Pennoyer v. Neff: The Hidden Agenda of Stephen J. Field

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I can hear the groans already. Not another article about Pennoyer v. Neff! That gold mine was played out years ago. Well, not quite. While many veins of ore lead away from the Pennoyer mother lode, one in particular yields rich insight into not just Pennoyer, but into some of the ways major changes in legal theory actually develop. Such insight is particularly important when those changes involve the United States Supreme Court, a necessarily insular group whose influence on each other is constantly evolving within an almost secret society replete with code phrases and allusions that are incredibly difficult for even the most diligent scholar to decipher.

At least sixty major law review articles have been written about Pennoyer over the last fifty years, with Professor Wendy Collins Perdue’s being the most intriguing on the exotic and even lurid background of the main actors in the litigation that culminated in the Pennoyer decision. What has not been fully explored is the equally intriguing and far

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1 95 U.S. 714 (1877).
more important legal and political context of the case, and its effect on Pennoyer's author, Justice Stephen J. Field. I hope to show that Pennoyer was far more radical than has been generally perceived and that its due process dictum was only part of a larger agenda that focused on three main themes. First, Field believed in a strong judiciary, whose sacred duty it was to protect established order from the turmoil of the times. Second, Field was a zealous protector of property rights. This value was forged by his personal experience as a young man growing up in Massachusetts and later during his tenure in California, where he was both a legislator and a supreme court justice. Third, Field interpreted the Fourteenth Amendment in a way that is readily accepted today, but which was still in its infancy in 1877. The Fourteenth Amendment had only been ratified in 1868, and over the next nine years Justice Field dissented in most early Supreme Court interpretations of the new Amendment. Field's brethren on the Court held that general protection of economic rights to citizens was not afforded by the Fourteenth Amendment. Field's disagreement with the majority of the Court on this issue, coupled with his self-appointed role as guardian of property rights, resulted in an opinion in Pennoyer that did not accurately reflect then-existing attachment or personal jurisdiction law. Further, I think Field purposely distorted that law to advance his constitutional vision of what the law should be. Only Justice Hunt, the sole Pennoyer dissenter, seems to have grasped the significance of Field's actions. For in Pennoyer, Justice Field effectively obliterated generations of law on the right of a sovereign to control property within its territory, all while ostensibly affirming that right.


Justice Stephen Field stated specifically:

Senators represent their States, and Representatives their constituents, but this court stands for the whole country, and as such it is truly "of the people, by the people, and for the people." It has indeed no power to legislate. It cannot appropriate a dollar of money. It carries neither the purse nor the sword. But it possesses the power of declaring the law, and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety of a popular government. . . .


For an excellent summary of Field's California experience, see Carl Brent Swisher, Stephen J. Field, Craftsman of the Law 25-105 (1963).

See Munn v. Illinois, 94 U.S. 113, 136 (1876) (Field, J., dissenting); The Slaughterhouse Cases, 83 U.S. 36, 105 (1872) (Field, J., dissenting).
I. PENNOYER v. NEFF: A BRIEF SUMMARY

It is unlikely that anyone interested enough to read this far is unfamiliar with the facts of Pennoyer. The case is enshrined in the memory of every law student and lawyer. However, a brief refresher on the facts is in order. I encourage the reader to sit back, turn off any twentieth-century distractions, and try to imagine him or herself journeying back in time to the decades just before and just after the Civil War.

A. The Original Case in State Court: Mitchell v. Neff

Marcus Neff was born in 1826 in Iowa. He traveled to Oregon by wagon train in 1848, the same year Congress established the territorial government of Oregon. By modern standards, Oregon was a rough and wild land, filled with explorers and pioneers. By the standards of the time, it was extensively settled, with towns, highways, taxes, and land laws. For nearly thirty years, the United States and Great Britain held joint possession of the territory under an 1818 treaty. By August 14, 1848, when the Territory of Oregon was officially formed by Congress, the residents had already created an independent government for themselves. Being claimed by two sovereigns yet ruled by neither for the prior thirty years, they resorted to their own laws and codes. Surprisingly, there is some indication that they patterned many early laws after those of New York.

On September 27, 1850, Congress passed "[a]n Act to create the office of surveyor-general of the public lands of Oregon, and to provide for the survey and to make donations to the settlors of the said public lands," commonly called the Donation Act of Oregon. The Donation

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7 Professor Linda Silberman relates the story of a panhandler in Greenwich Village's Washington Square Park who convinced her that he was a lawyer down on his luck by calling out "Pennoyer v. Neff" and even describing the case. See Silberman, supra note 3, at 33-34.
8 Neff's affidavit in his land claim gives his birth date as 1826. See Perdue, supra note 2, at 481 n.9.
9 See id. at 481.
10 See generally Lownsdale v. City of Portland, 15 F. Cas. 1036 (D. Or. 1861) (No. 8579).
11 For a detailed discussion on early Oregon government and laws, see generally Arthur S. Beardsley, Code Making in Early Oregon, 23 OR. L. REV. 22 (1943).
12 See id. at 25. In 1841, a group of Oregon settlers, Methodist missionaries, and representatives of the Hudson Bay Company met to adopt initial laws for the territory. See id. They instructed Dr. Ira Babcock "to fill the office of supreme judge" and "to act according to the laws of the state of New York." See id. at 24-25. One theory on why New York was chosen was that a copy of New York laws may have been carried to Oregon by a settler. See id. at 25.
13 9 Stat. 496 (1850).
Act provided that settlers or occupants of public lands, who resided in Oregon by December 1, 1850, and who resided upon and cultivated the same land for four consecutive years after passage of the Act, could apply for a patent on the land. The limit was one-half section, or 320 acres, for single men, and one section, or 640 acres, for married couples. Marcus Neff was one of the earliest applicants for a patent in 1850, with donation claim number 57. In 1853, (a year too early) and again in 1856 (two years after he became eligible), he filed the necessary affidavits concerning his four-year occupancy on the land. Since the patent request was processed by government officials in Washington, the procedure was slow even by 1856 standards.

Sometime between January 1, 1862, and May 15, 1863, Neff consulted Portland lawyer John H. Mitchell. Mitchell only arrived in Oregon in 1860, but by 1863, he had already built up a lucrative law practice and was a member of the state senate. We do not know the precise nature of the legal services rendered, but it may well have been to speed up the patent process because another affidavit was filed in 1862 on Neff's behalf. Neff was subsequently sent notice by the government on December 31, 1862, that he had met the requirements for issuance of a land patent. On January 24, 1863, Neff paid Mitchell $6.50 for services rendered. What, if anything, transpired between Neff and Mitchell after that initial payment is a mystery. However, on November 13, 1865, Mitchell (then President of the Oregon Senate), and his partner Joseph N. Dolph filed a complaint against Neff in state court claiming that Neff

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15 See Neff v. Pennoyer, 17 F. Cas. 1279, 1280 (C.C.D. Or. 1875) (No. 10,083).

16 See Perdue, supra note 2, at 482 & n.16 (citing the Notification to the Surveyor General of Oregon).

17 See Neff, 17 F. Cas. at 1286.

18 See 7 DICTIONARY OF AMERICAN BIOGRAPHY 53-54 (Dumas Malone, ed. 1934) [hereinafter Dictionary of American Biography]. Mitchell was quite a character. At various points in his life he was charged with bigamy, financial dishonesty, and bribery. Yet he served as United States Senator from Oregon from 1872-1878, and again from 1891-1897. Mitchell was a United States Senator when Pennoyer was heard in the United States Supreme Court, and, at least during his 1891-1897 term, Mitchell was acquainted with Pennoyer's Supreme Court author, Justice Stephen Field. In discussing the appointment of another District Judge in Oregon, Field stated, “Senator Mitchell told me that he thought it would preclude (Morrow) from receiving the higher commission. However, we shall see.” Letter from Stephen Field to Judge Matthew Deady (Oct. 13, 1891) (Or. Historical Soc'y, Portland, Or.) (on file with the Seton Hall Law Review).

19 See Neff, 17 F. Cas. at 1286.

20 See id.

21 Dolph was almost as colorful a character as Mitchell. Twenty-eight-year-old
still owed Mitchell $209 for professional services rendered between January 1, 1862, and May 15, 1863. Mitchell filed an affidavit with the court the same day he filed suit, asserting that Neff now resided at an unknown location in California, that Mitchell’s claim was for a “money demand on account,” and that Neff had property in the county and state. Mitchell then sought service of the summons by publication against Neff under Oregon Code of Civil Procedure Section 55, which allowed such constructive service “when the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action.” Section 56 of the Code provided for six weeks of publication in a newspaper published in the county where the action was commenced and, also, that the court should direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the defendant, at his place of residence, unless it shall appear that such residence is neither known to the party making the application, nor can, with reasonable diligence, be obtained by him.

Notice of the suit was published for six weeks in the Pacific Christian Advocate, a local weekly newspaper. Oregon Code of Civil Procedure Section 506 also provided that

[n]o natural person is subject to the jurisdiction of a court in this state, unless he appear in the court, or be found within the state, or be a resident thereof, or have property therein; and in the last case only to the extent of such property at the time the jurisdiction attached.

No property belonging to Neff was attached or seized before judgment, but no such attachment or seizure appears to have been required under Dolph arrived in Oregon from New York in 1862 and formed an immediate law partnership with Mitchell. They quickly became the most successful legal duo in the territory, representing most major business interests. Their largest client was Ben Holliday, owner of the Oregon Central Railroad Company. Both were very active in politics, with Dolph serving as Portland City Attorney, State Senator, Chair of the State Republican Committee, and United States Senator from 1883-1895. When the action against Neff was filed in 1865, Dolph was United States District Attorney for the District of Oregon, having been appointed by President Lincoln earlier that year on the recommendation of Judge Matthew Deady. See Henry W. Scott, Distinguished American Lawyers 309-20 (Charles Webster & Co. 1891) (1989).

