part and dissenting in part) (refusing to overrule the hundred-year-old precedent of *Hans v. Louisiana*, 134 U.S. 1 (1890)).

⁵⁶ 59 U.S. (18 How.) 272 (1856).

⁵⁷ *Id.* at 277.

⁵⁸ 110 U.S. 516 (1884).

⁵⁹ *Id.* at 528.

⁶⁰ *Id.* at 528-29.

Hurtado, then, clarified the proper role of history in a due process analysis: if the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process, but if it chooses to *depart* from historical practice, it does not necessarily *deny* due process.⁶¹

The ensuing task was to decide when such a departure *would* violate due process. It was in resolving that issue, Justice Scalia contends, that notions of fundamental fairness first began creeping into the due process lexicon. He concludes that, at least until the Court's decision in *Snyder v. Massachusetts*⁶² in 1934, fundamental fairness was only relevant to due process adjudication when traditional procedures were discarded, not as a standard to define what due process consisted of generally.⁶³

The story over the last half-century, though, is the Supreme Court's rejection of the first axiom of *Hurtado* by elevating fundamental fairness from its limited role as a test for weighing the constitutionality of governmental procedures which depart from tradition, to the universal benchmark for measuring due process. Justice Blackmun's assertion for the *Haslip* majority, that antiquity alone will not insulate a traditional practice from constitutional attack, reflects this evolution. While a hoary pedigree remains relevant under modern due process analysis, the government still must demonstrate that the challenged practice is not fundamentally unfair.⁶⁴

The modern approach is best exemplified, as Justice Scalia suggests,⁶⁵ in *Sniadach v. Family Finance Corp. of Bay View*⁶⁶ and its progeny and *Shaffer v. Heitner*.⁶⁷ The Supreme Court in *Sniadach* invalidated a wage garnishment statute which did not provide for a preliminary showing of the validity of the underlying claim prior to enforcement.⁶⁸ Although writs of garnishment had been enforced without such a showing for centuries, the Court was unimpressed, holding that "[t]he fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection. . . ."⁶⁹

⁶¹ *Haslip*, 111 S. Ct. 1032, 1050 (Scalia, J., concurring) (emphasis in original).

⁶² 291 U.S. 97 (1934).

⁶³ *Haslip*, 111 S. Ct. at 1050-52.

⁶⁴ See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

⁶⁵ *Haslip*, 111 S. Ct. at 1052-53.

⁶⁶ 395 U.S. 337 (1969).

⁶⁷ 433 U.S. 186 (1977).

⁶⁸ *Sniadach*, 395 U.S. at 341-42.

⁶⁹ *Id.* at 340.

Eight years later in *Shaffer*, the Supreme Court struck down a similarly venerable practice, quasi in rem jurisdiction, remarking that "traditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage."⁷⁰

Justice Scalia, of course, thinks that *Sniadach* and *Shaffer* were wrongly decided.⁷¹ It is worth specifying precisely why. It is not, or at least not very much because those decisions are inconsistent with the Court's older decisions in *Murray's Lessee* and *Hurtado*. As indicated above, Justice Scalia views precedent as essentially irrelevant "judge-talk." And to criticize more recent decisions for ignoring precedent requires the critic to justify his own refusal to abide by *stare decisis* and adhere to them. Nor, as we have seen, is there much evidence that the original understanding of due process included a methodology for its explication. Rather, the principal reason Justice Scalia rejects the modern approach to due process is its alleged rootlessness and the attendant danger of "judicial personalization" of the law. He thus encapsulates the reason for his disagreement with the majority in *Haslip*: "[I]t is not for the Members of this Court to decide from time to time whether a process approved by the legal traditions of our people is 'due' process. . . ."⁷²

To summarize, the role of original intent in Justice Scalia's general jurisprudence is assumed by tradition in his due process jurisprudence. The reason for the change is pragmatic. The intent of the authors of the Due Process Clause is too murky to prevent judges from invalidating government practices that are inconsistent with their own view of justice. Substituting tradition for original intent, however, is not without cost from a theoretical perspective. That a practice is old is less of a reason to keep it than that the framers intended that it be kept. This is not to disparage the force of tradition *qua* tradition in constitutional or other adjudication, the importance of which Justice Blackmun explicitly recognizes in *Haslip* and which I address in Part II. It is to say that where judges are being asked, as Justice Scalia asks them, to cabin their sense of justice and affirm what is traditional for that reason alone, it must at the very minimum be conclusively demonstrated that the appeal

⁷⁰ *Shaffer*, 433 U.S. at 212. *Shaffer* is discussed in detail *infra* text accompanying notes 201-12.

⁷¹ *Haslip*, 111 S. Ct. at 1053.

⁷² *Haslip*, 111 S. Ct. 1032, 1048 (Scalia, J., concurring) (emphasis added).

to tradition is not merely a subterfuge for the importation of the values of the traditionalist. In Part II I take up the question of whether Justice Scalia successfully makes such a demonstration, after exploring his application of traditionalism to the problem of territorial jurisdiction.

*C. Traditionalism Applied to Territorial Jurisdiction:
Burnham v. Superior Court*

Territorial jurisdiction is an area of the law which has vexed the Supreme Court for over a century. Ever since it constitutionalized the problem by holding in the landmark case of *Pennoy v. Neff*⁷³ that the Due Process Clause of the Fourteenth Amendment limits the reach of state courts, the Court has struggled both to agree upon the doctrinal underpinning for that conclusion and to articulate a conceptual framework for the analysis of particular assertions of jurisdiction. As to the former, the Court has vacillated, sometimes with remarkable speed, between identifying *both* the individual's liberty interest in being free of the unwarranted exercise of state power against him *and* the limits of state sovereignty in a federal system as proper constitutional rationales for restricting state court authority;⁷⁴ and at other times, holding that the individual's liberty interest is the *only* source of the due process limitation of state judicial jurisdiction.⁷⁵ As to a conceptual framework, the

⁷³ 95 U.S. 714 (1877). For an argument that territorial jurisdiction should never have been subsumed within the Due Process Clause, see Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoy to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990). Cf. Roger H. Transrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849 (1989).

⁷⁴ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The Supreme Court remarked that:

The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

444 U.S. at 291-92.

⁷⁵ See, e.g., *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). The Court held in *Insurance Corp. of Ireland*, two years after its decision in *World-Wide Volkswagen*, that:

The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be

Court has either required or accepted as a basis for jurisdiction that a defendant be physically served with process within the borders of the state;⁷⁶ own property within the state;⁷⁷ consent to jurisdiction,

possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

456 U.S. at 702-703 n.10.

The question of whether federalism should play any part in the law of personal jurisdiction has engendered a considerable scholarly controversy. Compare, e.g., Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 83-87 (1984) (criticizing the application of federalism to due process); Daan Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 SYRACUSE L. REV. 533, 563-64 (1982) (interstate federalism should not limit state authority); Stephen E. Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U. L.Q. 1291, 1299 (1983) (sovereignty irrelevant to due process analysis); Harold S. Lewis, Jr., *The Three Deaths of State Sovereignty and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 735-36 (1983) (criticizing reference to state sovereignty in jurisdictional analysis); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1113-14 (1981) (federalism limitations are irrelevant to an analysis of state judicial jurisdiction); Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 527-28 (1984) (federalism concerns should be relegated to the "dustbin of history"); Whitten, *supra* note 42, at 846 (Supreme Court should reject "the notion that vindication of the status of the states as coequal sovereigns is a proper function of due process analysis"); with Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 84-85 (sovereignty remains a relevant jurisdictional concern); Stanley E. Cox, *Would That Burnham Had Not Come To Be Done Insane! A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, An Explanation of Why Transient Presence Jurisdiction Is Unconstitutional, and Some Thoughts About Divorce Jurisdiction in a Minimum Contacts World*, 58 TENN. L. REV. 497, 529 (1991) ("sovereignty does play a significant role in due process analysis"); Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 273 (1990) ("the conclusion that early state courts were unconcerned with state sovereignty in invoking the personal jurisdiction doctrine simply distorts history"); Allen R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 689 (1987) ("assertions of jurisdiction . . . ought to reflect the general limits on state sovereignty inherent in a federal system"); Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377, 379 (same).

⁷⁶ In-state personal service was one of the original bases of jurisdiction articulated by the Supreme Court in *Pennoyer*. See *infra* text accompanying notes 182-84. Jurisdiction based upon a court's authority over a defendant's person is known as "in personam" jurisdiction. Whether in-state service alone remains a sufficient basis for jurisdiction when the defendant has no other affiliation with the forum is the question Justice Scalia posed in *Burnham v. Superior Court*. *Burnham* is discussed *infra* Part IC.

⁷⁷ The presence of property in a state is the other basis of jurisdiction recognized by the Supreme Court in *Pennoyer*. See *infra* text accompanying notes 182-84. Jurisdiction based upon the presence of property in the forum is known as "in rem" or "quasi in rem" jurisdiction. True in rem jurisdiction exists when the court has the authority to dispose of the interests of all persons in designated property; quasi in rem jurisdiction exists when the court has the authority to dispose of the interests of particular persons in designated property. There are, in turn, two types of quasi in rem jurisdiction. In the first type a plaintiff seeks to vindicate a pre-existing interest in the property, such as a foreclosure on a mortgage. In the second type a plaintiff seeks to apply the defendant's property to satisfy a judgment

either explicitly or implicitly;⁷⁸ have "minimum contacts" with the state, sometimes related to his conduct at issue in the lawsuit and sometimes not;⁷⁹ "purposely avail" himself of the benefits and privileges of state law;⁸⁰ and, most recently, that the assertion of jurisdiction not transgress a more generalized test of "reasonableness."⁸¹

The presentation of the foregoing factors in the form of a laundry list admittedly exaggerates the confusion which the Supreme Court's varying approaches to territorial jurisdiction has engendered. As with most areas of the law, the Supreme Court's approach to territorial jurisdiction has been evolutionary; not all of the listed factors have been relevant to a jurisdictional inquiry at the same historical time. Moreover, the broad thrust of the Court's jurisdiction decisions since *Pennoyer*, at least until very recently, has certainly been to expand the reach of state courts to reflect the increasing (inter)nationalization of commerce.⁸² Nevertheless, Pro-

entered in an unrelated claim against the defendant. See *Shaffer v. Heitner*, 433 U.S. 186, 199, n.17 (1977).

⁷⁸ As the Supreme Court observed in *Insurance Corp. of Ireland*, discussed *supra* note 75, a defendant may always affirmatively consent to jurisdiction if he so chooses. The Court also relied for a time after its decision in *Pennoyer* upon the fiction of "implied" consent to enable courts to assert jurisdiction over nonresident persons and corporations who caused injury within the forum but did not own property there and could not be domestically served with process. See, e.g., *Hess v. Pawloski*, 274 U.S. 352, 356-57 (1927) (out-of-state motorist held to have implicitly consented to appointment of designated state official as agent to receive process out of any lawsuits stemming from use of the state's roads); *Kane v. New Jersey*, 242 U.S. 160, 168-69 (1916) (same). The Supreme Court ultimately abandoned the fiction of implied consent in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁷⁹ The minimum contacts test was promulgated by the Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Where a court exercises jurisdiction over a defendant whose contacts with the forum give rise to the litigation, it is said to exercise "specific jurisdiction." Where a court exercises jurisdiction over a defendant whose contacts with the forum are unrelated to the litigation, it is said to exercise "general jurisdiction." See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8 & 9. (1984). The Supreme Court borrowed the terminology in *Helicopteros* from Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-64 (1966). See also ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 654 (1965). The subject of general jurisdiction has received considerable recent scholarly attention. See generally, e.g., Lea Brilmayer, et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723 (1988); B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097 (1990); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988).

⁸⁰ See *World-Wide Volkswagen*, 444 U.S. at 297; *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

⁸¹ See *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113-15 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985).

⁸² The Supreme Court discusses the expansion of state court authority subsequent to *Pennoyer* in *Shaffer*, 433 U.S. at 198-205 (and authorities cited therein). The high-water mark of that expansion was *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223-24 (1957),

fessor Borchers' description of the law of territorial jurisdiction as a "thousand-piece jigsaw puzzle" is not entirely inaccurate.⁸³

For a proponent of a rule-based jurisprudence such as Justice Scalia, the desire to lend some clarity to an area of the law seized of some confusion and governed largely by a test of reasonableness must have been overwhelming. As a vehicle to begin to accomplish that end, *Burnham v. Superior Court*, in turn, must have seemed a godsend.⁸⁴ At least on its face, the issue for decision in *Burnham* was discrete and amenable to a definitive yes or no answer: Is a defendant's physical presence in a state when personally served with process by itself sufficient to vest the state's courts with jurisdiction over him?⁸⁵

The facts in the case are straightforward and undisputed. Dennis and Francie Burnham were a married couple residing together in New Jersey with their two children.⁸⁶ They separated and decided

where the Supreme Court sustained an assertion of jurisdiction against an out-of-state insurance company whose only contact with the forum was by mail. More recently, the Court has evinced an increased willingness carefully to scrutinize exercises of state judicial authority, particularly over defendants who merely inject a product into the stream of commerce which happens to sweep the product into the forum state, and especially if the defendant is a foreign corporation. See *Asahi Metal Industry Co.*, 480 U.S. 102, 115-16 (1987) (rejecting an assertion of jurisdiction over a foreign corporation that sold component parts to another foreign manufacturer who incorporated the components into goods shipped to the forum); *World-Wide Volkswagen*, 444 U.S. 286, 298-99 (1980) (rejecting a claim of jurisdiction over an automobile retailer who sold a car driven by the purchaser into a state where the retailer did not do business).