22 See Neff, 17 F. Cas. at 1286. While $209 may seem a paltry sum, it equates to about $2,600 in 1997 dollars. The reader should always convert these sums by a multiplier of 10 to 15 times for the period of 1863-1877. More importantly, for Mitchell and Dolph, pursuit of the alleged debt was key to obtaining Neff’s land for a fraction of its actual value.

23 See id. at 1284.
24 Id. at 1282.
25 Id.
26 See id. at 1285.
27 Id. at 1281.
any of the relevant Oregon Code sections. On February 19, 1866, a
default judgment was rendered against Neff in the amount of $294.98,
which presumably included costs for Mitchell.

On March 19, 1866, Neff's patent to the 320 acres was finally is-
sued in Washington and sent to him. Apparently, this patent was
mailed to him in California, and although we do not know when it was
received by Neff, we know that it was received. He was able to produce
it when he initiated his action against Pennoyer in 1874. Whether it
was mailed to him directly from Washington or sent from the local Ore-
gon land office is unknown.

On July 9, 1866, Mitchell executed on his February judgment, and
Neff's land was sold to Mitchell for $341.60 in satisfaction thereof on
August 7, 1866. Three days later, Mitchell assigned the property to
Portland investor Sylvester Pennoyer, a Harvard Law School graduate
who would later become Governor of Oregon. What consideration
Mitchell received from Pennoyer, if any, is unknown. Pennoyer went
about his business for eight years until Neff returned to Oregon and sued
Pennoyer for ejectment from the property. By 1874, Neff claimed that
the property purchased by Mitchell for $341.60 at the 1866 execution
sale had a value of $15,000.

The astute reader may observe that I have not mentioned the fact
that Neff did not actually acquire title to the property in question until
after Mitchell's original judgment was rendered in February 1866. In

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28 All of the Oregon Code sections were silent on just how the property of an absent
defendant should be attached or brought under the jurisdiction of the court. Section 55
allowed service by publication when the defendant was a non-resident but owned property
in Oregon. Section 56 described the method of service by publication, and Section 506
limited the extent of the jurisdiction to the value of property owned when the jurisdiction
attached. For a discussion of these code sections, see generally Neff, 17 F. Cas. 1279.
29 See id. at 1280.
30 See id.
31 See id.
32 See id. The $46.62 difference between the $341.60 sale price and the $294.98
judgment almost certainly went to sheriff's fees. This left Neff with nothing, and Mitchell
obtained the land for next to nothing. See id.
33 Pennoyer moved to Portland in 1855 at age 24, after graduating from Harvard. He
soon became a successful real estate investor and in 1868 bought the Oregon Herald
newspaper. He was the Governor of Oregon from 1886-1894 and Mayor of Portland
34 See Neff, 17 F. Cas. at 1280. While it is rare, ejectment cases based on diversity
35 See Neff, 17 F. Cas. at 1280. The $15,000 equates to about $187,000 in 1997
dollars.
fact, the patent was not issued to Neff until March 1866. Neither the district court nor the Supreme Court opinion even mentions this anomaly. But there is a simple reason. By 1874, it was well-settled law that the right to a patent under the 1850 Donation Act, once vested, was treated as equivalent to the patent being actually issued.\(^\text{36}\) When the patent was issued, it related back to the inception of the right of the patentee and cut off any intervening claimants. Because Neff had been sent a notice by the government in December 1862 that he had fulfilled all requirements for issuance of a land patent, Neff’s right in that patent was vested at the time of Mitchell’s original action in 1865.

**B. The Ejectment Action in Federal District Court: Neff v. Pennoyer\(^\text{37}\)**

Neff filed his September 1874 suit against Pennoyer in Federal District Court for the District of Oregon, based on diversity of citizenship.\(^\text{38}\) Neff claimed to be a citizen of California, and Pennoyer was a citizen of Oregon. Had Neff sued in state court, he would likely have been trounced by his politically powerful opponents and the case dispatched to history’s dustbin. But whether common sense or luck drew him to federal court, Neff had the good fortune to have his case heard by District Judge Matthew P. Deady.

Deady journeyed to Oregon in 1849, one year after Marcus Neff made the same trip by wagon train.\(^\text{39}\) That was virtually all they had in common. While Neff wandered from Oregon to California in an apparent search for riches, Deady led a far more intellectual life. Deady was born in Maryland in 1824.\(^\text{40}\) His family moved around during his childhood and finally settled in Ohio.\(^\text{41}\) Deady left home in 1841 at age seventeen to become a blacksmith apprentice and also to obtain a teaching cer-

\(^\text{36}\) See Stark v. Starrs, 73 U.S. 402, 418 (1867). According to the Supreme Court in *Stark:*

> The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants.

*Id.* The opinion in *Stark* was written by Justice Stephen Field, who would later write *Pennoyer* in the Supreme Court. The doctrine was later confirmed in a case involving our friend Joseph Dolph. See *Barney v. Dolph,* 97 U.S. 652, 656 (1878).

\(^\text{37}\) 17 F. Cas. 1279 (C.C.D. Or. 1875) (No. 10,083), aff’d, 95 U.S. 714 (1877).

\(^\text{38}\) See id. at 1280.


\(^\text{40}\) See id.

\(^\text{41}\) See id.
tificate.\textsuperscript{42} By 1845, he was teaching in Ohio and reading law part-time. He joined the Ohio Bar in 1847.\textsuperscript{43} In 1849, Deady left the relative prosperity of Ohio for the excitement of a place that as recently as 1841 had not a single lawyer—Oregon.\textsuperscript{44}

Deady became an immediate force in Oregon politics and law. He was elected to the Oregon territorial assembly in 1850, and in 1853, President Franklin Pierce appointed him to the territorial Supreme Court.\textsuperscript{45} He was President of the Constitutional Convention formed in 1857 to help in the creation of Oregon statehood.\textsuperscript{46} When Oregon became a state in 1859, President James Buchanan appointed Deady as the first Oregon federal district judge.\textsuperscript{47} Deady retained that position until his death in 1893.\textsuperscript{48}

In 1860, Judge Deady was asked by the Oregon Legislature to lead a commission that would draft Oregon's Code of Civil and Criminal Procedure.\textsuperscript{49} This he did, and the "Deady Codes" of Civil Procedure and Criminal Procedure were passed in 1862 and 1864, respectively. These Codes were later amended by another group under Deady's leadership in 1872 and remained the foundation for subsequent Oregon Codes.\textsuperscript{50} Thus, the Code of Civil Procedure in force when Mitchell originally sued Neff

\textsuperscript{42} See id.
\textsuperscript{43} See id.
\textsuperscript{44} See Beardsley, supra note 11, at 23. The original pioneers coming to Oregon were not lawyers. "There was not a single lawyer among them in 1841. They knew little of legislative or parliamentary procedure and less of law. Their sense of right and justice, the urgency of their need, and their desire to build a structure of endurance were their greatest assets." Id.
\textsuperscript{45} See Mooney, supra note 39, at 329.
\textsuperscript{46} See id.
\textsuperscript{47} For further discussion on Deady's career, see 3 Dictionary of American Biography, supra note 18, at 167-68.
\textsuperscript{48} While Deady remained a district court judge for 34 years, friends often tried to have him appointed to other judicial offices. When he was first appointed district judge in 1859, he was also offered a position on the Oregon Supreme Court. He chose the federal job. Over the years, Stephen Field, who would become a United States Supreme Court Justice in 1863, tried to secure an appointment for Deady on the circuit court several times, to no avail. In 1869, Field wrote about the elevation of Lorenzo Sawyer to circuit court over Judge Deady:

Deady has a great future, even if miserable small demagogues attempt to obstruct [sic] his elevation now. His decision in the McDowell case does him honor. He can go on and hold the Circuit, just as though the new bill about the Circuit Judgeship had never been passed. There is no doubt about this.


\textsuperscript{49} See Beardsley, supra note 11, at 49.
\textsuperscript{50} See id. at 49-51.
in 1865, and again when Neff sued Pennoyer in 1874, was drafted primarily by Judge Deady. Who better to ask to interpret it?

Judge Deady took a conservative, formal approach to the law. Indeed, he seemed to take that approach in most areas of his life. In the extensive diaries that he kept, he even referred to his wife as "Mrs. Deady." 51 In the expansive growth of the 1850s and 1860s, land was the foundation for wealth and power in Oregon. Judge Deady heard many cases involving land disputes and, in particular, the 1850 Donation Act. 52 He developed a reputation for being one who looked to the strict letter of the law. 53 If you were in Judge Deady's courtroom, you knew that he could not be pressured by appeals to practicality, flexibility, or mere possession of property. He focused on the need for security in land titles and precise statutory construction.

Neff's 1874 action against Pennoyer was based on a number of theories. As a collateral attack on the original Mitchell v. Neff judgment, Judge Deady believed that if there was any evidence in the original Mitchell affidavit tending to prove or establish the legitimacy of the state cause of action against Neff, then the judgment should be sustained and full faith and credit afforded it in federal court. 54 Significantly, all parties conceded that the Mitchell v. Neff 1866 judgment was not in personam, that is, binding on Neff personally apart from the property. 55 While later analysis of this case has often hinged on the lack of in personam jurisdiction over Neff, that was, as just noted, not really an issue in the case. Numerous American cases had already outlined the parameters of nineteenth-century in personam jurisdiction, and as we shall see, Mitchell's action clearly fell outside them. 56

51 See Mooney, supra note 39, at 370 n.215. Also, my own review of the Field-Deady correspondence finds Deady's wife, Lucy, only ever referred to as "Mrs. Deady."

52 For cases heard by Judge Deady involving land disputes, see generally Lamb v. Starr, 14 F. Cas. 1024 (C.C.D. Or. 1868) (No. 8021); Chapman v. School Dist., 5 F. Cas. 487 (C.C.D. Or. 1866) (No. 2608); Lownsdale v. City of Portland, 15 F. Cas. 1036 (D. Or. 1861) (No. 8579).

53 In addition to the cases cited supra in note 52, which often turned on procedural details, see the discussion on Deady's structured approach to the law in Mooney, supra note 39, at 321-22.

54 See Neff v. Pennoyer, 17 F. Cas. 1279, 1285 (C.C.D. Or. 1875) (No. 10,083). "Full faith and credit" refers to both Article IV, § 1, of the United States Constitution as well as the Full Faith and Credit Act of 1790. See U.S. Const. art 10, § 1; 1 Stat. 122 (1790). The Constitutional provision requires that judgments of one state be given effect in all other states. See U.S. Const. art. IV, § 1. The Full Faith and Credit Act extends this credit to federal courts. See 1 Stat. 122 (1790).

55 See Neff, 17 F. Cas. at 1281.

Jurisdiction over a person such that he or she was personally bound by the decision of the court was historically based on "power" and the legitimacy of its exercise. Notice to the defendant was key to the legitimate exercise of that power by a sovereign's court. Of course, the notion that notice was a part of the required "due process of law" was not derived originally from the Fifth or Fourteenth Amendments to the United States Constitution; rather it had a long English tradition.\(^{57}\) As the English legal system developed, civil lawsuits often began with the arrest of the defendant under a *writ capias ad respondendum*, which was sworn out by the plaintiff. The defendant was physically detained to answer the complaint unless a bond could be posted. This procedure ensured both notice to the defendant and the ability of the court to enforce its judgment once rendered.

The American judicial system was inherently different from the English, in the sense that there were competing state interests in the United States that did not exist in England. Concerns of federalism created an emphasis on the scope of the Full Faith and Credit Clause of the United States Constitution, as well as on the 1790 Full Faith and Credit statute, in defining the requirements of validity for in personam judgments. In 1813, Justice Joseph Story held in *Mills v. Duree*\(^{58}\) that the judgment of a state court rendered with jurisdiction over the parties had the same effect in a sister state that it would in the rendering state.\(^{59}\) The jurisdiction of the original court, however, was always open to inquiry by the enforcing court.\(^{60}\) Justice Story later expanded on the distinction between jurisdiction over a person and jurisdiction over his or her property in *Picquet v. Swan*,\(^{61}\) written in 1828 while Story was covering the New England Circuit. Authorities continually cite *Picquet* for the proposition that the judgment of a court lacking jurisdiction is void.\(^{62}\) For a court to exercise in personam jurisdiction, according to *Picquet*, notice to the defendant was required so that he or she had an opportunity

\(^{57}\) The requirement that certain powers could be exercised only "per legem terrae," or "by the law of the land," was found in the Magna Carta and served to protect citizens from arbitrary actions by the sovereign. Sir Edward Coke explained that "law of the land," as outlined in the twenty-ninth chapter of the Magna Carta, meant that "[n]o man shall be taken, or imprisoned, or be deprived of his freehold, or liberties, or free customs ... but by lawful judgment of his peers, or by the law of the land, that is, by the due course, and process of law." 2 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45-46 (William S. Hein Co. 1986) (1797).

\(^{58}\) 11 U.S. (7 Cranch) 481 (1813).

\(^{59}\) See id. at 484.

\(^{60}\) See id.

\(^{61}\) 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134).

to respond to the claim. Jurisdiction over the defendant's property, however, did not require notice, as it was within the power of the sovereign to seize property located within its borders in order to satisfy claims up to the value of that property. Picquet cited with approval Phelps v. Holker, a 1788 Pennsylvania Supreme Court case articulating the same view.

In 1850, the United States Supreme Court in D'Arcy v. Ketchum upheld Louisiana's refusal to enforce a New York judgment against a Louisiana defendant who was not served with process in New York or Louisiana and who owned no property in New York. The D'Arcy Court quoted extensively from Mills v. Duryee, and went on to state that judgments were not entitled to full faith and credit when the defendant had neither been served with process nor voluntarily made a defense. Other Supreme Court and state cases of the time affirmed this view. Thus, it was clear to the parties and Judge Deady that the court in the original Mitchell action did not obtain an in personam judgment over Neff. But an in personam judgment was not required for a valid sheriff's sale, and lack of personal jurisdiction was not the basis of Neff's claim that the sheriff's sale was invalid.

Neff asserted four primary challenges to the original Mitchell judgment: He claimed (1) that actual seizure of the property was required at the commencement of legal proceedings or before judgment; (2) that there was no evidence that Mitchell had an actual cause of action against Neff; (3) that Mitchell had not used sufficient "diligence" to ascertain Neff's residence in 1865; and (4) that the service of the summons was not proved as required by the statute.

Judge Deady made short shrift of Neff's first point on seizure. Deady found that the state had supreme power over property located within its limits, whether that property was owned by residents or non-residents. The mode of exercising this power was a matter solely for

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63 See Picquet, 19 F. Cas. at 612-13.
64 See id. at 615.
65 1 Dall. 261 (Pa. 1788).
66 See Picquet, 19 F. Cas. at 612.
68 11 U.S. (7 Cranch) 481 (1813).
69 See D'Arcy, 52 U.S. at 175.
70 For cases affirming this general principle, see generally Thompson v. Whitman, 85 U.S. 457 (1873); Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235 (1819); Hall v. Williams, 23 Mass. 232 (1828); Mackay v. Gordon, 34 N.J.L. 286 (1870).
71 See Neff v. Pennoyer, 17 F. Cas. 1279, 1285 (C.C.D. Or. 1875) (No. 10,083).
72 Deady stated specifically:
But the power of the state over the property within its limits, of non-
the state to determine, and the role of the court was simply to ensure that the requirements established by the state were strictly followed. According to Deady, Oregon statutes did not require seizure at the time an action was commenced. In fact, a state might have good reason for not allowing such a pre-judgment seizure. Under such an approach, a plaintiff would be forced to prove his or her case in front of a competent tribunal before interfering with the property of another party. After the right or claim of a citizen was satisfactorily established before a court, the defendant’s property could be seized as though the action were in rem. Whether seizure was required when an action commenced, during its pendancy, or after judgment was rendered, though, was a decision within the power of the state legislature. They were all parts of the same proceeding. Judge Deady believed that under Oregon Code of Civil Procedure Sections 55, 56, 506, or any other section, seizure could take place at any point between commencement of the action and execution of the judgment. Since he was the primary author of that Code and the Code language supported this conclusion, his opinion was no doubt right as a matter of Oregon law. Deady ruled that it was quite proper for Mitchell to delay seizing Neff’s property until after the judgment was rendered.

It may surprise the reader to learn that Judge Deady’s ruling on seizure was soundly based on existing general American attachment law. American courts regularly held that the power of a state to control property within its borders was sovereign. The antecedents for this doctrine

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residents, being supreme, and it being admitted on all hands that the state may subject such property “to such disposition by their tribunals as may be necessary to protect the rights of its own citizens,” in my judgment, the mode of exercising this power is a matter for the state to determine.

\textit{Id.} at 1281.

\textsuperscript{73} \textit{See id.}

\textsuperscript{74} Deady stated: In the exercise of this power it may require that the proceedings be strictly in rem and commenced by the seizure of the property, or it may, as provided in this state, upon the proper preliminary showing, permit a suit to be maintained against the non-resident by name—nominally—for the purpose of enabling the plaintiff therein to first judicially establish his right or claim against such non-resident, and then authorize the seizure and disposition of the property so as to satisfy the same . . . .

\textit{Id.}

\textsuperscript{75} \textit{See id.}

\textsuperscript{76} \textit{See id.}

\textsuperscript{77} \textit{See Neff, 17 F. Cas. at 1281.}

\textsuperscript{78} For cases stating this proposition, see generally Thompson v. Whitman, 85 U.S. (18 Wall.) 437 (1873); Day v. Micou, 85 U.S. (18 Wall.) 156 (1873); Averill v. Smith, 84 U.S. (17 Wall.) 82 (1872).
dated back not just to England but to the Romans. The extent of that jurisdiction in Europe and Great Britain varied over the years, but certain fundamental principles applied. A plaintiff could seize the defendant’s real or personal property that was located within the forum to satisfy a debt or, in some cases, other personal obligations. A court could render a judgment up to the value of the seized property. The timing of seizure was a matter of local concern, and many laws allowed attachment before, during, or after the judgment.

Sometimes notice to the defendant was required, and sometimes it was not—usually depending on local statutory requirements. If the local statute did require notice, the requirement had to be strictly adhered to or the seizure and subsequent sale of the property were invalid. The difficult problem of “actual notice” that would so haunt Justice Field in the Supreme Court Pennoyer case was not a serious concern in early attachment cases. The underlying premise was that a sovereign had power to control property within its borders and to seize it as necessary to satisfy the legitimate claims of citizens.

Justice Joseph Story in 1834, Charles Drake in 1854, and S.F. Kneeland in 1885 all traced the history of attachment jurisdiction. Their versions of the tale were not always the same, but certain threads were consistent. According to all three, the Romans carried their attachment law to England. Blackstone wrote that, in England, the first process of civil law was by “personal writ.” If that failed, the next process was by “writ of attachment.”

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79 See generally George B. Fraser Jr., Actions in Rem, 34 CORNELL L.Q. 29 (1949).
80 See STILLMAN FOSTER KNEELAND, LAW OF ATTACHMENTS ch. 28 (Diossy & Co. 1885) (citing the statutory language from most states on attachment). According to Kneeland, states requiring attachment before judgment included Massachusetts and Colorado. Those allowing attachment at any time, including after judgment, included Oregon, Delaware, Tennessee, Florida, Georgia, Indiana, Iowa, and New York. See id.; see also JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 546, 613 (Arno Press 1972) (1834).
81 See Averill, 84 U.S. at 95.
83 See generally STORY, supra note 80 (tracing the history of attachment jurisdiction).
84 See generally CHARLES D. DRAKE, A TREATISE ON THE LAW OF SUITS BY ATTACHMENT (Little, Brown & Co. 1854) (tracing the history of attachment jurisdiction).
85 See generally KNEELAND, supra note 80 (tracing the history of attachment jurisdiction).
86 See DRAKE, supra note 84, §§ 1-3; KNEELAND, supra note 80, § 8; STORY, supra note 80, § 613.
87 It has been stated that...
If the defendant still failed to appear, he not only forfeited the secured property, but a *writ of distringas* was given to the sheriff to distress the defendant of all his other lands and chattels until he appeared. Thus, domestic attachment law in England used forfeiture to compel appearance, not to satisfy claims.  