⁸³ Borchers, *supra* note 73, at 20. See also Weintraub, *supra* note 75, at 485 (referring to the "[c]haos and confusion" in the law of personal jurisdiction).

⁸⁴ 110 S. Ct. 2105 (1990).

⁸⁵ Justice Scalia defines the issue in *Burnham* as follows:

The question presented is whether the Due Process Clause of the Fourteenth Amendment denies California courts jurisdiction over a nonresident, who was personally served with process while temporarily in that State, in a suit unrelated to his activities in the State.

Id. at 2109. Justice Scalia thus frames the issue so as to require the Supreme Court either to affirm or disavow categorically in-state personal service as a basis for jurisdiction. There is nothing inherent in the facts of the case, however, which necessitates that the question for decision be posed so generally. The Court might have asked whether the assertion of jurisdiction was reasonable on the particular record before it, or whether there was some reason that the rule of in-state service ought not apply in the case, even if the Court was otherwise inclined to affirm the rule generally. *Cf.* Cox, *supra* note 75, at 503 ("transient presence jurisdiction . . . was unnecessary to maintain jurisdiction over the defendant in the case"). Although Justice Scalia does not acknowledge it, his choice to define the issue for decision in such a way as to compel a categorical response is a discretionary act, which is not in any way mandated by his invocation of tradition to resolve the issue once it has been defined. See the discussion of the limits of traditionalism *infra* Part II.

⁸⁶ 110 S. Ct. at 2109.

to divorce.⁸⁷ Francie Burnham planned to move to California, taking the children with her.⁸⁸ The Burnhams agreed that Francie would file to dissolve the marriage on the grounds of irreconcilable differences when she arrived in California.⁸⁹ Once she departed, Dennis sought a divorce in New Jersey, alleging desertion.⁹⁰ Although he did not cause process to be issued in his New Jersey action, he also refused voluntarily to submit to a divorce action in California.⁹¹

Per their original agreement, Francie proceeded to file for an irreconcilable differences divorce in California.⁹² Later that month, Dennis came to California to conduct business and visit his children.⁹³ Upon returning the older child home after a weekend outing, Dennis was served with a summons and a copy of the complaint in Francie's divorce action.⁹⁴ Several months later, he appeared specially in the California court to contest jurisdiction.⁹⁵ He argued that, notwithstanding that he had been personally served with process within the state, he lacked "minimum contacts" with California sufficient to vest its courts with jurisdiction over him.⁹⁶ The California trial and appellate courts found that personal service within the state was a permissible basis to sustain an assertion of jurisdiction irrespective of the defendant's other contacts with the state, and the United States Supreme Court agreed.⁹⁷

The result in *Burnham* was not controversial. Every one of the Justices concurred in the judgment upholding California's claim of jurisdiction.⁹⁸ They disagreed, at times heatedly, however, about the correct methodology for arriving at that result.

Justice Scalia wrote the opinion of the Court, although he did not command a majority.⁹⁹ In its hearkening back to historical prac-

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 110 S. Ct. at 2109.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 110 S. Ct. at 2109.

⁹⁷ *Id.* at 2109, 2119.

⁹⁸ *Id.* at 2108-09.

⁹⁹ Justice Scalia wrote for himself, Chief Justice Rehnquist, Justice Kennedy and Justice White, in part. *Id.* at 2109. Justice White concurred on the basis of his unwillingness to acquiesce to Justice Scalia's traditionalism in its most extreme form—that a practice with a lengthy pedigree *always* affords due process—although he thought that personal service in

tice, its reliance upon dated precedent and its reverence for tradition, Justice Scalia's opinion resembles his concurrence in *Haslip*. Yet it is far more scornful in tone of those who disagree with it,¹⁰⁰ and its reliance upon traditionalism in lieu of originalism is much plainer. Conspicuous by its absence is any discussion at all of the meaning of due process as it bears upon territorial jurisdiction or of the thoughts of the authors of the Fourteenth Amendment on that subject. Justice Scalia does not offer even the perfunctory nod in that direction which he afforded in his concurrence in *Haslip*. The shift from original intent to tradition in *Burnham* is thus a complete one; historical practice is now the unchallenged yardstick for measuring due process. Put differently, the states may continue to do under the Fourteenth Amendment anything they have been doing, provided they have been doing it for a long enough time.

Justice Scalia rests his conclusion that service of process upon a defendant while within a state's boundaries vests the state's courts with jurisdiction over him or her, known in the argot of civil procedure as "transient" (or "tag") jurisdiction,¹⁰¹ upon two grounds.

the forum state was so widely accepted as a predicate for jurisdiction that he would not strike it down, either facially or as applied. *Burnham*, 110 S. Ct. at 2119. (White, J., concurring in part and concurring in the judgment). Justice Brennan, writing for himself and Justices Marshall, Blackmun and O'Connor, concurred in the judgment. While agreeing that service upon a defendant voluntarily present in the state is generally sufficient to permit jurisdiction, Justice Brennan arrived at that conclusion because he thought that the rule *today* is consistent with the reasonable expectations of defendants who engage in interstate travel. *Id.* at 2124-25 (Brennan J., concurring in the judgment). While tradition was relevant to the due process inquiry in Justice Brennan's eyes, it was not alone dispositive. *Id.* at 2120, 2122-24 (Brennan, J., concurring in the judgment). Justice Stevens, as is his wont, refused to join formally with any of his colleagues, but lauded their collective views which, in his estimation, "all combine to demonstrate that this is, indeed, a very easy case." *Id.* at 2126 (Stevens, J., concurring in the judgment).

¹⁰⁰ Justice Scalia remarks, for example, that "one can only marvel" at Justice Brennan's disagreement with the pedigree of the in-state service rule, and describes Brennan's dissent as "imperious." *Id.* at 2112 n.3, 2119 n.5.

¹⁰¹ "Transient" (or "tag") jurisdiction refers to jurisdiction premised upon personal service of process on a defendant within the territorial boundaries of the state in whose court the defendant is being sued. See, e.g., Peter Hay, *Transient Jurisdiction, Especially Over International Defendants: Critical Comments on Burnham v. Superior Court of California*, 1990 U. ILL. L. REV. 593, 593. Professor Twitchell has objected to the use of the term "transient jurisdiction" as misleading when it refers to exercises of jurisdiction following in-state service where the defendant has significant contacts with the forum other than the mere fact of service, e.g., he resides or conducts business there. Mary Twitchell, *Burnham and Constitutionally Permissible Levels of Harm*, 22 RUTGERS L.J. 659, 660 n.7 (1991). Despite Professor Twitchell's objection, however, the term is widely used and seems to be understood usually to imply that the defendant is only temporarily present when served. See, e.g., Linda Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 569 n.3 (1991). Use of the term is

First, transient jurisdiction has traditionally been a permissible basis for a state court to maintain an action against a nonresident. Second, its use is sanctioned by Supreme Court precedent, principally *Pennoy*, which, at least in its view of transient jurisdiction, has never been explicitly overruled. Because of the centrality of these two propositions to Justice Scalia's enterprise in *Burnham*, and because of what his method of supporting them reveals about the practical operation of traditionalism more generally, it is worth elaborating on their articulation and proof.

1. The Tradition of Transient Jurisdiction

Justice Scalia purports to show definitively that the in-state service rule was "[a]mong the most firmly established principles of personal jurisdiction in American tradition . . . at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted."¹⁰² He cites as evidence Justice Story's commentaries from the mid-nineteenth century¹⁰³ and a number of state court cases sustaining the exercise of jurisdiction over temporarily present non-residents.¹⁰⁴ Story's assertion that transient jurisdiction was firmly embedded in the common law, though, was premised upon his understanding that the practice was well grounded in the legal history of England.¹⁰⁵ In fact, as Professor Ehrenzweig convincingly demonstrates, there was little support for it in English tradition at all.¹⁰⁶ From a practical standpoint, because the English courts were constituted under a single sovereign, the problem of conflicts of authority of the sort inherent in the American federal system simply did not arise. All English courts could at least potentially exercise nationwide jurisdiction over the entire citizenry.¹⁰⁷ Accordingly, there was no need for a domestic rule of transient jurisdiction. There was some discussion of a transient rule in early nineteenth-

appropriate in discussing *Burnham*, where the Court framed the issue in terms of the constitutionality of in-state service on a temporarily present defendant, although Mr. Burnham arguably had enough contacts to sustain an assertion of jurisdiction over him had the Court chosen to view the case as calling for an application of minimum contacts.

¹⁰² *Burnham*, 110 S. Ct. at 2110-11.

¹⁰³ *Id.* at 2111. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 554, 543 (1846).

¹⁰⁴ See the cases collected by Justice Scalia in *Burnham*, 110 S. Ct. at 2111-12.

¹⁰⁵ STORY, *supra* note 103.

¹⁰⁶ Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 297-98 (1956). See also Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 252-62.

¹⁰⁷ See Ehrenzweig, *supra* note 106, at 297-98; Redish, *supra* note 75, at 1122.

century English cases in an international context as, for example, when personal service was effected upon an English subject abroad who had defaulted and enforcement of the default judgment was then sought against him in England.¹⁰⁸ It was unclear even in that setting, however, that the English courts would recognize the jurisdiction of the foreign court.¹⁰⁹ According to Professor Ehrenzweig, the first English decision squarely to uphold transient international jurisdiction was not rendered until well after *Pennoyer*.¹¹⁰

The support for Justice Scalia's claim as to the embeddedness of transient jurisdiction in the American legal tradition before the enactment of the Fourteenth Amendment thus coalesces into his citation of state court authority. He lists a considerable number of cases, most decided after 1868 (and indeed after *Pennoyer*), but several decided before, which on their face appear to affirm temporary presence as a valid basis for an assertion of jurisdiction.¹¹¹ Upon careful examination, however, it is not at all apparent that those cases may collectively be read as categorically affirming transient jurisdiction in all situations, especially when understood in historical context.

The evolution of jurisdictional rules in the eighteenth and nineteenth centuries was inextricably intertwined with the concept of the nature of causes of action. Under English practice, all causes of action originally had a fixed *situs* where the event in dispute occurred and were, to that extent, local—meaning that suit had to be filed in that one locality.¹¹² This "local action" rule arose as a corollary of the right to trial by jury. Juries were constituted from among witnesses to the disputed event and were expected to be familiar with the facts.¹¹³ Of necessity, trial therefore had to take place where the event had occurred. As the function of the jury

¹⁰⁸ See, e.g., *Buchanan v. Rucker*, 103 Eng. Rep. 546, 546–47 (1808).

¹⁰⁹ See Ehrenzweig, *supra* note 106, at 298.

¹¹⁰ *Id.* The case is *Carrick v. Hancock*, 12 T.L.R. 59 (1895). In light of the scholarship of Professors Ehrenzweig and Hazard, *supra* note 106, Justice Scalia acknowledges in *Burnham* that "English tradition [concerning transient jurisdiction] was not as clear as Story thought." *Burnham*, 110 S. Ct. at 2111. As suggested *supra* text accompanying note 106, that is a bit of an understatement.

¹¹¹ *Burnham*, 110 S. Ct. at 2111–12.

¹¹² See William W. Blume, *Place of Trial of Civil Cases*, 48 MICH. L. REV. 1, 20–27 (1949); Brainerd Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 66–69 (1959); Ehrenzweig, *supra* note 106, at 300–303; Arthur K. Kuhn, *Local and Transitory Actions in Private International Law*, 66 U. PA. L. REV. 301, 303 (1918); Twitchell, *supra* note 79, at 614–18.