By the time attachment law reached the United States, it developed more elaborate nuances, some of which were lifted from English admiralty law. This insertion of admiralty concepts into common-law attachment jurisdiction is part of the key to understanding the later Supreme Court opinion in *Pennoyer*. In admiralty, the ship had its own identity, quite distinct from the owner. It was not merely a proxy for the owner, but a “person” in its own right. This meant that judgments against the ship were not personally binding on the owner, but were binding up to the value of the ship. Thus, seizure of the ship provided a res for the satisfaction of the judgment, not merely a compulsion to appear. The ship’s debts usually traveled with her to new owners, as she, not just the owners, was liable. Judgments against the owners could also be executed against the ship. Actions against ships were frequently used for personal writs for injuries not against the peace, by summons ... either in person or left at his house or land .... This warning on the land is given ... by erecting a white stick or wand on the defendant’s grounds; and by statute ... [the notice] must also be proclaimed on some Sunday before the door of the parish church.

3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 279-80 (Clarendon Press 1768) (hereinafter BLACKSTONE'S COMMENTARIES).

“... and thereby the sheriff is commanded to attach him, by taking ... certain of his goods, which he shall forfeit if he doth not appear.” *Id.* at 280.

According to Blackstone: If, after attachment, the defendant neglects to appear, he not only forfeits this security, but is moreover to be farther compelled by a writ of distringas ... commanding the sheriff to [distrain] the defendant from time to time, and continually afterwards, by taking his goods and the profits of his lands which he forfeits to the king if he doth not appear. *Id.*; see also KNEELAND, supra note 80, § 8.

See F.L. WISWALL JR., THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800, at 160 (1970); see also generally Bradstreet v. Neptune, 3 F. Cas. 1184 (C.C.D. Mass. 1839) (No. 1793) (affirming the principle that a ship has its own identity, distinct from the owner).

See Harmony v. United States, 43 U.S. 210, 233 (1844) (stating that in admiralty a ship is the offender without regard to the owner’s culpability); The Palmyra, 25 U.S. 1, 14 (1827) (stating that the owner’s personal conviction is not necessary for forfeiture of a ship).

See Bradstreet, 3 F. Cas. at 1187; see also generally The Nestor, 18 F. Cas. 9 (C.C.D. Me. 1831) (No. 10,126) (holding that judgments against a ship are only binding up to the value of the ship).

See Nestor, 18 F. Cas. at 13; The “Bold Buccleugh,” 3 W. Rob. 218, 229 (1850).

seamen’s wages, collision, debt, and a wide variety of other claims. The action was directly against the ship; thus there was very little pretext of giving actual notice to the owners. A warrant served on the ship was often nailed to the mainmast and also filed with the local registry.95 If the owner failed to appear (and this was not uncommon since owners were often beyond the seas), the court would enter a formal default.96 Notice to absent owners was clearly not a significant issue in admiralty cases because the notice need only be made to the “person” of the ship.97 Thus, seizure of the ship was key to jurisdiction by the court in admiralty. However, notice to the ship’s owners was not as critical because the ship itself was treated as the guilty party. As we shall see in Pennoyer v. Neff, Justice Field would take the actual seize requirement of admiralty and combine it with the in personam requirement of actual notice, creating an entirely new approach to attachment jurisdiction.

Justice Story probably had more influence than any other person in combining the concepts associated with in rem admiralty jurisdiction and attachment jurisdiction. As the Supreme Court Justice assigned to ride the New England Circuit during so many of the “prize” cases during and after the War of 1812, he developed a particular affinity for maritime law and wrote some of its most famous decisions.98 Story also wrote some of the most influential cases on jurisdiction in the non-admiralty area; therefore his credibility on this subject, among others, was quite high throughout the nineteenth century.99 Story’s 1834 Commentaries on the Conflict of Laws was widely quoted in mid-nineteenth-century jurisdiction cases. One cannot read Story’s Conflicts treatise and then read the twenty or so major United States Supreme Court cases on personal jurisdiction from Mills v. Duryee100 in 1813 up to Pennoyer v. Neff101 in 1877

95 See Wiswall, supra note 90, at 13.
96 See id.
97 See Rose v. Himley, 8 U.S. (4 Cranch) 241, 277 (1808).
98 See Bradstreet v. Neptune, 3 F. Cas. 1184 (C.C.D. Mass. 1839) (No. 1793); Nestor, 18 F. Cas. 9; De Lovio, 7 F. Cas. 418.
99 Joseph Story was one of the most influential jurists of all time. Born in 1779, he spent 34 years as a United States Supreme Court Justice. He graduated from Harvard in 1798, was admitted to the Massachusetts bar in 1801, and was appointed to the Supreme Court in 1811. He also served as a Massachusetts legislator as well as in the United States House of Representatives. In 1829, Story took on an additional responsibility as Nathan Dane Law Professor at Harvard, a part-time position. He published his three-volume Commentaries on the Constitution in 1833, and Commentaries on the Law of Bailments the same year. In 1834 came Commentaries on the Conflict of Laws, in 1836 his Commentaries on Equity Jurisprudence, and in 1839 his Commentaries on the Law of Agency as a Branch of Commercial and Maritime Jurisprudence. Story’s prose continued unabated until his death in 1845. His Conflict of Laws treatise was highly influential in the law of personal jurisdiction.
100 11 U.S. (7 Cranch) 481 (1813).
and not be struck by the complete domination of Story’s views on the language of these cases. Many cases expressly cite Mills, various Story treatises, or both. Even when the cases fail to mention him, however, Story’s words are there. Subsequent scholars have challenged the intellectual soundness and research of many of Story’s concepts and treatises, but in the mid-1800s, his star was at its zenith.102

Story made it clear more than once that he saw no reason not to apply numerous admiralty concepts to domestic attachment cases.103 Justice Story, though, did not completely blend admiralty and in rem jurisdiction. He always distinguished between them in certain areas such as seizure. Whereas admiralty required an actual capture of the vessel, Story believed that it was within the local court’s discretion to determine the precise nature of constructive seizure for in rem cases. He did not blur the concepts as Stephen Field would later do in Pennoyer. Story stated,

[b]ut in respect to municipal courts, acting in rem, but deriving their authority solely from the territorial laws of the sovereign, they are and must, from the nature of the case, be presumed to be the best judges of the nature and extent of their own jurisdiction, and of its just and legitimate exercise.104

The result was a system of domestic quasi in rem jurisdiction where both the timing and the method of seizure of property to satisfy otherwise personal claims was legitimately within the absolute discretion of the sovereign where the property was located.

Story’s method of analysis was highly influential on early United States attachment law and was fairly ingrained in cases by the time Judge Deady decided Neff v. Pennoyer.105 Not only did Deady discuss the English practice of distraining an absent defendant’s goods and lands ad infinitum to compel an appearance, the good judge made it clear that

101 95 U.S. 714 (1877).
102 For modern criticism of Story’s scholarship, see Hazard, supra note 3, at 258-62; see also generally Albert A. Ehrenzweig, The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens, 65 YALE L.J. 289 (1956) (criticizing Story’s scholarship).
103 See, e.g., Bradstreet, 3 F. Cas. at 1186. Story stated specifically in Bradstreet:
   It does not strike me, that any sound distinction can be made between a sentence pronounced in rem by a court of admiralty and prize, and a like sentence pronounced by a municipal court upon a seizure or other proceeding in rem. In each case the sentence is conclusive, as to the title and property, and it seems to me, that it must be equally conclusive as to the facts, on which the sentence professes to be founded.

Id.
104 Id.
105 17 F. Cas. 1279 (C.C.D. Or. 1875) (No. 10,083).
Oregon was not required to provide any notice whatsoever to Neff of the property seizure.\textsuperscript{105} This was entirely within the control of the state.

Neff's second argument was dispatched with equal alacrity by Judge Deady. While it was true that Mitchell's original affidavit lacked sufficient specificity on the claim he had against Neff and merely recited the requisite language of the statute, Mitchell's complaint, filed the same day, was very detailed and specific.\textsuperscript{107} The affidavit stated that a cause of action existed against Neff based on a "money demand on account."\textsuperscript{108} According to Deady, this left one to wonder whether the indebtedness was for "one mill for 'a small measure of moonshine,' or a million dollars for as many miles of land."\textsuperscript{109} But the complaint explained that the claim was for $209.00 for legal services rendered between January 1862 and May 1863 and that Mitchell had now been a practicing attorney in Portland for over five years.\textsuperscript{110} Judge Deady found this sufficiently detailed, and found the judgment valid on this point also.\textsuperscript{111}

It was on the next two arguments that Neff succeeded in persuading Judge Deady that Mitchell's judgment was invalid. Section 56 of the Code of Civil Procedure required that for service by publication to be valid, "reasonable diligence" be used by plaintiffs in their efforts to locate absent defendants.\textsuperscript{112} What constituted "reasonable diligence" was not defined. Mitchell's affidavit in the original case did not specify what steps, if any, he had taken to locate Neff.\textsuperscript{113} He simply indicated that Neff's whereabouts were unknown to Mitchell and could not be ascertained with "reasonable diligence."\textsuperscript{114} Mitchell argued that his efforts to locate Neff had been described orally at the time of the original action and that this should suffice.\textsuperscript{115}

Judge Deady disagreed. The efforts made could only be shown by affidavit and must appear in the record.\textsuperscript{116} Since notice by publication was unlikely ever to reach an absent defendant, the record must clearly show that "reasonable diligence" had been made to locate him before resorting to publication.\textsuperscript{117} Judge Deady may have been influenced by

\textsuperscript{105} See id. at 1287-88.
\textsuperscript{106} See id. at 1286.
\textsuperscript{107} See id. at 1286.
\textsuperscript{108} See id. at 1284.
\textsuperscript{109} Id. at 1285.
\textsuperscript{110} See id. at 1286.
\textsuperscript{111} See Neff, 17 F. Cas. at 1286.
\textsuperscript{112} See id.
\textsuperscript{113} See id.
\textsuperscript{114} See id.
\textsuperscript{115} See id. at 1286.
\textsuperscript{116} See id.
\textsuperscript{117} See Neff, 17 F. Cas. at 1286.
Mitchell's somewhat unsavory reputation, as well as the fact that somehow the United States government found Neff at about the time of the Mitchell action in order to deliver his patent. Deady held that Mitchell's mere assertion in his affidavit that Neff resided "somewhere in California," without any evidence that Mitchell made any effort to locate Neff, was insufficient. Deady stated that without such evidence on the record, or even that Mitchell was not conveniently and intentionally ignorant of the fact, the service by publication and subsequent judgment were void because Mitchell had not fulfilled the requirements of the Oregon statute.

The role of jurisdictional presumptions in attachment and ex parte cases was critical to Judge Deady. While there was a presumption in favor of the validity of proceedings in courts of general jurisdiction, that presumption did not apply when there was no appearance or actual service and the defendant was a non-resident of the state. In such cases, every fact necessary to sustain the jurisdiction must appear in the record or the judgment would be void. Deady discussed both English and American precedent to this effect in Neff v. Pennoyer. If Pennoyer failed to show affirmatively that every fact necessary to give the original court jurisdiction in the Mitchell v. Neff case existed, then that judgment would be void.

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118 See id. at 1287.
119 See id.
120 "Presumption," as used in nineteenth-century jurisdiction cases, differed from the way the term is used in an evidentiary context today. In other words, once the "basic fact" is established, the "presumed fact" is assumed unless a specific condition is fulfilled. "Presumption" in the context of nineteenth-century jurisdiction meant that an enforcing court would assume jurisdiction was proper in the original court only if the proceeding fell within the original court's general jurisdiction. Even then, that jurisdiction was subject to collateral attack. However, if the original court's jurisdiction was limited or special, the record must show full compliance with that special authority or the enforcing court was not required to give credit to the judgment. See id. at 1288-89; Galpin v. Page, 9 F. Cas. 1126, 1132 (C.C.D. Cal. 1874) (No. 5206).
121 See Chapman v. School Dist., 5 F. Cas. 487 (C.C.D. Or. 1866) (No. 2608); Lownsdale v. Portland, 15 F. Cas. 1036 (D. Or. 1861) (No. 8579). Judge Deady's approach was described by a Portland critic: It was evident from the start that the courts must proceed in one of two ways—either to stick to the letter of the law and... recognize no title except that conferred by the United States Patent; or else to take a general view of the circumstances and necessities of the case and decide upon the general equities and common understanding of all parties, and to let possession count for all that it was worth. Mooney, supra note 39, at 341-42 (citation omitted).
122 17 F. Cas. at 1288-89. As we shall see, Justice Stephen Field shared Judge Deady's views on the presumption of validity and its exceptions.
123 See id. at 1288.
This need for strict statutory compliance was central to Neff's final argument. It appealed directly to Judge Deady's obsession with detail and his views on jurisdictional presumptions in ex parte cases. Section 69 of the Code of Civil Procedure provided that proof of service by publication required an “affidavit of the printer or his foreman or his principal clerk.” The affidavit in Mitchell's case had been signed by Henry C. Benson, the editor of the Pacific Christian Advocate. Judge Deady found this error fatal. While Pennoyer argued that the editor was just as competent as the printer to state that the publication had indeed run in his paper, Deady disagreed. An editor is not expected to keep track of all the information published in each edition of his newspaper. That is the responsibility of the printer. Thus, the printer's affidavit, not the editor's, is the best evidence of the matter. If editor Benson had checked with his printer and verified that the notice had indeed run for six weeks as required by statute, then this affidavit should have so stated. But it was silent on this point. Because the statute clearly required that the affidavit be signed by the printer, foreman, or principal clerk, the requirements were not met by Mitchell and the judgment was void based on that violation of Oregon statutory requirements, as well as the violation of the requirement of due diligence in locating Neff's new address.

One last issue not discussed by either Judge Deady or the Supreme Court was the possibility that Pennoyer was a good faith buyer of the land, and thus entitled to retain it, even if the original Mitchell v. Neff judgment was invalid. Section 57 of the Oregon Code provided that if a defendant successfully challenged the jurisdiction of an in rem action, his remedy was either return of the property or restitution. However, it also stated: “[b]ut the title to property sold upon execution issued on such judgment to a purchaser in good faith shall not be thereby affected.” Neither Judge Deady nor later Justice Field discussed the

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124 See id. at 1287.
125 See id.
126 The Court stated:
The statute is imperative and admits of no proof of service but the affidavit of the printer or his foreman or his principal clerk. The reason is obvious. The persons described are the only ones who, as a rule, are likely to have personal knowledge of the fact, by virtue of their relation to the subject. . . . One of the elementary rules of evidence is that a fact shall be proven by the best evidence of which, in its nature, it is susceptible. For very cogent reasons this rule ought to be rigidly applied to the proof of jurisdictional facts where the proceeding is ex parte.

Id.
127 See id. at 1288.
129 Id.
possibility that Pennoyer was a bona fide purchaser. It seems difficult to understand this oversight, especially from the Code's author, Deady. If it was not an oversight, it is even more difficult to explain. Perhaps it was because Pennoyer took from Mitchell, who was the purchaser at the execution sale and was definitely not a bona fide purchaser. Whatever the reason, Judge Deady's March 1875 ruling in favor of Neff set the stage for the case to move to the last arena, the United States Supreme Court.

C. The Final Act in the United States Supreme Court: Pennoyer v. Neff

Because the primary focus of this article is on the forces that shaped the Supreme Court opinion, a simple review of the holding is sufficient now. Writing for an eight to one Court on October 1, 1877, Justice Stephen Field affirmed Judge Deady's decision. Field's grounds for the decision, however, differed radically from those of Judge Deady. For reasons I hope will become apparent by the time the reader completes this article, I believe that Justice Field agreed with the rationale outlined by Judge Deady and would have gladly affirmed on each point. Unfortunately, he was unable to persuade his fellow Justices of that view and thus wrote a convoluted opinion designed to gain votes and advance his personal agenda on property rights and the Fourteenth Amendment. Whether by circumstance or design, Justice Field used Pennoyer to accomplish a goal that he had failed to accomplish more directly in other cases.

There are a number of enduring notions about Pennoyer v. Neff and just what it stood for or settled. One is that Pennoyer defined the proper boundaries of "in rem" jurisdiction once and for all, or at least

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130 See Neff, 17 F. Cas. at 1280. It may also be that Pennoyer failed to plead bona fide purchaser status under Code Section 57 as a defense. Had he so pled, Judge Deady would have surely addressed the issue. In a subsequent action, Neff v. Pennoyer, 17 F. Cas. 1291 (C.C.D. Or. 1875) (No. 10,085), Neff sued Pennoyer for removal of timber from the land during the period in which Pennoyer occupied it. Pennoyer counterclaimed for payment of back taxes, as well as for the value of improvements he made on the property. Pennoyer also claimed the defense of good faith purchaser to avoid Neff's claim for treble damages, which would have been available if Pennoyer could not show that he had possessed the property in good faith. Judge Deady ruled that Pennoyer's counterclaim "contains facts tending to show that the defendant occupied under color of title in good faith, adversely to the plaintiff." Neff, 17 F. Cas. at 1293. However, Judge Deady did not mention Code Section 57 as an absolute defense to Neff's action nor did Pennoyer plead it in the subsequent action. See id.

131 95 U.S. 714 (1877).

132 See id. at 736.

133 95 U.S. 714 (1877).
until *Shaffer v. Heitner*\(^{134}\) was decided one hundred years later.\(^{135}\) Another popular notion is that *Pennoyer* first articulated the need for a defendant’s physical presence in a state before that state could exert the power of personal jurisdiction over him or his property.\(^{136}\) *Pennoyer*’s most important legacy, however, is often said to be the insertion by Justice Field of the concept of due process, especially in the context of the Fourteenth Amendment, into the law of personal jurisdiction.\(^{137}\) Whatever the validity of these notions or others, and I will discuss them all, the case does represent something extremely important. I would argue, however, that what is most important about it is less a function of the actual opinion text and more a function of the relentless way in which seemingly unrelated events and people can converge into a single immovable point. A clearer understanding of the forces shaping the Supreme Court in 1877, and how one strong-willed and highly perceptive Justice was influenced by and used those forces, may give us insight not only into *Pennoyer* and its meaning, but about the judicial process of the nineteenth century and its effects on the late twentieth century. For *Pennoyer* remains one cornerstone of American jurisdictional law and still influences current thinking on this subject in every area.\(^{138}\)

II. THE SUPREME COURT IN THE PRE- AND POST-CIVIL WAR ERA

While Marcus Neff, John Mitchell, and Matthew Deady were embroiled in Oregon land disputes, the rest of the country was in utter turmoil. The chaos that was the United States from 1856, when Mitchell first received his judgment against Neff, until 1877, when Neff ultimately prevailed in the United States Supreme Court, is a critical backdrop to the *Pennoyer* case. Without a thorough understanding of the issues that wrecked the country and Court, one cannot fully appreciate *Pennoyer* itself.

\(^{134}\) 433 U.S. 186 (1977).
\(^{135}\) *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 683-84 (2d ed. 1988).
\(^{136}\) *See* RESTATEMENT (SECOND) OF JUDGMENTS at 16-17 (1982) (noting the need for a defendant’s “physical presence” in a state before that state could exert power over him or his property).
\(^{137}\) *See* JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE § 3.3 (1985).
A. Civil War Turmoil and its Aftermath

The twenty-one year period of 1856 to 1877 was the most divisive in the history of the United States. From *Dred Scott v. Sandford* in 1857, holding that slavery was protected by the Due Process Clause of the Fifth Amendment, through *Munn v. Illinois* in 1877, upholding "for the common good" state regulation of private property in which the public has an interest, the country went through a series of transformations. It saw the start and end of a bloody civil war, Reconstruction in the South, the passage of three constitutional amendments, the assassination of one President and impeachment of another, and incredible economic growth and westward expansion, all culminating in 1877 with a disputed and fraudulent United States presidential election that threatened to bring about a second Civil War.