¹¹³ Currie, *supra* note 112, at 67; Ehrenzweig, *supra* note 106, at 300–01.

began to evolve toward the modern role of disinterested finder of fact, however, the local action rule gradually began to wither. The courts came to recognize a distinction between "local" actions, which still had to be tried where they arose, and "transitory" actions, which did not.¹¹⁴ The category of local actions was eventually limited primarily, although not necessarily exclusively, to disputes relating to real property.¹¹⁵ The category of transitory actions was expanded to include almost everything else.¹¹⁶

The distinction between local and transitory actions is referred to in a passage from Justice Story's *Commentaries on the Conflict of Laws* which Justice Scalia quotes in *Burnham*: "[B]y the common law[,] personal actions, being transitory, may be brought in any place, where the party defendant may be found. . . ."¹¹⁷ Insofar as Justice Story asserts that by the mid-nineteenth century so-called personal actions could be filed in places other than where the claim arose, he is undoubtedly correct. In *Potter v. Allin*,¹¹⁸ for example, one of the pre-Fourteenth Amendment cases which Justice Scalia cites, the court found that a personal, and therefore transitory, action on a contract entered into in England could be maintained in Connecticut because the plaintiff resided there.¹¹⁹ The court held that the cause of action for breach of contract was "a personal right in the plaintiff, and transitory wherever he went."¹²⁰

¹¹⁴ Blackstone explained the difference as follows:

In *local* actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, &c., affecting land, the plaintiff must lay his declaration or declare his injury to have happened in the very county and place that it really did happen; but [i]n *transitory* actions, for injuries that might have happened any where, as debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases, and then the trial must be had in that county in which the declaration is laid.

3 BLACKSTONE, *supra* note 3, at 294.

¹¹⁵ See *infra* text accompanying note 143.

¹¹⁶ See *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411). The local action rule persisted as to actions relating to real estate out of a concern that a judgment not rendered by the jurisdiction where the property was situated would be unenforceable. See *Currie*, *supra* note 112, at 67-68. In light of the Full Faith and Credit Clause, however, that would not seem to be a significant problem. Nevertheless, the local action rule continues to arise on occasion even today. See, e.g., *Raphael J. Musicus, Inc. v. Safeway Stores, Inc.*, 743 F.2d 503, 509-11 (7th Cir. 1984) (recognizing but declining to apply the local action rule to an action for fraud and breach of a lease); cf. *Shaffer v. Heitner*, 433 U.S. at 217-18, (Powell, J., concurring and Stevens, J., concurring) (evinced a concern that jurisdictional rules not be altered to eliminate quasi in rem jurisdiction over real property).

¹¹⁷ STORY, *supra* note 103, § 554, quoted in *Burnham*, 110 S. Ct. at 2111.

¹¹⁸ 2 Root 63 (Conn. 1793).

¹¹⁹ *Id.* at 67-68.

¹²⁰ *Id.* at 67.

It did not necessarily follow, however, that jurisdiction would lie wherever the defendant could be found. While that was apparently the prevailing view, it was not universal. Justice Scalia's boast that "not one American case from the period . . . held, or even suggested, that in-state personal service on an individual was insufficient to confer personal jurisdiction"¹²¹ is simply wrong. His claim ignores local actions, in which the transient presence of the defendant was irrelevant. More significantly, there are several cases involving transitory actions where the courts refused to proceed despite the presence of the defendant, or proceeded only over a vigorous dissent.

The first such decision is *Brinley v. Avery*.¹²² The case involved a claim for breach of contract brought in Connecticut. At the time the contract was entered into both parties resided in Nova Scotia.¹²³ The defendant had subsequently moved to Connecticut, the place of his birth, where he resided at the time the lawsuit was commenced.¹²⁴ He moved to abate the action on the grounds that the Connecticut court lacked jurisdiction over a lawsuit arising out of a contract made and to be performed outside the state between parties who were both nonresidents at the time of its execution.¹²⁵ The plaintiff responded that the action for breach was "personal and transitory," and the defendant's current local residence was, therefore, sufficient for the court to proceed.¹²⁶ The court agreed with the defendant and dismissed the case.¹²⁷

The *Brinley* court did not specify whether it dismissed the case because it thought the action was local rather than transitory, in the sense that the underlying events were tied to the locale of the contract's execution and expected performance, or whether it thought that there was more to establishing jurisdiction in a transitory action than the presence of the defendant.¹²⁸ In any event, the court concluded that even the defendant's residence in the state, let alone mere transient presence, was not enough to vest it with jurisdiction.¹²⁹

¹²¹ *Burnham*, 110 S. Ct. at 2112 (emphasis in original) (footnote omitted).

¹²² 1 Kirby 25 (Conn. 1786).

¹²³ *Id.* at 25.

¹²⁴ *Id.* at 26-27.

¹²⁵ *Id.* at 25.

¹²⁶ *Id.* at 26.

¹²⁷ *Id.* at 27.

¹²⁸ *Id.* at 26-27.

¹²⁹ *Id.*

The second case is *Molony v. Dows*.¹³⁰ An action was commenced in New York concerning an assault which had occurred in California.¹³¹ The New York court refused to take jurisdiction despite local service on the defendant, remarking that "an action cannot be maintained in this court, or in any court of this State, to recover a pecuniary satisfaction in damages for a wilful injury to the person, inflicted in another State, where, at the time of the act, both the wrongdoer and the party injured were domiciled in that State as resident citizens."¹³² Justice Scalia notes the case and attempts to distinguish it on the grounds that the assault was quasi-criminal in character and the New York court was unwilling to interfere with California's administration of its criminal justice system.¹³³ While his reading of the case is not implausible, the language of the court's opinion does not support his conclusion directly and it is not the reading the case was given by a New York judge who cited it in dissent a few years later.¹³⁴

The final case is *Latourette v. Clarke*.¹³⁵ Justice Scalia fails to mention it, which is curious, considering the number of cases he does cite and the fact that it is mentioned by Professor Ehrenzweig, whose scholarship Scalia acknowledges.¹³⁶ More so than most of the cases Justice Scalia relies upon, which tend to invoke mechanically the rule of transient jurisdiction without making any attempt to explain its rationale or justify its application,¹³⁷ the court in *Latourette* discusses the rule at some length.¹³⁸ Furthermore, the majority opinion supports Justice Scalia's depiction of nineteenth-century jurisdictional tradition.¹³⁹ A cynic might thus wonder whether the powerful dissent in *Latourette* is itself so inconsistent with Justice

¹³⁰ 8 Abb. Pr. 316 (N.Y. C.P. 1859).

¹³¹ *Id.* at 316-17.

¹³² *Id.* at 326.

¹³³ *Burnham*, 110 S. Ct. at 2112-13 n.3.

¹³⁴ See *Latourette v. Clarke*, 45 Barb. Ch. 327, 331 (N.Y. Ch. 1865) (Clerke, J., dissenting).

¹³⁵ 45 Barb. Ch. 327 (N.Y. Ch. 1865).

¹³⁶ *Burnham*, 110 S. Ct. at 2111. It is interesting that while Justice Scalia accepts Professor Ehrenzweig's criticism of Story's conclusion that the transient rule was an established part of English tradition, he rejects Ehrenzweig's view that American courts, too, "hardly ever in fact held transient service sufficient as such" prior to *Pennoyer*. Ehrenzweig, *supra* note 106, at 292.

¹³⁷ See, e.g., *Smith v. Gibson*, 3 So. 321, 321 (Ala. 1887); *Murphy v. J.S. Winter & Co.*, 18 Ga. 690, 691-92 (1855); *Savin v. Bond*, 57 Md. 228, 233 (1881); *Nathanson v. Spitz*, 31 A. 690, 691-92 (R.I. 1895).

¹³⁸ *Latourette*, 45 Barb. Ch. at 330-31.

¹³⁹ See *id.*

Scalia's boast about the absence of authority rejecting the in-state service rule that the case was best ignored.

The facts in *Latourette* are essentially similar to those in *Molony*: domestic service was made upon a nonresident defendant in an action arising out of a tort committed elsewhere.¹⁴⁰ The majority of the court, while acknowledging that "some judges have expressed an opinion that the courts could refuse to exercise such jurisdiction," nevertheless permitted the case to proceed.¹⁴¹ The majority's primary reason for sustaining jurisdiction was the fear that the victim would be without redress if it did not let the case go forward, presumably because a proceeding elsewhere was either impractical or impossible.¹⁴² The dissenting judge disagreed. He relied, *inter alia*, on *Molony*, describing it as having "expressly decided that the courts of one state have no jurisdiction between citizens of another state for damages for personal torts, committed within the jurisdiction of another state."¹⁴³ He stated that the assertion of jurisdiction over another state's citizen, "quietly and trustingly preparing to embark in a vessel in our port for a long voyage" was properly of "no concern" to a New York court.¹⁴⁴ The dissent was clearly influenced as well by the fact that the plaintiff was not a citizen of New York, either, suggesting that the outcome might be different if the court were asked to vindicate the rights of one of its own citizens.¹⁴⁵

Indeed, although they tend on their face to resolve the jurisdictional issue summarily without reference to the facts, the majority of the pre-*Pennoyer* cases which Justice Scalia cites as affirming the principle of transient jurisdiction do so in instances where the result also serves either to facilitate recovery by a resident plaintiff,¹⁴⁶ hold

¹⁴⁰ *Id.* at 327-29.

¹⁴¹ *Id.* at 330-31.

¹⁴² *See id.*

¹⁴³ *Id.* at 333 (emphasis in original) (Clerke, J., dissenting). Both the majority and dissenting opinions in *Latourette* emphasize that the action is *ex delicto* rather than *ex contractu*, implying that tort actions may be somewhat less transitory than actions on a contract. *See id.* at 330-33. This view received some support in perhaps the most famous English case involving transitory actions, *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1030 (1774), in which Lord Mansfield expressed doubt concerning the jurisdiction of the English courts to hear a tort action arising overseas between two nonsubjects only later casually present in England. *But see* *McLeod v. Connecticut & P.R. R.R. Co.*, 6 A. 648, 652-53 (Vt. 1886) (transitory tort action); *New Orleans N.O., J & G.N.R.R. Co. v. Wallace*, 50 Miss. 244, 247 (1874) (same).

¹⁴⁴ *Latourette*, 45 Barb. Ch. at 333.

¹⁴⁵ *See id.*

¹⁴⁶ *See, e.g.,* *Roberts v. Dunsmuir*, 16 P. 782, 782 (Cal. 1888); *Potter v. Allin*, 2 Root 63, 68 (Conn. 1793); *Mussina v. Belden*, 6 Abb. Pr. 165, 166 (N.Y. 1858); *Vinal v. Core*, 18 W. Va. 1, 5-6 (1881).

accountable an alien who might otherwise be difficult to reach,¹⁴⁷ or enable a proceeding to go forward against a nonresident whose contacts with the state are sufficiently extensive as not to render his appearance unfair.¹⁴⁸ For example, in *Hart v. Granger*, the court nominally determined that it had jurisdiction by invoking the transient rule without elaboration.¹⁴⁹ A review of the facts, however, reveals that the lawsuit was for breach of a contract entered into within the state, brought by a citizen plaintiff, against a defendant who lived in the state at the time the contract was made, but who had since moved away.¹⁵⁰

What, then, are we to make of this historical record? Admittedly, Justice Scalia cites many cases where the transient rule alone seems to explain the outcome (although the factual recitation in those cases is sometimes sketchy or nonexistent).¹⁵¹ His conclusion that state courts in the nineteenth century recognized personal service of process upon a defendant within the boundaries of the state as sufficient to confer jurisdiction is, in general, unassailable. They did. For that matter, most courts continue to do so today. But it is also true that the nineteenth-century courts' recognition of transient jurisdiction was not necessarily as ubiquitous as Justice Scalia portrays it. And even when in-state service was formally invoked as the *ratio decidendi* in a case, the result may often be accounted for on other grounds.¹⁵²

¹⁴⁷ See, e.g., *Potter v. Allin*, 2 Root at 65; *Barrell v. Benjamin*, 15 Mass. 354, 355-56 (1819).

¹⁴⁸ See, e.g., *Wagner v. Hallack*, 3 Colo. 176, 181-83 (1877); *New Orleans N.O., J & G.N.R.R. Co.*, 50 Miss. at 247; *Bowman v. Flint*, 82 S.W. 1049, 1050 (Tex. Civ. App. 1904); *Vinal*, 18 W. Va. at 5-6.

¹⁴⁹ 1 Conn. 154, 164 (1814).

¹⁵⁰ *Id.*

¹⁵¹ See, e.g., *Murphy v. J.S. Winter & Co.*, 18 Ga. 690, 691 (1855).

¹⁵² See *supra* notes 122-50 and accompanying text. Moreover, Justice Scalia's exclusive focus upon "jurisdiction" as a concept independent of the related doctrines of venue, *forum non conveniens* and the nature of a cause of action is historically dubious. He asserts, for example, that *Gardner v. Thomas*, 14 Johns. 134 (N.Y. 1817), a case in which the court refused to take jurisdiction of a tort action arising out of an incident on the high seas between two foreign subjects, is not inconsistent with the transient rule because the decision was based on the doctrine of *forum non conveniens*. *Burnham*, 110 S. Ct. at 2112 n.3. It is not clear, however, that the early nineteenth-century courts paid much attention to jurisdictional power in the abstract divorced from their decision whether to entertain particular cases. Based upon the historical record, Professor Twitchell concludes that "[a]lthough it has become commonplace to state that early common law courts based jurisdiction on a power theory that permitted jurisdiction over many claims unrelated to the forum . . . [the courts] only occasionally decided disputes having absolutely no relationship with the forum." Twitchell, *supra* note 79, at 618 & n.36. For that matter, because, as Professor Hazard demonstrates and Justice Scalia concedes, there was no developed English law of territorial jurisdiction for

Thus, assuming, *arguendo*, that tradition ought to constrain constitutional interpretation, one might still legitimately inquire whether this particular tradition is definitive enough to do so. That the historical record surrounding transient jurisdiction even permits this question to be posed in good faith, moreover, casts doubt not only upon the result in *Burnham*, but upon the entire traditionalist enterprise. For if transient jurisdiction, trumpeted by Justice Scalia as "[a]mong the most firmly established principles" in our legal tradition,¹⁵³ is less well entrenched than advertised, one might ask how useful appeals to tradition will ever prove to be. I take up these questions in Part II.

2. The Teaching of *Pennoyer v. Neff*

Justice Scalia relies on more than traditionalism in the *Burnham* decision. As indicated above, he also relies upon *Pennoyer v. Neff*¹⁵⁴ to bolster his argument concerning transient jurisdiction. I thus consider *Pennoyer* with an eye toward whether it ultimately lends support to the current vitality of the principle of transient jurisdiction or to Justice Scalia's traditionalism more generally.

The basic facts of the case are familiar to anyone who finished the first year of law school, but bear repeating as an aid to understanding the *Pennoyer* Court's approach to due process. The plaintiff, Marcus Neff, retained a lawyer named J.H. Mitchell, a shyster if ever there was one.¹⁵⁵ Mitchell alleged that Neff failed to pay his bill and sued him for the unpaid balance of approximately \$300 in the state court of Oregon.¹⁵⁶ Neff then lived outside the state and was served by publication in a weekly Oregon newspaper of denom-

the early Americans to borrow, whatever "tradition" they fashioned was, at most, little more than half a century old at the time the Supreme Court constitutionalized the jurisdictional doctrine in *Pennoyer*. Hazard, *supra* note 6, at 253. *But see* James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 73 (1990) (arguing that American jurisdictional rules were borrowed directly from Dutch theorists).

¹⁵³ *Burnham*, 110 S. Ct. at 2110.

¹⁵⁴ 95 U.S. 714 (1877).

¹⁵⁵ The personal histories of the *Pennoyer* cast of characters is fascinatingly retold by Professor Perdue. Wendy C. Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 497 (1987). *See also* Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 44 n.53 (1978). At the center is J.H. Mitchell, actually the alias of one John Hipple, who had changed his name after fleeing West with his mistress, abandoning his wife whom he had been forced to marry after seducing her at the age of fifteen. Mitchell then left his mistress and married another woman, without bothering to divorce his first wife. He later became a successful politician.

¹⁵⁶ *Pennoyer*, 95 U.S. at 719.

inational circulation rather than personally.¹⁵⁷ Neff naturally defaulted, and a tract of land he owned in Oregon was sold in execution of the default judgment which Mitchell had entered against him.¹⁵⁸ Sylvester Pennoyer took title to the land through the execution sale.¹⁵⁹

Neff eventually got wind of what had transpired and brought a diversity action in federal court to recover possession of the land, by that time worth considerably more than \$300.¹⁶⁰ Neff argued that the Oregon state court had been without jurisdiction to enter its original judgment.¹⁶¹ The court lacked in personam jurisdiction because Neff was not an Oregon resident, was never personally served with process and had not voluntarily appeared.¹⁶² The court lacked quasi in rem jurisdiction, Neff maintained, because Mitchell had failed to comply with the Oregon statutes authorizing publication service on nonresident property owners.¹⁶³ Before service could be made by publication, Oregon law required, *inter alia*, proof by the plaintiff's affidavit that, after a diligent search, he had been unable to locate the defendant within the state.¹⁶⁴ The law further required that proof of actual publication be made by submission of the affidavit of the "printer" of the newspaper.¹⁶⁵

The district court held for Neff.¹⁶⁶ Owing to the absence of personal service, there was no argument that in personam jurisdiction had been present in the original proceeding; Mitchell conceded as much.¹⁶⁷ The district court found that there had not been quasi in rem jurisdiction either, because the affidavit to which Mitchell attested did not demonstrate adequate diligence in attempting to locate Neff, and because the affidavit Mitchell submitted to establish publication was from the "editor" of the newspaper and not its "printer."¹⁶⁸ If that latter reading of the statutes was hypertechnical,

¹⁵⁷ *Id.* at 719-20.

¹⁵⁸ *Id.* at 720.

¹⁵⁹ *Id.* at 719.

¹⁶⁰ *Id.*

¹⁶¹ *See id.* at 719-20.

¹⁶² *Id.*

¹⁶³ OR. CODE CIV. P. § 55 (1863). Relevant portions of the statute are quoted in *Pennoyer*, 95 U.S. at 718.

¹⁶⁴ *Id.*

¹⁶⁵ OR. CODE CIV. P. § 69 (1863).

¹⁶⁶ *Neff v. Pennoyer*, 17 F. Cas. 1279 (C.C.D. Or. 1875) (No. 10,083), *aff'd*, 95 U.S. 714 (1877).

¹⁶⁷ *Id.* at 1280-81.

¹⁶⁸ *Id.* at 1286-87.

the former was defensible. The inadequacy of publication as a means to convey actual notice was obvious and well understood, and the need carefully to scrutinize an application for its use correlatively great.¹⁶⁹ Indeed, it was substantially in response to the problem of providing adequate notice that Justice Field organized his opinion for the Supreme Court.

Justice Field agreed that the Oregon state court judgment was void for want of jurisdiction, but disagreed with the district judge as to the reason why. Eschewing the usual deference afforded a trial judge's construction of state law in a diversity action,¹⁷⁰ Justice Field first found that any alleged defects in Mitchell's affidavit could not support a collateral attack on the judgment because the Oregon service of process statute only required that the affidavit be deemed satisfactory by the judge who originally authorized notice by publication, which it obviously had.¹⁷¹ Justice Field was similarly unimpressed by the argument that the term "printer" as used in the Oregon Code did not include a newspaper's editor.¹⁷² Rather than problems with the affidavits in the case, the jurisdictional defect Justice Field seized upon was Mitchell's failure to attach Neff's land at the outset of the litigation.¹⁷³ Without such an attachment, Justice Field reasoned, quasi in rem jurisdiction would not lie.¹⁷⁴

Justice Field's conclusion that the prior seizure of Neff's property was a prerequisite to jurisdiction has been criticized as contrary to the practice in a number of states at the time, arguably including Oregon, which did not require seizure as a condition of jurisdiction.¹⁷⁵ This criticism is accurate, in the sense that it correctly de-

¹⁶⁹ *Id.* at 1287.

¹⁷⁰ *Cf. Salve Regina College v. Russell*, 111 S. Ct. 1217, 1223-25 (1991) (discussing, but ultimately rejecting, the deferential standard of review historically applied to district court interpretations of state law in favor of *de novo* appellate consideration). Justice Field's disagreement with the view of the district judge, Matthew Deady, is particularly noteworthy in that Deady had drafted the Oregon Code at issue in the case. *Perdue*, *supra* note 155, at 491. Moreover, even though the decision in *Pennoy* long predates *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), construction of a state procedural code was certainly a matter of "local" rather than "general" law even under the regime of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

¹⁷¹ *Pennoy v. Neff*, 95 U.S. at 721.

¹⁷² *See id.* There was, however, apparently some disagreement among the members of the Supreme Court on the question of whether the defects in the affidavits might be an appropriate basis to set the judgment aside, although the majority agreed with Justice Field that they were not. *Id.* at 720-21.

¹⁷³ *Id.* at 727-28.

¹⁷⁴ *Id.* at 728.

¹⁷⁵ *See Perdue*, *supra* note 155, at 498. Professor Perdue notes that Justice Field does not cite any authority in support of the requirement of prior seizure, which several states did not deem necessary and which the district court judge (who, as indicated in note 170 *supra*,

scribes state law, but it misapprehends Justice Field's larger point. Justice Field was not principally worried, as his critics suggest, by the possibility that a case might turn out to be a waste of time without an initial seizure of the defendant's property if it later appeared that the defendant either did not own property in the state or had sold it before it was formally seized.¹⁷⁶ He was ultimately concerned, instead, with the problem of notice. He first remarks upon the shortcomings of notice in actions in personam:

If, without personal service, judgments *in personam*, obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression.¹⁷⁷

He next cites two instances where defendants lost their property pursuant to default judgments entered after publication only in local newspapers. He then justifies seizure at the beginning of an action quasi in rem as a means of providing such defendants with notice of the proceedings:

The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.¹⁷⁸

As a practical matter, of course, the assumption that an out-of-state property owner will always be informed of litigation concerning his property by its seizure is unwarranted. He will, however, be

had drafted the Oregon Code of Civil Procedure) did not find required by Oregon law. *Neff v. Pennoyer*, 17 F. Cas. at 1281-82; see also George B. Fraser, Jr., *Actions In Rem*, 34 CORNELL L.Q. 29, 38-40 (1948); Trangsrud, *supra* note 73, at 874. The Supreme Court had also itself suggested a few years earlier that the time of seizure was irrelevant. See *Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308, 320 (1870) ("Whether the writ [of seizure] should have been issued simultaneously with the institution of the suit, or at some other stage of its progress, cannot be a question of jurisdiction.").

¹⁷⁶ Justice Field does refer to the "element of uncertainty in judicial proceedings" which would arise absent a rule of prior seizure. *Pennoyer*, 95 U.S. at 728. As Professor Perdue suggests, however, while the lack of certainty that they might ultimately obtain a valid judgment might be discomfiting to plaintiffs, it is not clear why failing to seize a defendant's property at the commencement of a case should pose constitutional problems. Perdue, *supra* note 155, at 498 n.133.

¹⁷⁷ *Pennoyer*, 95 U.S. at 726.

¹⁷⁸ *Id.* at 727.

far more likely to be informed by a judicial seizure than by publication in an obscure newspaper. Aware of a jurisdictional rule requiring prior seizure, the prudent owner of (real) property will, at a minimum, appoint an agent to examine the records at the local recorder's office regularly, to see if his property has been seized. For our purposes, though, what is interesting is Justice Field's willingness to override state practice in service of what we would describe, in contemporary due process parlance, as "fundamental fairness." Prior seizure is required because it will provide better notice, making the proceedings fairer.¹⁷⁹ Justice Field's approach is to that extent counter-traditional, both in the sense that tradition gives way to equity and in that the federal judiciary may instruct states how to implement jurisdictional principles.¹⁸⁰

In the famous part of his opinion, Justice Field turned to the question of whether there had been in personam jurisdiction over Neff, and held that there had not. This portion of the opinion was technically dicta. Mitchell had conceded the issue in the district

¹⁷⁹ Professor Perdue argues at one point that Justice Field was not principally concerned with the problem of notice because the *Pennoyer* opinion is a "disaster" on that point, a characterization she borrows from Professor Hazard. Perdue, *supra* note 155, at 496-97 n.127, citing Hazard, *supra* note 106, at 261-62, 270. What this characterization apparently refers to is that Justice Field's equation of seizure with notice ironically served to reduce the chance that a defendant would receive actual notice once service by mail became more common. See John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1029 n.67 (1983); Hazard, *supra* note 106, at 252 n.35. But Justice Field's inability to forecast the evolution of modes of service of process does not establish that he was not concerned with the problem of notice. On the contrary, his concern is very evident from the passages of the opinion quoted in the text. Moreover (as Professor Perdue observes), Professor Hazard identified the notice problem as Justice Field's major concern, even if his attempt to deal with it ultimately proved inadequate. Hazard, *supra* note 106, at 269-70. Accord Drobak, *supra* at 1029 n.67; Trangsrud, *supra* note 73, at 875 n.34. There is also the curiousness of Justice Field's requirement that property be attached prior to the commencement of an action. As discussed earlier, there was no authority requiring seizure, and the presence of property in a state should itself confer jurisdiction on the state's courts to proceed, even if a judgment might prove uncollectable if the property were removed prior to execution. This is precisely what occurs pursuant to an assertion of transient in personam jurisdiction. In-state service confers jurisdiction at the outset of the case, which continues in force irrespective of whether the defendant remains in the forum thereafter. See Silberman, *supra* note 155, at 45-46. Attachment does, however, afford the defendant the possibility of better notice. But see Silberman, *supra* note 155, at 46-47. (asserting, without elaboration, that a concern with notice is not a "persuasive explanation for Justice Field's requirement of attachment," but perhaps meaning that attachment does not satisfactorily solve the notice problem, not that it was not Justice Field's attempt to do so).