The Civil War backdrop to *Pennoyer* involves far more than simple historical curiosity. It is essential to understanding both the Fourteenth Amendment tensions on the Court and the Confiscation Act cases, which involved seizure of property used to support the rebellion. We will review both in more detail later, but they are crucial to gaining a firm grasp on *Pennoyer*.

An examination of the voluminous history of the role of the Supreme Court during this period yields inconsistent conclusions. Views range from the Court being at its weakest during this time, after the shame of its *Dred Scott* decision in 1857 and the expansive power of Congress during Reconstruction, to the Court rapidly re-establishing itself as the final arbiter of the law and wielding a mighty sword against unconstitutional state and federal legislation after the Civil War. No doubt, the truth is somewhere in the middle. The Court was indeed at its nadir after Chief Justice Roger Taney’s disastrous opinion in *Dred Scott*. Not only did *Dred Scott* provide a constitutional basis for the continuation of slavery, it struck down the 1820 Missouri Compromise, which had allowed Congress to regulate slavery. This "self-inflicted wound" was thought by many at the time to have given Abraham Lin-

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139 60 U.S. (19 How.) 393 (1856).
140 94 U.S. 113 (1876).
142 See *Dred Scott*, 60 U.S. (19 How.) at 398.
143 See Hughes, *supra* note 141, at 50.
coln his biggest lift towards the presidency. Perhaps it did. But those who view it as completely emasculating the Court are not correct. The decision was a disgrace for the Court, and Chief Justice Taney in particular was vilified for years. But the Court was not left in ruin. Before 1857, people looked to the Court for an “easy” resolution of the slavery issue. “Easy” in the sense that legislators, the press, and much of the public turned to the Supreme Court to solve the problem, much as similar groups today seek to delegate the abortion issue to the Supreme Court. This approach necessarily leads to disappointment. The widespread hostility toward the Court was seen as in need of reform, not destruction. Even in Abraham Lincoln’s first annual address to Congress in 1861, he spoke of expanding the jurisdiction of the Supreme Court, as well as of ways to improve its efficiency.

Roger Taney began his position as Chief Justice in 1836, taking over from the venerable John Marshall. By 1857, the nine-man Taney Court was dominated by Southern Democrats, and Taney himself was from Maryland. Since 1837, there had been nine circuits, and Supreme Court Justices were by tradition drawn from each of the circuits. Increasingly, the circuit territories did not reflect the population shifts in the country. By 1860, the five southern circuits had a population of eleven million, versus 16.5 million in the remaining four circuits. The Ninth Circuit, composed of Mississippi and Arkansas, had 1.2 million inhabitants, while the Seventh Circuit, composed of Ohio, Indiana, Illinois and Michigan, contained 6.2 million people. Eight new states,

144 When Taney died in 1864, a northern citizen is reputed to have remarked that Taney had “earned the gratitude of his country by dying at last. Better late than never.” See KUTLER, supra note 141, at 22 (citation omitted).

145 Lincoln stated specifically:

Besides this, the country generally has outgrown our present judicial system. . . . Three modifications occur to me, either of which, I think, would be an improvement upon our present system. Let the Supreme Court be of convenient number in every event. Then, first, let the whole country be divided into circuits of convenient size, the supreme judges to serve in a number of them corresponding to their own number, and independent circuit judges be provided for all the rest. Or, secondly, let the supreme judges be relieved from circuit duties, and circuit judges provided for all the circuits. Or, thirdly, dispense with circuit courts altogether, leaving the judicial functions wholly to the district courts and an independent Supreme Court.


146 See KUTLER, supra note 141, at 17.

147 See id.
including Oregon, were not assigned to any Supreme Court Circuit. In addition to their duties on the Supreme Court, the nine Justices were each assigned a circuit to cover, and were expected to spend part of each year in their circuits hearing appeals from federal district courts.

Various proposals for Court reform were made after *Dred Scott*. Clearly, the removal of southern, pro-slavery dominance was a key objective, as was the reduction of workload burdens placed on the Justices. On July 15, 1862, Congress reorganized and equalized the circuits, bringing many of the new states into the system. It also reduced the dominance of the southern states by packing them into three circuits. In March 1863, Congress added a Tenth Circuit, consisting of California and Oregon, and expanded the Supreme Court to ten Justices. The tenth Justice was none other than Stephen J. Field, then Chief Justice of the California Supreme Court, and future author of the *Pennoyer* Supreme Court opinion in 1877.

In 1864, Chief Justice Taney died and was replaced by Salmon P. Chase, President Lincoln’s Secretary of the Treasury. Chase was a highly-regarded and popular choice. He had been Governor of Ohio, a United States Senator, and was notably anti-slavery. By the time of Lincoln’s assassination on April 14, 1865, the President had appointed five new Justices and had changed the balance of the Supreme Court. The prevailing view was that the Court was now composed primarily of sensible men who would work with Congress to clean-up the aftermath of the Civil War. It may be unfair to suppose that the President or Congress believed that the 1865 Court would be a puppet on the executive or legislative string, but if that notion had crossed anyone’s mind, it was soon dispelled.

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148 See id. at 18.
149 The Judiciary Act of 1789 created at least one district court for each state, and three circuit courts; but judges were only given to the district and supreme courts. In 1869, Congress added a judge to each of the now-expanded circuits and provided that each Supreme Court Justice need only attend court for each district within his circuit once every two years. In 1891, the Circuit Court of Appeals Act established nine new federal circuit courts, with their own judges and with appellate jurisdiction. This finally ended the circuit riding duties of the Supreme Court Justices. For an excellent discussion of the issue, see CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS 5-14 (1983).
151 See 12 Stat. 794 (1863). The Judiciary Act of 1789 created a Supreme Court with six Justices. That number was increased to seven in 1807, to nine in 1837, and by 1863 the number of Justices was increased to ten. In 1866, President Johnson signed legislation reducing the number of Justices to seven as vacancies occurred. The actual number fell only to eight before the court was enlarged back to nine Justices in 1869. See FRIDLINGTON, supra note 141, at 12; WRIGHT, supra note 149, at 13.
Presidents from Lincoln to Clinton have learned that once someone is appointed to the Supreme Court, a remarkable thing happens. Justices realize that if they have the will to do so, they can now decide cases without regard to political or economic pressure. Of course, the Court in 1865 did not quite fit this mold, as at least four of its members aspired to the presidency themselves. 152 Still, the unpredictable nature of the Court became immediately apparent.

The first blow was *Ex parte Milligan*, 153 which in 1866 struck down the use of military courts when civil courts were open and available. *Cummings v. Missouri* 154 and *Ex parte Garland*, 155 the 1867 Test Oath cases, found state and federal requirements for oaths of past loyalty to the United States unconstitutional. *Hepburn v. Griswold* 156 in 1870 held the Legal Tender Acts of 1862 and 1863 unconstitutional in authorizing the use of greenbacks to pay pre-existing debt. At the same time, the Court upheld a number of questionable laws and tried to avoid ruling on the constitutionality of the 1867 Reconstruction Act. 157 The Reconstruction Act and its supplements 158 divided the ten southern states into five military districts that were subject to martial law and a variety of other restrictions. 159 In *Mississippi v. Johnson*, 160 the Court in 1867 declared that it could not interfere with President Johnson's enforcement of the Reconstruction Acts, as this was a political question and beyond the jurisdiction of the Court. In 1868, *Ex parte McCordle* 161 upheld Congress's right to remove some habeas corpus appellate jurisdiction from the Supreme Court. On balance, the Court struck down ten acts of Congress between 1865 and 1873, compared to only two in the previous 76

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152 They were Stephen Field, Salmon Chase, David Davis, and Samuel Miller. For a thorough discussion on their political aspirations, see FREDLINGTON, supra note 141, at 153-54, 182-83; SWISHER, supra note 5, at 270-75; Howard Jay Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851, 874-75 (1943).

153 71 U.S. (4 Wall.) 2 (1866).

154 71 U.S. (4 Wall.) 277 (1866).

155 71 U.S. (4 Wall.) 333 (1866).

156 75 U.S. (8 Wall.) 603 (1869).


158 See 15 Stat. 35 (1868) (appropriating funds for enforcement of Reconstruction); 15 Stat. 14 (1867) (allowing removal from civil office of all persons disloyal to the United States Government); 15 Stat. 2 (1867) (covering ballot procedures).

159 See 14 Stat. 428, 428-29 (1867). The Reconstruction Act allowed for extensive use of military tribunals, vast arrest powers to suppress insurrection, disorder, and violence, and punishment for those who disturbed the public peace. See id. The Act was to remain in effect until the southern states each ratified a new state constitution that conformed with the United States Constitution, including the Fourteenth Amendment. See id.


161 73 U.S. (6 Wall.) 318, 327 (1867).
years. What may have seemed like a malleable group of Justices in 1865 was quickly becoming viewed as a group who could not be relied upon to support any particular partisan interest.

The passage of the Thirteenth Amendment prohibiting slavery in 1865, the Fourteenth Amendment in 1868, and the Fifteenth Amendment prohibiting denial of voting rights based on race or prior servitude in 1870 all added to growing divisions on the Court. In particular, the hopes of those who looked to the Court for protection of economic and social rights were soon dashed. By 1875, the Court held in United States v. Reese that "the Fifteenth Amendment does not confer the right of suffrage upon anyone." The right to vote was properly regulated by the states, and all the Fifteenth Amendment did was to create federal protection from racial discrimination while actually voting.