¹⁸⁰ See Trangsrud, *supra* note 73, at 875. It was on the question of the federal courts' authority to mandate state procedure that Justice Hunt dissented. *Pennoyer*, 95 U.S. at 737-38, 748 (Hunt, J., dissenting). The implications of Justice Hunt's dissent for the traditionalism of Justice Scalia are discussed *infra* text accompanying notes 196, 197.

court, and Oregon law in any event did not allow an assertion of in personam jurisdiction against a nonresident not served with process within the state's borders.¹⁸¹ Justice Field nevertheless availed himself of the opportunity to expound the framework which was to govern jurisdictional analysis until at least the middle of the twentieth century. He began by identifying "two well-established principles of public law respecting the jurisdiction of an independent State over persons and property."¹⁸² First, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."¹⁸³ Second, "no State can exercise direct jurisdiction and authority over persons and property without its territory."¹⁸⁴ Personal jurisdiction was thus a function of each state's sovereign power over its own territory. A state had jurisdiction over its residents, those served with process domestically, and those who appeared voluntarily and over property within its borders (as long as it seized the property before asserting jurisdiction). It had no jurisdiction over anyone or anything else.

In articulating his jurisdictional vision, Justice Field had a number of formidable analytical hurdles to surmount. There was, as an initial matter, the absence of supporting authority. Justice Field adopted his "public law" principles from Justice Story,¹⁸⁵ who had borrowed them from a Dutch scholar, Ulrich Huber.¹⁸⁶ Huber developed the principles with reference to international law, although the examples he offered as illustrations were drawn from the relations of the federated Dutch provinces *inter se*, which at the time in their political configuration resembled the American states.¹⁸⁷ The pre-*Pennoyer* case law that incorporated those principles consequently arose entirely as a problem of the *interstate* recognition of

¹⁸¹ *Neff*, 17 F. Cas. at 1280-81.

¹⁸² *Pennoyer*, 95 U.S. at 722.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*; see STORY, *supra* note 103, §§ 17-23. Justice Story's version of the public law principles of judicial jurisdiction is set out and analyzed in Hazard, *supra* note 106, at 260. Justice Story also relied upon the principles in *Piquet v. Swan*, 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134) decided several years before publication of his treatise. See *id.* at 259-60.

¹⁸⁶ See Erenst G. Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375 (1919); Kurt H. Nadelman, *Joseph Story's Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL HIST. 230-31 (1961).

¹⁸⁷ See Lorenzen, *supra* note 186, at 377. The importance of Continental legal theory in the early development of American law is also reflected in Alexander Hamilton's and James Madison's discussion of the relevance of the Dutch federation to the construction of our federal union in *The Federalist* No. 20, noted in Drobak, *supra* note 179, at 1027 n.60.

judgments under the Full Faith and Credit Clause and statute.¹⁸⁸ The issue in *Pennoyer*, however, was not whether Justice Field's principles governed the decision of some state other than Oregon to recognize the original Oregon judgment and give it full faith and credit. The issue was, rather, whether those principles could regulate Oregon's decision to give its own judgment *intrastate* recognition. Justice Story and Huber were of no help on that point.¹⁸⁹

Justice Field's solution to the intrastate recognition problem was to look to the Due Process Clause of the Fourteenth Amendment.¹⁹⁰ Invoking the Due Process Clause, though, raised additional obstacles. One impediment, which Justice Field either overlooked or ignored, was that the Fourteenth Amendment was not ratified until after the relevant events in the case had already transpired.¹⁹¹

¹⁸⁸ The Full Faith and Credit Clause of the Constitution provides:

Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by General Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art. IV, § 1.

The full faith and credit statute implements the constitutional requirement by providing that judicial proceedings "have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." Act of May 26, 1790, ch. 11, 1 Stat. 122 (current version at 28 U.S.C. § 1738 (1988)).

Prior to *Pennoyer*, the Supreme Court had to decide whether the Full Faith and Credit Clause and statute allowed for a collateral attack on a judgment in a state where the judgment was sought to be enforced on the ground that the rendering court lacked jurisdiction over the defendant. In *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1850), the Supreme Court held that the command of full faith and credit had not altered "the well-established rules of international law, regulating governments foreign to each other," which permitted such attacks. *Id.* at 174. The Court later made it clear, however, that the full faith and credit requirement, as the text of the Constitution and statute make plain, applies only to the question of the extent of recognition a judgment need be given by another state, and is not in any way a limitation on the effect the rendering state may give its own judgment. In *Galpin v. Page*, 85 U.S. (18 Wall.) 350, 369 (1873), Justice Field, writing for the Court, confirmed that states were empowered to enact jurisdictional rules beyond the principles of "public international law," although the Court would carefully review broad jurisdictional assertions to ensure that the states complied with their own jurisdictional statutes.

¹⁸⁹ Justice Field acknowledges in *Pennoyer*, that previous cases implied that a judgment not entitled to full faith and credit outside the state because it was rendered without jurisdiction could nevertheless be given effect within the state. 95 U.S. at 732.

¹⁹⁰ *Id.* at 733.

¹⁹¹ Justice Field notes that the default judgment in the case was entered in February, 1866. *Pennoyer*, 95 U.S. at 719. The Fourteenth Amendment was not ratified until July 1868, more than two years later. No. 13, 40th Cong., 2d Sess., 15 Stat., app. at 708-09 (1868). In light of Justice Field's assertion that jurisdiction had to attach at the time an action was commenced, the gap between the assertion of jurisdiction and the ratification of the Fourteenth Amendment was, in reality, even larger. See *supra* text accompanying note 175. Several commentators have noted that Justice Field's invocation of the Due Process Clause was

More importantly, there was little formal support for equating jurisdiction with due process. The best evidence of the common law understanding of due process suggests that it was not thought to restrict the states' ability to enact rules inconsistent with accepted notions of territorial jurisdiction, irrespective of the fact that other states would not be obligated to enforce judgments rendered in contravention of those notions.¹⁹² And there is certainly nothing in the Fourteenth Amendment ratification debates suggesting either a limitation on state power to fashion jurisdictional rules or that due process was intended to enshrine principles of territorial jurisdiction generally.¹⁹³

On what basis, then, did Justice Field invoke the Due Process Clause? The answer is our old friend, "fundamental fairness." If, as Justice Field demonstrates, a judgment rendered without jurisdiction was unenforceable in other states because "contrary to the first principles of justice,"¹⁹⁴ then it is hard to see why it should nevertheless be enforceable in the state which rendered it. Not to extend the jurisdictional requirement to the rendering court seems "fundamentally unfair," and the Due Process Clause is the logical source to remedy the unfairness. Thus, in this author's view, Justice Field ultimately reads his jurisdictional framework of territorial sovereignty into the Due Process Clause as part of an effort to ensure fairness to defendants.¹⁹⁵

technically dicta. See, e.g., Harold S. Lewis, Jr., *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769, 773-74 (1982); Redish, *supra* note 75, at 1115 n.25.

¹⁹² See, e.g., Whitten, *supra* note 42, at 804. See also *supra* notes 188, 189.

¹⁹³ There was apparently little discussion of the meaning of due process in the Fourteenth Amendment by its framers. Their principal concern was with the meaning of the guarantee of equal protection. See MOTT, *supra* note 49, at 164; JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 187-90* (1951); Redish, *supra* note 75, at 1124-25; Whitten, *supra* note 42, at 804-21. The most noteworthy remark in the debate was offered by the Amendment's author, Representative Bingham, who answered in response to a question as to the meaning of due process that "the courts have settled that long ago, and the gentleman can go and read their decisions." MOTT, *supra* note 49 at 164; Redish, *supra* note 75 at 1124-25 n.91; Whitten, *supra* note 42, at 810. Professor Whitten expresses the scholarly consensus that "[i]t does not seem plausible . . . that the Fourteenth Amendment originally imposed the traditional rules of international territorial jurisdiction on the states directly through the due process clause." Whitten, *supra* note 42, at 821.

¹⁹⁴ *Pennoyer*, 95 U.S. at 732.

¹⁹⁵ Professor Lewis offers additional support for this reading of *Pennoyer*. While conceding that the concept of sovereign territorial authority is central to the decision, he asserts that the "stress on sovereignty in the *Pennoyer* opinion appears as a way of defining the due process rights of litigants, rather than as a suggestion that the challenged state judicial fora had any claim on due process of their own." Lewis, *supra* note 191, at 773. Professor Lewis reaches this conclusion by comparing Justice Field's approach to the due process issue, which

Justice Scalia's reliance upon *Pennoyer* in *Burnham* is thus profoundly ironic. He wants to extract the jurisdictional rules from *Pennoyer*, especially the rule that in-state service necessarily confers jurisdiction, while ignoring Justice Field's reason for incorporating those rules into due process in the first place.¹⁹⁶ Indeed, had Justice Scalia been on the Court when *Pennoyer* was decided and applied his traditionalism consistently, he would doubtlessly have joined Justice Hunt's dissent on the grounds that it was traditionally a prerogative of the states to determine for themselves what the appropriate reach of their courts should be; and the Fourteenth Amendment was, therefore, entirely irrelevant to the issue of personal jurisdiction. Justice Scalia's extolling of the rule of *Pennoyer* while rejecting its rationale of fairness evinces, at a minimum, an extraordinarily formalistic approach to precedent.

focuses on "judicial proceedings . . . for the protection and enforcement of private rights," with Justice Hunt's focus on the forum's legislative power. *Id.* at 774 (quoting *Pennoyer*, 95 U.S. at 733 (emphasis supplied by Lewis)). He concludes:

Thus, the Court in 1878 explicitly recognized that the process that is due in judicial proceedings involving private disputes is due to individual litigants, not to the forum—hardly a surprising interpretation of a provision in the fourteenth amendment that speaks in prohibitory terms to the states and enjoins them not to deprive any 'person' of property without due process. The repeated references in *Pennoyer* to state sovereignty really only give content to the process due individual parties.

Id.; accord Drobak, *supra* note 179, at 1029 n.68.

This understanding of *Pennoyer* is, concededly, controversial. Numerous scholars have viewed the limits of state sovereignty, rather than a concern with fairness to the litigants, as not only the measure of personal jurisdiction established by *Pennoyer*, but as the rationale for Justice Field's opinion in *Pennoyer* as well. See, e.g., Stewart Jay, *Minimum Contacts as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C. L. REV. 429, 474 (1981) ("more fundamental aspect of *Pennoyer* was its insistence that constitutional limitations on jurisdiction to adjudicate were a function of the constraints associated with a federation of sovereigns retaining independent judiciaries"); Kenneth F. Ripple & Mollie A. Murphy, *World-Wide Volkswagen: Reflections on the Road Ahead*, 56 NOTRE DAME L. REV. 65, 70 ("while *Pennoyer* established the presence test, its fundamental concern was state sovereignty"); Allan R. Stein, *Burnham and the Death of Theory in the Law of Personal Jurisdiction*, 22 RUTGERS L.J. 597, 600-01; cf. Kogan, *supra* note 75, at 331-42 (describing *Pennoyer* as "Janus-faced," reflecting concerns both with individual rights and traditional sovereign power).

For the limited purpose of analyzing Justice Scalia's due process traditionalism in *Burnham*, however, it is unnecessary definitively to characterize Justice Field's opinion as an attempt to protect defendants, to constrain state power, or as some combination of the two. The existence of a scholarly disagreement over its rationale over a century after the case was decided is in itself sufficient reason not to invoke *Pennoyer* uncritically as a contemporary guide for decision.

¹⁹⁶ See Stein, *supra* note 195, at 600-01 (contrasting Justice Field's attempt "to construct a normative model of judicial legitimacy" with Justice Scalia's view that due process merely "guarantees judicial conformity with historical practice").

In any event, virtually from the day *Pennoyer* was handed down, the Supreme Court gradually but systematically began to chip away at Justice Field's jurisdictional edifice. Justice Field's second principle, that a state's jurisdictional authority is limited to persons and property within its borders, was the first to erode. The precipitating event was the invention and mass production of the automobile, which vastly increased the number of cases with interstate ramifications.¹⁹⁷ For a time the Supreme Court endeavored to work within *Pennoyer's* framework and relied upon the fiction of "implied consent" to permit a state to take jurisdiction over nonresident motorists who caused injury in the state but could not be locally served with process.¹⁹⁸ Eventually, however, the fiction collapsed of its own weight and the Supreme Court formally discarded it in *International Shoe Co. v. Washington*,¹⁹⁹ which expanded the reach of state courts to cases against defendants who had "minimum contacts with [a state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,'" even if they had not been served within the state or their consent to suit could not in some manner be "implied."²⁰⁰

Justice Field's first principle, that a state enjoys untrammelled authority over persons and property within its territory, withered more slowly. At least prior to *Burnham*, however, its ultimate demise also seemed inevitable. In *Shaffer v. Heitner* the Supreme Court held that the mere presence of property within a state was no longer sufficient to permit jurisdiction over the property's owner, essentially the same fact pattern presented in *Pennoyer*.²⁰¹ The Court opined that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and

¹⁹⁷ See *Shaffer v. Heitner*, 433 U.S. 186, 202 (1977) (noting that "[t]he advent of automobiles, with the concomitant increase in the incidence of individuals causing injuries in States where they were not subject to *in personam* jurisdiction actions under *Pennoyer*, required further modification of the territorial limits on jurisdictional power").

¹⁹⁸ See *Hess v. Pawloski*, 274 U.S. 352 (1927). The Supreme Court also sanctioned use of the implied consent fiction to enable state courts to effect service of process upon foreign corporations. The application of the fiction to corporations proved difficult to administer, though, because it required a threshold finding that a corporation was "doing business" in the state, a more complex task than merely finding that a nonresident had used the state's roads. Indeed, that inquiry was essentially another way of asking whether the corporation had sufficient contacts that it was just that the corporation be haled into court, which is the test the Court ultimately settled on in *International Shoe Co. v. Washington*, 326 U.S. 310, 321 (1945).

¹⁹⁹ 326 U.S. 310 (1945).

²⁰⁰ *Id.* at 316.

²⁰¹ 433 U.S. 186, 212 (1977).

its progeny."²⁰² There was no reason to think that the Court's use of the word "all" did not include assertions of jurisdiction based upon the presence of the defendant as well as his or her property, and the commentators who wrote about *Shaffer* concluded overwhelmingly that it presaged the end of transient jurisdiction.²⁰³

Justice Scalia attempts in *Burnham* to save the transient rule from the logic of *Shaffer*, but his effort is utterly unconvincing.²⁰⁴ He essentially argues that *Shaffer* should be confined to its facts, that it addressed only the situation where the minimum contact of property ownership is substituted for the physical presence of an absent defendant.²⁰⁵ Physical presence, he maintains, is the paradigm against which the minimum contacts rule was fashioned, and it would be perverse to jettison it in favor of a standard that was intended as its substitute.²⁰⁶

But this limited reading of *Shaffer* wrenches the case from the historical context in which it was decided. *Shaffer* was the apogee of the Supreme Court's rejection of the jurisdictional theory of *Pennoyer*. The Court looked to minimum contacts analysis as a theoretical alternative to the sovereign territorialism of the states, not as an application of it. Justice Brennan captures this lesson in his *Burnham* dissent:

²⁰² *Id.*

²⁰³ Daniel O. Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction*, 25 VILL. L. REV. 38, 61-62 (1979-80); Cox, *supra* note 75, at 503; Jack H. Friedenthal, *A Comment on the Impact of Shaffer v. Heitner in the Classroom*, 1978 WASH. U. L.Q. 319, 320; Donald W. Fyr, *Shaffer v. Heitner: The Supreme Court's Latest Last Words on State Court Jurisdiction*, 26 EMORY L.J. 739, 770 (1977); Jay, *supra* note 195, at 474; Frank R. Lacy, *Personal Jurisdiction and Service of Summons After Shaffer v. Heitner*, 57 OR. L. REV. 505, 508-09 (1978); Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 60-61 (1984); Bruce Posnak, *A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729 (1981); Ripple & Murphy, *supra* note 195, at 76-77; Robert Allen Sedler, *Judicial Jurisdiction and Choice of Law in Interstate Accident Cases: The Implications of Shaffer v. Heitner*, 1978 WASH. U. L.Q. 329, 332; David H. Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of Shaffer v. Heitner*, WASH. U. L.Q. 273, 303; Weintraub, *supra* note 75, at 492; Donald J. Werner, *Dropping the Other Shoe: Shaffer v. Heitner and the Demise of Presence-Oriented Jurisdiction*, 45 BROOK. L. REV. 565, 606 (1979). But see Earl M. Maltz, *Sovereign Authority, Fairness and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction*, 66 WASH. U. L.Q. 671 (1988) (arguing that transient jurisdiction survived *Shaffer*).

²⁰⁴ For critiques of Justice Scalia's treatment of *Shaffer*, see Cox, *supra* note 75, at 506-08 & n.42, 539-47; Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After Burnham v. Superior Court*, 22 RUTGERS L.J. 675, 679-81 (1991).

²⁰⁵ *Burnham*, 110 S. Ct. at 2115-16.

²⁰⁶ *Id.*

The critical insight of *Shaffer* is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process. No longer were we content to limit our jurisdictional analysis to pronouncements that '[t]he foundation of jurisdiction is physical power,' and that 'every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . ' While our holding in *Shaffer* may have been limited to *quasi-in-rem* jurisdiction, our mode of analysis was not. . . . *International Shoe* and *Shaffer* . . . mean that every assertion of state-court jurisdiction, even one pursuant to a 'traditional' rule such as transient jurisdiction, must comport with contemporary notions of due process.²⁰⁷

Justice Scalia acknowledges that the Supreme Court in *International Shoe* properly discarded Justice Field's second principle that a state could not act outside its territory.²⁰⁸ But in the face of this acknowledgment, it is impossible to argue consistently for the continuing vitality of Justice Field's first principle. Both principles flow from the identical theory of territorial sovereignty. They cannot logically be decoupled, one rejected and the other accepted.²⁰⁹ And even if one were persuaded of the virtue of unlinking them, Justice Scalia offers no warrant for applying the first principle of sovereign territoriality to people but not to their property.²¹⁰

Perhaps mindful that his opinion in *Burnham* is less than faithful to the rationale of *Shaffer*, Justice Scalia candidly concedes that his methodology is not the same. He writes in explanation:

[W]hile our holding today does not contradict *Shaffer*, our basic approach to the due process question is different. We have conducted no independent inquiry into the de-

²⁰⁷ *Id.* at 2120-22 (Brennan, J., dissenting).

²⁰⁸ *Id.* at 2114.

²⁰⁹ *Accord* Cox, *supra* note 75, at 541-42; Redish, *supra* note 204, at 679-81; Stein, *supra* note 195, at 601.

²¹⁰ Professor Stein suggests that it is possible to make an argument for treating power over persons and power over their property differently, although he does not necessarily subscribe to it. The argument would run that the fairness of jurisdiction depends upon the volitional contact of a defendant with the forum. A defendant has more control over where he travels than over the location of his property, especially intangible property. This is exemplified by the facts in *Shaffer*, where the governing Delaware law provided that the situs of all shares in a Delaware corporation—including those owned by out-of-state residents—was Delaware. *Shaffer*, 433 U.S. at 192. Hence, there may be a reason to analyze jurisdiction based upon the presence of an individual and the presence of his property differently. Whatever the virtues of this argument, however, it is not, as Professor Stein points out, an argument which Justice Scalia thought necessary to offer. *See* Stein, *supra* note 195, at 603.

sirability or fairness of the prevailing in-state service rule, leaving that judgment to the legislatures that are free to amend it; for our purposes, its validation is its pedigree. . . . The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'²¹¹

Justice Scalia has thus distilled his theory of due process down to its essence. The process which is due is that which the states have traditionally afforded. Departures from tradition are possible, but that is up to the states. So long as they adhere to tradition, they do not run afoul of the Constitution. The role of the federal courts is merely to ascertain the content of the relevant tradition and ensure that the states comply with it. No normative inquiry into the character of the tradition is required or permitted.

It is now time to see whether Justice Scalia's theory presents a workable alternative to the judicial subjectivism he so roundly condemns.

II. THE LIMITS OF TRADITIONALISM

In many respects, tradition is the fundamental ordering principle of our lives. Much of what we believe, feel, do and say is unscrutinized and reflexive, a product of the historical accumulation of practices conveyed to us as part of our acculturation as members of human society. The impartation of tradition to us, and our incorporation into it, begins with birth and does not end even when we die; the acts we perform in life become part of tradition itself, passed on to those who succeed us. Appeals to tradition are accordingly powerful, for they touch very closely on a substantial part of that which makes us what and who we are. It is not surprising that they occupy a central place in the creation and interpretation of law.

The realms of law and tradition overlap considerably. Much of what we call law is codified tradition, practice and belief turned into formal rules. At the same time, law and tradition are not congruent. Legal rules are, indeed, often fashioned precisely in order to regulate tradition, especially when it is noxious or abhorrent, the most obvious instance of such regulation being the criminal law. The

²¹¹ *Burnham*, 110 S. Ct. at 2115, 2116.

relationship between law and tradition is thus variegated and complex; tradition is both a building block of law and an object which law seeks to control.

It follows, I think, that an attempt to define legal norms solely with reference to tradition, even tradition as embodied in prior legal rules, is doomed to fail as a theoretical matter.²¹² It is for this reason, perhaps, although it assuredly has something to do with the need of a sitting Supreme Court Justice to decide individual cases, that Justice Scalia does not offer a comprehensive defense or account of the role of tradition in law. As indicated in Part I, his case for traditionalism is narrowly pragmatic: It will keep activist judges in line.

Justice Scalia advocates traditionalism as an ostensibly neutral principle, in the sense that conservative judges will be bound to uphold liberal traditions with which they disagree just as liberal judges will be bound to uphold conservative ones. There is, however, a normative premise to his argument; he thinks that restraining judges is a good thing, partly out of a preference for majoritarian decision-making and partly because it will retard the overall pace of social change.²¹³ And this latter effect in particular dovetails nicely with his conservative political leanings. The criticism principally worth offering, though, is not that appeals to tradition are backward-looking and tend to enshrine the status quo, which is obvious. The important point is that traditionalism is not neutral on its own terms, because it cannot be applied without resort to the value-laden discretionary judgments it is said to eliminate. This can be seen from an examination of the two principal methodological problems inherent in traditionalism: how to identify a controlling tradition, and how to define one. This section explores those questions and then concludes with a discussion of the appropriate role of tradition in due process adjudication.

A. *The Problem of Identification*

The first problem with traditionalism is that, as with any adjudicatory methodology, it contains no self-referential rule of application. The world is generally full of differing and often conflict-

²¹² For an elegant defense of the role of tradition in law see Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990). For an incisive reply see David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991). See also Burt, *supra* note 53; Strauss, *supra* note 54.

²¹³ Scalia, *supra* note 14, at 862-64; Scalia, *supra* note 20, at 1176.

ing practices of varying force and antiquity. So is the law. How do we know when one of these putative traditions is the real thing? Justice Scalia does not tell us.

To begin, consider the hermeneutical objection mentioned briefly in Part I, that the historiography necessary to locate a tradition inevitably involves the coloration of the past by the perspective of the present. On the whole Justice Scalia is correct that the concern with this objection tends to be somewhat overblown.²¹⁴ Reconsider for a moment, though, the appropriate "tradition" to be derived from the eighteenth- and nineteenth-century state cases which discuss transient jurisdiction. As we know, Justice Scalia finds that those cases "firmly establish" transient jurisdiction as a fundamental principle of American law.²¹⁵ His conclusion arguably rests, however, upon a misapprehension of the mindset of the courts of that era. As we have seen, until well into the nineteenth century, courts used to recognize a distinction, no longer of great importance, between local and transitory actions.²¹⁶ It was only in the latter type of case that the fleeting presence of a defendant might serve as a basis for proceeding against him. Moreover, at least some courts refused to assert jurisdiction over a casually present defendant even though the suit may have been characterizable as transitory.²¹⁷ Understood in historical context, then, it is not so clear that when the courts upheld transient jurisdiction in "transitory" actions they were endorsing it across the board, and certainly not in its most extreme form: a lawsuit brought by one nonresident against another nonresident over a tort committed elsewhere. Further, even when a court nominally invoked the transient rule, its decision could often be explained on other grounds.²¹⁸ Contemporary approaches to jurisdiction, which no longer pay significant attention to historical distinctions once thought consequential, may thus have blurred Justice Scalia's vision of the past.

More significant than the difficulty of looking backward accurately is the question of what to make of historical evidence once it is accumulated. Justice Scalia's methodology does not indicate the nature or quantum of evidence necessary to comprise a "tradition." Is his description of his understanding of the historical record in

²¹⁴ See Scalia, *supra* note 14, at 864.

²¹⁵ *Burnham*, 110 S. Ct. at 2110-13.

²¹⁶ See *supra* text accompanying notes 112-20.

²¹⁷ See *supra* text accompanying notes 122-46.

²¹⁸ See *supra* text accompanying notes 147-50.

Burnham, that no nineteenth-century court "even suggested" that local service would not confer jurisdiction, the standard against which a historical record is to be measured?²¹⁹ Does even a single counterexample preclude identification of a tradition? If so, then applying traditionalism is a waste of time; *Burnham* itself seems not to measure up. If not, then Justice Scalia gives no indication of what yardstick judges should apply in the usual case where the historical evidence is confused and conflicting. Judges will, perforce, make their own discretionary assessments of whether a tradition has been established.