The Civil Rights Act of 1875 made it a federal crime to deny "full and equal enjoyment" of public accommodations, inns, theaters, and railroads based on race. In 1883, the Court found the 1875 Acts unconstitutional in the Civil Rights Cases. The Court also held that neither the Thirteenth nor the Fourteenth Amendment protected against individual acts of discrimination.

Finally, a series of cases in the 1870s held that the Fourteenth Amendment did not afford either due process or privileges and immunities protection in the area of economic rights. The view of the Court's majority from 1873's Slaughterhouse Cases to 1877's Munn v. Illinois was that the Thirteenth, Fourteenth, and Fifteenth Amendments

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162 Prior to 1865, the only two cases overturning federal statutes were Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). The ten cases between 1865 and 1872 were: United States v. Railroad Co., 84 U.S. (17 Wall.) 322 (1872); United States v. Klein, 80 U.S. (13 Wall.) 128 (1871); The Collector v. Day, 78 U.S. (11 Wall.) 113 (1870); The Justices v. Murray, 76 U.S. (9 Wall.) 274 (1869); United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1869); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869); The "Alicia," 74 U.S. (7 Wall.) 571 (1868); Reichart v. Felps, 73 U.S. (6 Wall.) 160 (1867); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866); Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865).

163 92 U.S. 214 (1875).

164 Id. at 217. While Reese involved the right to vote for blacks, the Court ruled that the right to vote for women was also not guaranteed under the Fourteenth Amendment. See Minor v. Happersett, 88 U.S. 162, 178 (1874).

165 Reese was overruled by United States v. Raines, 362 U.S. 17, 24 (1960). Minor was overruled by the Nineteenth Amendment, ratified in 1920.

166 See Civil Rights Act of 1876, 18 Stat. 335, 335-36 (1875).


168 See id. at 23.

169 83 U.S. (16 Wall.) 36, 82 (1872).

170 94 U.S. 113, 125 (1876).
were designed to eradicate the evils of slavery and should not be construed in a more expansive manner.\textsuperscript{171}

It should be apparent that by 1877, when Pennoyer reached the Supreme Court, that august body was a scarred and tension-filled place. Chief Justice Chase died in May 1873, and after an embarrassing seven months in which President Ulysses S. Grant offered the position to six other people, Morrison R. Waite of Ohio was finally confirmed in January 1874.\textsuperscript{172} By this time, the balance of power between the Chief Justice and his eight associates also shifted. Gone were the days when the Court could be described as “Marshall’s Court” or “Taney’s Court.” Now, a number of opinionated Justices vied for control on every major issue. No one person dominated the Court. The man who came closest, however, to holding influence over his fellow jurists on a number of critical points was Stephen Field, who was appointed in March 1863 and who served until December 1897. Field’s thirty-four year tenure\textsuperscript{173} left

\textsuperscript{171} It is somewhat misleading to speak of a “majority” on this Court during and after Reconstruction. Many key opinions were 5-4 or 6-3, and majorities shifted from case to case. See The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872) (5-4 decision); Texas v. White, 74 U.S. (7 Wall.) 700 (1868) (6-3 decision); Georgia v. Stanton, 74 U.S. 50 (1867) (4-4 decision); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866) (5-4 decision); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) (5-4 decision); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) (5-4 decision). The decisions involving the use of paper currency as legal tender illustrate the point. The Legal Tender Act of 1862, 12 Stat. 345 (1862), authorized use of United States notes, “greenbacks,” to pay all public and private debts. See id. at 345-46. The issue first reached the Court in Roosevelt v. Meyer, 68 U.S. (1 Wall.) 512, 517 (1863), where the Court disclaimed jurisdiction. In 1870, the Court with seven sitting Justices decided 4-3 in Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 626 (1869), that the Legal Tender Act was unconstitutional to debts incurred before the legislation was passed. The Court did not decide whether the Act would apply to debts incurred after its passage. See id. The same day Hepburn was decided, President Grant appointed two new Justices, William Strong and Joseph Bradley. The Government immediately moved to have the issue reconsidered. This was done in the companion cases of Knox v. Lee and Parker v. Davis. See The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870). The newly constituted Court overruled Hepburn and found the Legal Tender Act constitutional. See id. at 539-40.

\textsuperscript{172} The six were George Williams, Caleb Cushing, Roscoe Conkling, Timothy Howe, Oliver Morton, and Hamilton Fish. See FRIDLINGTON, supra note 141, at 207. After Waite was confirmed, Justice Stephen Field wrote Judge Matthew Deady: “That matter—the Chief Justiceship is at last settled. We have a Chief Justice. He is a new man that would never have been thought of for the position by any person except President Grant.” Letter from Stephen J. Field to Matthew Deady (Mar. 16, 1874) (Or. Historical Soc'y, Portland, Or.) (on file with the Seton Hall Law Review).

\textsuperscript{173} Field served from March 1863 until December 1897. He submitted his resignation in April 1879, to take effect in December 1897. He wanted to exceed the time served on the court by Justices Marshall and Story, who had also served 34 years. Field’s tenure was finally exceeded by Justice William O. Douglas in 1973.
an enduring legacy, of which Pennoyer is only a part.\textsuperscript{174} To understand Pennoyer fully, however, one must understand Stephen Field.

\section*{B. Stephen J. Field: Life Before Washington, DC}

Photographs of Stephen Field depict an apparently wise, solemn, and temperate man, with receding brow and flowing beard—truly a Biblical visage. Unfortunately, Field was nothing like his pictures. He was shrewd rather than wise, pompous rather than solemn, and volatile rather than temperate. This was a man who managed to pick quarrels throughout his life, and he was the only sitting Supreme Court Justice ever involved in a murder trial. At one point during his tenure in California, Field had a special coat made with pockets large enough to hold two pistols so that he could shoot at his various enemies through the pockets.\textsuperscript{175}

Field was born in 1816 in Haddam, Connecticut, and was one of eleven children.\textsuperscript{176} His father was the Reverend David Dudley Field, who moved the family to Stockbridge, Massachusetts, in 1819 so that he could assume the leadership of the local Congregational Church. Stephen’s parents must have set a fine example for the family because a more productive group is hard to find. Stephen’s oldest brother, David Dudley Field Jr. was the principal author of the New York Code of Civil Procedure, as well as numerous other proposed codes, through which he attempted to transform nineteenth-century American law.\textsuperscript{177} David was also one of the most financially successful lawyers of his day and made a fortune representing the rich and powerful, ostensibly to support his Code and reform work. David was heavily involved in the Republican Party, including its nomination of Abraham Lincoln for President.

Stephen’s brother, Cyrus W. Field, made his own fortune in the paper industry and was the driving force behind the transatlantic telegraph cable in 1858.\textsuperscript{178} Another brother, Reverend Henry Martyn Field, was a

\textsuperscript{174} During his 34 years, Field wrote 544 opinions for the Court, more than any Justice before him except Samuel Miller, who served with Field from 1862 to 1890 and who was Field’s friend and primary rival for the hearts and minds of his colleagues. By comparison, John Marshall (1801-1835) wrote 508 opinions for the Court, Joseph Story (1811-1845) wrote 270, and Roger Taney (1836-1864) wrote 260. \textit{See} ALBERT P. BLAUSTEIN \\& ROY P. MERSKY, THE FIRST HUNDRED JUSTICES 100-01, 142-44 (1978).

\textsuperscript{175} \textit{See} SWISHER, supra note 5, at 37-41.

\textsuperscript{176} For discussions of Field’s life, see generally \textit{3 Dictionary of American Biography}, supra note 18, at 372-76; FRIDLINGTON, supra note 141, at 188-92; SCOTT, supra note 21, at 373-78; SWISHER, supra note 5, at 37-41.

\textsuperscript{177} David Dudley Field was even more interesting than Stephen. For more details on his life, see \textit{3 Dictionary of American Biography}, supra note 18, at 368-72; HENRY M. FIELD, THE LIFE OF DAVID DUDLEY FIELD (Charles Schribner’s Sons 1898); SCOTT, supra note 21, at 359-72.

\textsuperscript{178} \textit{See} PHILIP J. BERGAN ET AL., THE FIELDS AND THE LAW 32-33 (United States Dis-
noted pastor and evangelist in New England. Stephen’s sister, Emelia Field, was the mother of future United States Supreme Court Justice David Josiah Brewer, who served on the Court from 1890 to 1910, including seven years with Stephen.  

Stephen’s life was fascinating before his 1863 appointment to the Supreme Court at age forty-six. He grew up in Stockbridge under the heady influence of his older brothers and the family of Theodore Sedgwick, the Massachusetts Supreme Court Justice who lived across the street from the Fields. The Sedgwicks were a large and powerful family with ties to Joseph Story and Mark Hopkins. Stephen was especially influenced by Theodore Sedgwick II, author of the three-volume Public and Private Economy. Sedgwick was a strong believer in the security of property rights and the need for restraint on legislatures. While all the Sedgwicks were opposed to slavery, Theodore II strayed from his father’s party to become heavily involved in Massachusetts Democratic politics. Later, Stephen Field would also become a Democrat while the rest of his family remained Republican.

When he was thirteen, Stephen traveled to Greece and Turkey for two and a half years with his sister Emelia and her husband, Josiah Brewer. There, he learned to speak Greek, as well as some Italian, French, and Turkish. He returned later to graduate from Williams College as class valedictorian in 1837, with Williams College’s President, Mark Hopkins, as a close friend and tutor. Stephen’s brother David advised him to become a professor of Oriental studies after graduating from college, but Stephen chose to study law. He worked for a time in David’s New York office and was admitted to the New York bar in 1841. David had been in law partnership with several Sedgwick brothers in New York, but after Robert Sedgwick retired, David formed a formal partnership with Stephen in 1843. By that time, David was already a famous man, so he naturally took two-thirds of the partnership profits to Stephen’s one-third.