Finally, even if a consensus could be reached as to how much evidence is required to constitute a tradition, judges must still subjectively determine what the evidence means. This is most commonly a problem when looking to tradition captured in judicial precedent. Recall the previous discussion of how we should understand the teaching of *Pennoyer*.²²⁰ Justice Scalia maintains that *Pennoyer* established that presence is the paradigm of all jurisdiction. The decision continues to be relevant in his eyes because Justice Field's first principle of presence, dicta in the case, has never been explicitly overruled as applied to persons. The alternative view is that *Pennoyer* is primarily a case about fairness to defendants, reflected in its concern with adequate notice. Justice Field's reliance upon principles of territorial sovereignty is on this account incidental to his larger purpose of ensuring fairness, although perhaps inescapable in light of the nineteenth-century understanding of the relationship of geography to power.²²¹ But as that understanding changed due to the expansion of interstate commerce, there was no longer any reason to follow slavishly the original principles if, as was often the case, they led to outcomes inconsistent with the underlying rationale of fairness.²²² The theory of territorial sovereignty was then ultimately rejected in *Shaffer*, which involved the same type of jurisdiction—quasi in rem—as did *Pennoyer*.

Identifying the jurisdictional "tradition," if any, which *Pennoyer* and the cases following it help to establish without making some sort of judgmental choice between these alternative understandings is impossible. There is no *a priori* obvious rule to be gleaned. This

²¹⁹ *Burnham*, 110 S. Ct. at 2112.

²²⁰ See *supra* text accompanying notes 175–207.

²²¹ See Terry S. Kogan, *Geography and Due Process: The Social Meaning of Adjudicative Jurisdiction*, 22 RUTGERS L. REV. 627 (1991).

²²² See *Shaffer*, 433 U.S. at 212.

does not mean that the choice must be made arbitrarily. Resort may be had to all of the various forms of reasoning judges commonly use to decide cases.²²³ But it is plainly wrong to claim that instructing judges to canvass a historical record to locate and apply tradition relieves them to any substantial degree of the need to make the same type of judgments they would ordinarily.

B. *The Problem of Definition*

The most serious methodological shortcoming of Justice Scalia's traditionalism is that it fails to offer a satisfactory account of how a relevant tradition is to be defined, assuming that the available evidence points unambiguously to a practice or custom with a lengthy enough pedigree to qualify for traditional status. Justice Scalia's opinion in *Burnham* illustrates the definitional problem without appearing to appreciate it. In attempting to establish the breadth of adherence by the states to the rule of transient jurisdiction, Justice Scalia observes that many states created exemptions from amenability to process in a variety of specific situations.²²⁴ Exemptions were commonly recognized for persons who were, for example, present in the forum in order to testify in other matters,²²⁵ to defend (or sometimes prosecute) other litigation²²⁶ or whose presence was induced by force or fraud.²²⁷ He concludes, correctly, that these exemptions were (and are) necessarily premised upon the understanding that presence conferred jurisdiction, at least generally.

But what the existence of such exemptions also demonstrates is that the states did not adhere to the transient rule where doing so contravened public policy, at least as embodied in the exemptions themselves. Any definition of the salient tradition must, therefore, incorporate the exceptions as well as the transient rule. But this might be done in any number of different ways, none of which is inherently superior to the others.

²²³ See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 124-57 (1990).

²²⁴ *Burnham*, 110 S. Ct. at 2112.

²²⁵ See, e.g., *Stewart v. Ramsay*, 242 U.S. 128, 130-31 (1916); *Kelly v. Pennington*, 78 Colo. 482, 484-85, 242 P. 681, 682 (1926); *Fox v. Hale and Norcross Silver Min. Co.*, 108 Cal. 369, 374, 41 P. 308, 325 (1895).

²²⁶ See, e.g., *Page Co. v. MacDonald*, 261 U.S. 446, 447-48 (1922); *Beatty v. Monahan*, 240 Ill. App. 240, 246-47 (1926); *Dixon v. Shearer*, 98 Misc. 614, 615, 163 N.Y.S. 79, 79 (1917).

²²⁷ See, e.g., *Wyman v. Newhouse*, 93 F.2d 313, 314-15 (2d Cir. 1937), *cert. denied*, 303 U.S. 664 (1938); *Benesch v. Foss*, 31 F.2d 118, 118 (D. Mass. 1929); *Wanzer v. Brighi*, 52 Ill. 35 (1869).

One possible definition, for which Justice Scalia would presumably opt, is that presence confers jurisdiction unless the individual served is a member of a category of persons specifically exempted from service of process. Of course, there would still be the question of how to handle the case of a person falling into one of those categories in a state which did not recognize an exemption, but that question involves somewhat different considerations.²²⁸ Another way to define the tradition is to say that presence confers jurisdiction unless inconsistent with some articulated public policy. The state cases, together with the exemptions understood as examples of instances where jurisdiction should not be asserted, would support this definition. Yet a third possible view is that presence confers jurisdiction only when the jurisdictional assertion comports with the underlying policy rationale for the exemptions: fairness to parties and witnesses.²²⁹

We are thus again confronted with the need to make a discretionary choice among equally logical competing alternatives. With respect to the manner in which a tradition should be defined, however, unlike his lack of instruction on the problem of identification, Justice Scalia does offer some guidance as to how a judge should proceed (although not in *Burnham* where, as indicated above, he seems not to recognize the difficulty). He articulates his prescription in a case involving a claim of substantive due process, *Michael H. v. Gerald D.*²³⁰ Although the role of tradition in substantive due process varies from its role in procedural due process,²³¹ Justice Scalia's opinion requires exploration.

²²⁸ For Justice Scalia, that question might prove difficult to answer. As indicated in Part I, he does condone reference to fundamental fairness analysis to evaluate the constitutionality of procedures that depart from historical practice. See *Schad v. Arizona*, 111 S. Ct. 2491, 2501 (1991) (Scalia, J., concurring). But whether a state's failure ever to create an exemption constitutes a permissible "departure" from historical practice is not clear. It presumably depends, at least to some extent, upon whether the exemption rises to the level of a tradition, and then upon whether the tradition is sufficiently fundamental that it cannot be deviated from. As I argue in the text, neither of those questions is susceptible of an *a priori* answer.

²²⁹ Fairness to parties and witnesses is not the only rationale for the exemptions. They also serve to facilitate the administration of justice by removing impediments to the attendance of nonresidents at legal proceedings. See *Case Notes*, 4 S. CAL. L. REV. 245 (1931).

²³⁰ 491 U.S. 110 (1989).

²³¹ In substantive due process analysis, tradition may be consulted as an aid in determining whether the right at issue is worthy of constitutional protection. See *id.* at 133. In procedural due process analysis, tradition bears on the particular procedure that must be afforded before a constitutionally protected right may be interfered with or limited. See *Burnham*, 110 S. Ct. at 2115. Scholars disagree as to whether issues of personal jurisdiction are best understood as substantive or procedural, although this disagreement is essentially another way of arguing about whether the Fourteenth Amendment should be understood

Michael H. was the biological father of a female child conceived and born to a married woman living with her husband.²³² Under California law, which governed the case, the child was conclusively presumed to be the daughter of the husband.²³³ As a consequence of this legal bar to his establishing paternity, Michael was denied the right to visit his natural daughter.²³⁴ He challenged the law as a violation of his right to substantive due process.²³⁵

Writing for a plurality of the Court, Justice Scalia rejected Michael's claim that his paternal interest was a protectable liberty interest under the Fourteenth Amendment.²³⁶ Justice Scalia found that in construing the Due Process Clause the Court had "insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society."²³⁷ The interest of an unwed father in visiting his illegitimate child failed to qualify. As Justice Scalia saw it:

[T]he legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and [the child's mother] has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has.²³⁸

to reflect a concern with state sovereignty as well as with individual liberty. *Cf.* Stein, *supra* note 195, at 599 n.13 ("excessive assertions of jurisdiction are not procedural due process problems; they are, in a more meaningful sense, substantive due process issues") with Redish, *supra* note 204, at 687 (speaking of "the need to develop coherent procedural principles as a means of fostering fairness").

²³² *Michael H.*, 491 U.S. at 113-14.

²³³ *Id.* at 115-16.

²³⁴ *Id.*

²³⁵ *Michael H.*, 491 U.S. at 116.

²³⁶ *Id.* at 118-30. Justice Scalia wrote for himself, Chief Justice Rehnquist and Justices O'Connor and Kennedy. Justices O'Connor and Kennedy, however, specifically disassociated themselves from the most provocative part of Justice Scalia's opinion, footnote six, because they were unwilling to "foreclose the unanticipated by the prior imposition of a single mode of historical analysis." *Id.* at 132 (O'Connor, J., with whom Kennedy, J., joins, concurring in part). Justice Stevens provided the fifth vote to uphold the California statute. Unlike Justice Scalia, Justice Stevens thought that Michael's parental interest was entitled to Fourteenth Amendment protection, but he thought that the decision as to whether recognizing that interest in the form of mandatory visitation was in the best interest of the child was properly left to the discretion of the California court. *Id.* at 132-36.

²³⁷ *Id.* at 122.

²³⁸ *Id.* at 124.

Justice Scalia's traditionalist approach to substantive due process is vulnerable to criticism on a number of grounds, most of which are enumerated by Justice Brennan in his eloquent dissent.²³⁹ The important criticism for present purposes, though, is that Justice Scalia construed the relevant tradition too narrowly. Justice Brennan argued that the Court should focus not upon the historical treatment of men who beget children via adulterous affairs with married women, but "whether parenthood is an interest that historically has received our attention and protection."²⁴⁰

It is in response to this last criticism that Justice Scalia announces his methodology for defining a tradition. The methodology is contained in footnote six of his opinion, which, if it is ever blessed by a majority of the Court, may become perhaps the second most important footnote in Supreme Court history.²⁴¹ Justice Scalia writes:

Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.²⁴²

The rationale for this rule of specificity, of course, is that it will rein in judges. As Justice Scalia explains:

Because . . . general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. . . . Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all.²⁴³

The reality, however, is that Justice Scalia's commandment of specificity is not the neutral rule of law he claims it to be. Because history never repeats itself exactly, there will never be a single tradition which encompasses the entire factual predicate of a case. There will always be a virtually infinite number of potentially rele-

²³⁹ *Id.* at 136. (Brennan, J., dissenting). Justice Brennan was joined in his dissent by Justices Marshall and Blackmun. Justice White also filed a dissenting opinion in which Justice Brennan joined. *Id.* at 157 (White, J., dissenting). The criticisms enumerated by Justice Brennan are discussed *infra* Part IIC.

²⁴⁰ *Id.* at 139 (Brennan, J., dissenting).

²⁴¹ *Cf.* *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

²⁴² *Michael H.*, 491 U.S. at 127-28 n.6.

²⁴³ *Id.*

vant facts from which it will be necessary to abstract away the nonessential from the essential. As Professor Tribe and Michael Dorf convincingly demonstrate, the process of abstraction can never be performed as a matter of pure logic; it will always involve judgment.²⁴⁴ This may be illustrated with reference both to *Michael H.* and *Burnham*.

Justice Scalia describes the issue in *Michael H.* as whether the states "in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child."²⁴⁵ This is hardly the only way of describing the facts of the case. Michael had lived with his daughter at various times, contributed to her support, held her out as his child, wanted to maintain a relationship with her, and had her call him "Daddy."²⁴⁶ The Court could just as easily have framed the issue as whether the states have traditionally recognized the rights of a natural father in the situation Justice Scalia presents when the father's relationship with his daughter is the same as Michael's and his daughter's. This inquiry is manifestly more specific than the one Justice Scalia undertook. It is, indeed, so specific that it is doubtful we would ever find a case precisely on point, let alone anything which could count as a tradition. But if we retreat to the next level of generality and begin to exclude "irrelevant" facts, how do we know which counts more: biology and affection, or adultery?²⁴⁷

It is clear where Justice Scalia comes down on that issue: "no fewer than six times, [he] refers to Michael as the '*adulterous* natural father.'"²⁴⁸ His bias in favor of the unitary family thus leads him to emphasize the marriage of the child's mother and her husband over Michael's parental rights. His definition of the "relevant" tradition in the case is, accordingly, anything but "neutral." And his admonition to his brethren and sister and instruction to his inferiors to refer to the "most specific level at which a relevant tradition . . . can be identified"²⁴⁹ is not in any way a cure for the "problem" of judicial subjectivity. It will remain up to judges to determine when a tradition, or which one of a number of (conflicting) traditions, is relevant to deciding a case.

²⁴⁴ Lawrence H. Tribe and Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

²⁴⁵ 491 U.S. at 122.

²⁴⁶ *Id.* at 143-44 (Brennan, J., dissenting).

²⁴⁷ See Tribe & Dorf, *supra* note 244, at 1092.

²⁴⁸ See *Michael H.*, 491 U.S. 110, 144 (Brennan, J., dissenting) (emphasis added by the dissent).

²⁴⁹ *Id.* at 127-28 n.6.

Justice Scalia is not unaware of the "levels of generality" problem. His response, in part, is that any alternative approach is formless and incoherent. His position is also that there is utility in categorical rules notwithstanding their potential for arbitrariness, so long as the rules are grounded in tradition. In *Burnham*, he criticizes Justice Brennan's insistence that assertions of jurisdiction be measured by "contemporary notions of due process" as consisting not of:

a rule of law at all, but only a 'totality of the circumstances' test, guaranteeing what traditional territorial rules of jurisdiction were designed precisely to avoid: uncertainty and litigation over the preliminary issue of the forum's competence.²⁵⁰

Because in his view physical presence is "the very baseline of reasonableness" against which jurisdiction has hitherto been measured,²⁵¹ Justice Scalia is willing to tolerate the substantial hardship that the unwavering application of the transient rule may cause in particular cases. He asks rhetorically without answering, because he deems the answer to be irrelevant: "What if, for example, Mr. Burnham were visiting a sick child? Or a dying child?"²⁵²

Many of us would feel, I suspect, that the answer to the questions Justice Scalia poses is very relevant. If the choice is between recognizing an exception to the transient rule and discouraging a parent from visiting a sick or dying child, then it is hard not to come down in favor of the former. Moreover, the Supreme Court has previously recognized that jurisdictional rules ought to take note of familial considerations.²⁵³

This is not to deny the value of categorical legal rules. Categorical rules serve, at least in the abstract, to advance the goal of equality by ensuring that like cases are treated alike, to render the law more predictable and, therefore, more fair,²⁵⁴ and to reduce the cost of the administration of justice by reducing the volume of litigation and easing the burden on the decisionmaker.²⁵⁵ As Justice

²⁵⁰ *Burnham*, 110 S. Ct. at 2119.

²⁵¹ *Id.*

²⁵² *Id.* at 2118.

²⁵³ See *Kulko v. Superior Court of California*, 436 U.S. 84, 93 (1978) (expressing a concern that jurisdictional rules not be applied to "discourage parents from entering into reasonable visitation agreements").

²⁵⁴ See, e.g., Scalia, *supra* note 20, at 1179.

²⁵⁵ See, e.g., KARL LLEWELLYN, *THE BRAMBLE BUSH* 64-65 (1930).

Brandeis put it, "in most matters it is more important that the applicable rule of law be settled than that it be settled right."²⁵⁶ This is particularly true, as Justice Scalia suggests, with respect to the litigation of procedural matters like jurisdiction which consume judicial resources on issues unrelated to the merits of a controversy.²⁵⁷

Nevertheless, there must still be a weighing of the systemic benefit categorical rules engender against the suboptimal results they cause in particular cases.²⁵⁸ This is, after all, the lesson of *International Shoe*. The Supreme Court did not replace sovereign territoriality with a test of minimum contacts to clarify the rules of personal jurisdiction and thereby reduce the volume of litigation over the forum's competence. On the contrary, it overruled *Pennoyer* because *Pennoyer's* analytical framework had become unworkable, despite the fact that the minimum contacts test it substituted is far less certain in form and has led to far more litigation in application than Justice Field's two principles of jurisdiction.²⁵⁹ In *Shaffer*, too, the Court was unwilling to continue to abide the fundamental unfairness of requiring defendants to submit to suit wherever they owned property in order to limit the consumption of judicial resources.²⁶⁰ Thus, while categorical rules have their place, judges must still determine in any particular situation whether the overall benefit of establishing a categorical rule will exceed the harm it will cause in exceptional cases.

Justice Scalia's traditionalism cannot be defended as a means of limiting judicial discretion. There is no such thing as "the most specific level" of a "relevant" tradition which may be mechanically invoked to decide a case. Determining the appropriate level of specificity at which to recognize a tradition and formulate a legal rule, and deciding which past practices should be taken account of in making those decisions, require judges to do what their title implies: make judgments. The contention that this can be done in a value-free manner is fatuous.

It is clear, moreover, that even for Justice Scalia, traditionalist methodology will yield to permit a desired result. He has acknowledged openly, as alluded to in Part I, that he would not sustain the

²⁵⁶ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

²⁵⁷ See *Burnham*, 110 S. Ct. at 2119.

²⁵⁸ See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-602 (1987).

²⁵⁹ See Redish, *supra* note 204, at 686.

²⁶⁰ 433 U.S. at 211.

constitutionality of flogging even if it were widely practiced and historically well entrenched.²⁶¹ More revealingly, he vigorously condemned a minority set-aside program adopted by a predominantly African-American city council in *City of Richmond v. J.A. Croson Co.*²⁶² without mentioning either the tradition of ethnic "self-help" in awarding government contracts or the general ubiquity of government-sponsored affirmative action programs.²⁶³

Much of the foregoing discussion about the shortcomings of traditionalism and the impossibility of value-free adjudication may seem patently obvious, an attack mounted against a straw man. It is nevertheless important to debunk these myths not only because they are nominally being relied upon as rules for decision by Justice Scalia and others, but because they receive such widespread currency in the body politic at large. President Bush, for example, has repeatedly identified a willingness to abide by tradition and not "legislate from the bench" as one of the most important attitudes he seeks in a judicial nominee.²⁶⁴

The traditionalist misdescription of the nature of adjudication is not harmless. It enables judges to smuggle their values into the interpretive process under the guise of adhering to purportedly "controlling" traditions or rules which are in reality the product of value-driven choices.²⁶⁵ Legal discourse and, ultimately, the law itself, are impoverished as a consequence. Instead of debating whether the preservation of the unitary family justifies prohibiting a natural father from establishing paternity when the prohibition against his doing so was enacted prior to the development of reliable

²⁶¹ See *supra* note 29 and accompanying text.

²⁶² 488 U.S. 469, 520-28 (Scalia, J., concurring) (1989).

²⁶³ See *id.* at 520 (Scalia, J., concurring). Justice Scalia's failure to discuss the tradition of ethnic self-help is noted in Strauss, *supra* note 54, at 1709. Professor Strauss is particularly critical of Justice Scalia on this score because of his dissenting opinion in *Rutan v. Republican Party*, 110 S. Ct. 2729, 2746 (1990), in which he maintained that one of the reasons patronage hiring did not violate the First Amendment was that it enabled racial and ethnic minorities who were able to dominate local government to entrench themselves by dispensing jobs as rewards to their supporters. *Id.* at 2755 (Scalia, J., dissenting); Strauss, *supra* note 54, at 1709. Professor Edelman, citing as evidence *Croson* and a number of other cases, is highly scornful of Justice Scalia's purported reliance upon methodology, remarking upon "the noticeable tendency of the Justice to depart from his method when he feels he needs to for one reason or another." Peter B. Edelman, *Justice Scalia's Jurisprudence and the Good Society: Shades of Felix Frankfurter and Harvard Hit Parade of the 1950s*, 12 CARDOZO L. REV. 1799, 1800 (1991).

²⁶⁴ See, e.g., *Excerpts from News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991 at A14; Ruth Marcus, *Bush Quietly Fosters Conservative Trend in Courts*, WASH. POST, February 18, 1991 at A1, A4.

²⁶⁵ See Tribe & Dorf, *supra* note 244, at 1096.

blood tests and at a time when the stigma of illegitimacy was far greater than it is today,²⁶⁶ we are told the debate is irrelevant by a Supreme Court Justice who has already made up his mind but hides behind "tradition" to avoid having to engage his opponents. Similarly, instead of debating whether the utility of physical presence as a categorical rule of jurisdiction is worth the price of discouraging parents from visiting their children, even if they are sick or dying, we are told that "tradition" compels this result notwithstanding that the authority relied upon is somewhat ambiguous and no case has ever addressed this precise question.²⁶⁷

The use of tradition in this manner, as a cover for political choices, is subversive of the rule of law. It serves to stifle debate in the service of a particular political agenda. In the short run, "traditionalists" will reap a benefit because they are able to accomplish their objectives under a patina of deniability. If attacked they may assert that they were "only following [traditional] orders." In the long run, however, their disingenuousness will diminish respect for the law and the judges who administer it.

C. *The Value of Tradition*

As I observed in Part IIB, Justice Scalia's use of specific traditions to define interests entitled to recognition as a matter of substantive due process may be criticized in a number of respects in addition to its failure to limit judicial discretion as advertised. His approach is indifferent to the Supreme Court's precedents, which have recognized that a specific tradition denying a right may conflict with a broader tradition including that same right.²⁶⁸ It is highly

²⁶⁶ See *Michael H.*, 491 U.S. at 161-62 (White, J., dissenting).

²⁶⁷ This is not to say that a categorical jurisdictional rule is not justifiable. A case can be made that a categorical rule would be particularly well suited to the resolution of a threshold litigation problem like jurisdiction so as to limit the diversion of resources away from the merits of a case. Indeed, it can be argued that such a rule should control even where it might serve theoretically to dissuade parents from visiting their children because the deterrent effect of the transient rule is likely to be minimal. As in *Burnham*, in most instances where the rule might be invoked there are likely to be sufficient contacts to sustain an assertion of jurisdiction in any event, and the ease of modern transportation and communication have lessened the burden of appearing in a distant forum to the point where the prospect of having to do so is unlikely to be given much weight in the calculation of a parent sincerely interested in visiting his or her child. My point here is not so much that the transient rule cannot possibly be defended on policy grounds, but that Justice Scalia's invocation of tradition excuses him from the need actually to defend it.

²⁶⁸ The best examples of this type of conflict are the race discrimination cases where the specific practices in question, e.g., the anti-miscegenation statutes in *Loving v. Virginia*, 388 U.S. 1 (1967), or the segregation of schools in *Brown v. Board of Educ.*, 347 U.S. 483 (1954),

majoritarian, emphasizing only those traditions which have achieved formal legal recognition.²⁶⁹ It is excessively deferential to the states, enabling them to define through their own practices what the Fourteenth Amendment permits them to do.²⁷⁰ It reads the open-textured Due Process Clause strangely, as merely a codification of specific practices at a particular historical time.²⁷¹ In addition, it glosses over the unpleasant truth that many of our traditions are odious, unworthy of contemporary recognition or respect.²⁷²

It might seem that tradition should be banished from (due process) adjudication entirely, as a nettlesome impediment to achieving a just legal order. This would be an overreaction, and a deleterious one. The problem is not with looking to tradition *per se* as a guide to interpretation, which is probably inevitable, but with doing so exclusively. When Justice Scalia remarks in *Michael H.* that it is important to consult tradition in interpreting the Due Process Clause in order to "prevent future generations from lightly casting aside important traditional values,"²⁷³ I agree with him. We should no more unthinkingly discard a venerable tradition than demolish a sound building. Much of our accumulated wisdom and experience is reflected in our traditions, and our first impulse ought to be to preserve them.

were struck down by the Supreme Court despite their pedigree because they were inconsistent with the broader command of equality.

²⁶⁹ As Professor Redish aptly puts the matter, "the whole point of the Constitution is to act as check on majoritarian practice." Redish, *supra* note 204, at 685. See also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 69 (1980).

The concern with the possible excesses of majoritarianism is especially acute in the area of territorial jurisdiction because the most exorbitant jurisdictional assertions will be attempted against nonresidents who by definition have no ability to participate in the political process in the forum state.

²⁷⁰ See, e.g., Justice Brennan's dissent in *Michael H.*, 491 U.S. at 136, 140-41. Justice Brennan stated:

[T]he plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of States. Transforming the protection afforded by the Due Process Clause into a redundancy mocks those who, with care and purpose, wrote the Fourteenth Amendment.

Id. at 140-41 (Brennan, J., dissenting).

²⁷¹ The broad sweep of the majestic phrase "due process of law" suggests that the framers were concerned with generic problems that might arise rather than insisting upon adherence to extant procedures for the duration of history. See, e.g., Redish, *supra* note 204, at 684 ("Surely, due process has never been construed to 'grandfather' in all procedural practices existing at the time of the clause's adoption").

²⁷² See, e.g., Strauss, *supra* note 54, at 1712.

²⁷³ 491 U.S. at 122 n.2.

But to assert as Justice Scalia does that traditions are beyond reinterpretation is unacceptable. There is too much about them which may be abhorrent or irrelevant to bind us uncritically. We should revere those traditions which warrant reverence, but freely abandon those which are no longer worthy of respect. In the context of procedural due process, we should accord historical practices a presumptive validity, but insist that the presumption be readily rebuttable.

The quest for a methodology which takes the judgment out of judging is misguided. Law is far more art than it is science. What we can reasonably expect from members of the bench is their best effort to discover, expound and apply the law as they understand it. What we should demand is that they articulate their reasons for decisions with candor. Justice Scalia has it wrong: the principal danger of judging is not that judges will read their own values into the law, but that they will do so while pretending not to.