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179 See id.
180 See id. at 53-63.
181 See id. at 6-10.
182 For discussions on the Sedgwicks, as well as Mark Hopkins, see 7 Dictionary of American Biography, supra note 18, at 549-52; BERGAN, supra note 178, at 6-24.
184 See 7 Dictionary of American Biography, supra note 18, at 551.
185 See BERGAN, supra note 178, at 25-27 (containing a full reprint of the original 1843 partnership agreement between Stephen and David Dudley Field).
In 1848, David advised Stephen to head west to California, where the gold rush was just beginning. After a jaunt to Europe, Stephen did just that, arriving in San Francisco on December 28, 1849. Within twenty-four hours he was broke; he had spent all his savings on food, lodging, and hauling his trunk off the ship. Gold rush prices were indeed incredible. Luckily, David had given Stephen an IOU from Colonel Jonathan Stevenson, who lived in San Francisco and owed David money. Stephen promptly collected the $440 debt and left high-priced San Francisco. He headed for Marysville, a small settlement outside Sacramento, where he heard there was a need for a lawyer. Arriving in Marysville on January 15, 1850, Stephen began a career in land speculation. He optioned sixty-five lots for $16,250 with no down-payment required. This was fortunate because all he had was the remains of the $440 in his pocket. Still, he was deemed a big spender by the local populace and was elected to the position of alcalde—a sort of mayor—on January 18, 1850. Stephen had been in town for three days at the time.

Within three months, Stephen resold many of the sixty-five lots and created a tidy $25,000 profit. That, coupled with income from the alcalde position and rental property that he bought, made him quite the prosperous gentleman. Of course, this prosperity was not without its downside. Stephen made an enemy of the district judge, William Turner, and their feud carried on for years.

In 1851, Field was elected to the state legislature. There, he labored on the judiciary committee and was instrumental in writing the new Civil and Criminal Practice Acts, pat-
terned after David Dudley Field's proposed New York Codes. One notable provision of the Civil Practice Act exempted from debtors' sale the books and libraries of lawyers and other professionals. From a selfish viewpoint, this struck close to home for Stephen Field. He made and lost at least two small fortunes during his years in California. When he left the legislature in 1852, Field was in debt for over $18,000. By 1855, he built his law practice back up, paid off his debts, and had $38,000 in the bank. Along the way, he became embroiled in a fight with another judge, one William T. Barbour, who challenged Field to a duel. For various reasons, no shots were exchanged, but the pair continued to quarrel. In 1857, just after Dred Scott was decided, Field was appointed to the three-man California Supreme Court by Governor J. Neely Johnson. Stephen’s salary during his last year in private practice was $42,000, a far cry from what he would earn on either the California or United States Supreme Court benches.

When Stephen was appointed to the California court, the Chief Justice was David S. Terry. Terry had been on the court since 1855 and would serve until 1859 alongside Field. When Terry retired in 1859, Field became Chief Justice, but his and Terry’s paths would cross again. For it was Terry who was killed in 1889 by Field’s bodyguard, David Neagle, after Terry assaulted Field in a Lathrop, California, breakfast parlour. This murder led to the arrest of both Field and Neagle, although Field was later released. The prosecution of Neagle for murder subsequently made its way to the United States Supreme Court, where the circuit court opinion of justifiable homicide was affirmed.

While on the California bench, Field’s time was occupied primarily with land, property, and mineral rights disputes. California operated under Mexican law before becoming a state, and local laws were often confusing, contradictory, and, of course, written in Spanish. Whether gold found in the land was owned by the State of California, the United States, the individual landowner, the lessee, or the miner was all up for

195 See Shuck, supra note 190, at 424.
196 See id.
197 See id. at 425.
198 See id.
199 See Swisher, supra note 5, at 62-64.
200 See id. at 71-72.
201 See id. at 72.
202 See id. at 73-74.
203 For a thorough discussion of the incident, see id. at 321-61.
204 See Swisher, supra note 5, at 351-53.
205 See In re Neagle, 135 U.S. 1, 76 (1890).
206 See Swisher, supra note 5, at 88-91.
grabs. Land speculation was rampant, and there were charges that Field and his fellow judges were not above either bribes to vote certain ways or a fair amount of real estate speculation themselves.207 Stephen was certainly a great friend of many successful businessmen, including Leland Stanford who was later Governor of California. There is, however, scant proof that anyone on the Court accepted money from Stanford, John Fremont, John Sutter, or any other local entrepreneur.208 In 1861, Field spoke for the Court in Moore v. Smaw,209 which overturned prior state decisions on mineral rights. Moore held that all minerals, including gold and silver, were the property of the landowner.210 This was a boon to Fremont and others who owned vast amounts of California property. Field ruled that when Mexico deeded California public land to the United States, it included all mineral rights. When the United States deeded the land to individual owners, it retained no mineral rights as sovereign and instead transferred these rights to the new owners.211

Whether one agreed with Field or not on this and similar issues, he lent a stability and continuity to the California court that was previously lacking. With constant turnover of judges and charges of corruption, the court before Field continually reversed itself based solely on its membership. Stare decisis was not a consideration for that group. Though Field’s decisions were not always popular, they resolved broad issues and afforded a measure of predictability, particularly in land disputes. Still, while on the California bench, Field continued to make enemies and was frequently characterized in the press as a puppet for his rich friends.212 Three years after moving to Washington DC, Field even received a bomb in the mail from an unidentified, presumably disgruntled constituent in San Francisco.213

When Congress decided to expand the Supreme Court by adding a tenth circuit in 1863, Stephen Field was the logical choice. He knew California law and received strong support from Leland Stanford and the California congressional delegation.214 Though Stephen was a Democrat,

207 See id. at 85-97.
208 A popular pamphlet, The Gold Key Court or the Corruption of a Majority of It, raising these allegations, was published anonymously in 1860. Field was specifically accused of speculating in property affected by his decisions, but no proof was ever offered. See id. at 95.
209 17 Cal. 199 (1861).
210 See id. at 226.
211 See id.; see also SWISHER, supra note 5, at 87-88.
212 The San Francisco Bulletin challenged Field regularly. See SWISHER, supra note 5, at 92-95.
213 Luckily, no one was hurt. See SHUCK, supra note 190, at 428.
214 See SWISHER, supra note 5, at 116, 243.
he was antislavery and had helped keep California in the Union at the start of the Civil War. Further, David Dudley Field had been a large contributor to Lincoln's campaign and wanted his brother appointed. Lincoln is alleged to have asked his friend John Gray, "Does David want his brother to have it?" When Gray replied, "Yes," Lincoln said, "then he shall have it." Stephen Field was unanimously confirmed by the Senate in March 1863. Because the Court was not in session during the summer, Field did not take his seat until early December 1863, barely three weeks after Lincoln's Gettysburg Address, and just six months after John Mitchell claimed that Marcus Neff consulted him for legal services.

C. Stephen Field in the Supreme Court: 1863 to 1877

If President Lincoln thought that in Stephen Field he was getting a Supreme Court Justice who would be unerringly loyal to Lincoln's policies, he was mistaken. Like other appointees after 1860, Field had a mind of his own. He emphasized a number of key themes throughout his Supreme Court tenure, but three of them are important to our Pennoyer analysis: the need for a strong judiciary, the protection of individual property rights, and the use of the Fourteenth Amendment to protect economic rights. All three of these themes would later come together in Pennoyer.

During the 1860s and 1870s, Field's belief in the need for a strong judiciary to temper the wild excesses of the people became increasingly strong. As Congress passed what Field considered more radical and ill-conceived legislation during and after the Civil War, Field used most opportunities to challenge it. In 1866, he voted with his fellow recent appointee David Davis to strike down the use of military courts in *Ex parte Milligan*. He spoke for the Court in both cases holding state and federal test oath requirements unconstitutional. In 1868, he and Justice Robert Grier objected violently to the withdrawal of Supreme Court jurisdiction to temper the wild excesses of the people became increasingly strong. As Congress passed what Field considered more radical and ill-conceived legislation during and after the Civil War, Field used most opportunities to challenge it. In 1866, he voted with his fellow recent appointee David Davis to strike down the use of military courts in *Ex parte Milligan*. He spoke for the Court in both cases holding state and federal test oath requirements unconstitutional. In 1868, he and Justice Robert Grier objected violently to the withdrawal of Supreme Court
jurisdiction from the *McCordle* case after already hearing arguments.\(^{220}\)
It would be inaccurate, however, to attribute this to an expansive liberalism\(^{221}\) on Field’s part. He was horrified by what he saw as a rising tide of chaos threatening established order in a variety of areas.\(^{222}\) After the Civil War, a series of violent outbreaks throughout the United States\(^{223}\) and Europe\(^{224}\) also shook Field, particularly the rise of socialism. On top of everything else, the national political order seemed to break down by 1876 with the contested presidential election between Rutherford Hayes and Samuel Tilden requiring the creation of an Electoral Commission, on which Field served, to decide the outcome of the election.\(^{225}\) Field was

\(^{220}\) See Swisher, *supra* note 5, at 161. David Dudley Field argued *McCordle*’s case before the Supreme Court. I have been unable to find an instance in which Stephen Field recused himself simply because David was arguing a case before the Court nor have I found a case in which Stephen ever voted against David’s client.

\(^{221}\) “Liberalism” as construed in the twentieth-century sense of expansive personal rights.

\(^{222}\) Not only was Reconstruction legislation of great concern to Field, but the violence associated with the developing American labor movement, the Grangers in the midwest, and rioting and strikes by miners in California all distressed him. See Graham, *supra* note 152, at 864-79.

\(^{223}\) Violence was widespread and varied after the Civil War. It ranged from the murder of between 60 and 150 black citizens by setting fire to the Grand Parish, Louisiana, courthouse on April 13, 1873, to the Battle of the Little Big Horn in which General George Custer and 264 men of the Seventh Cavalry were killed on June 25, 1876. The Louisiana case came to the Court in *United States v. Cruikshank*, 92 U.S. 542 (1875). David Dudley Field argued on behalf of Cruikshank, one of the accused murderers, that the Fifth and Fourteenth Amendments did not afford protection against purely private conduct. The Court sustained this view, which still applies today. See id. at 569; *see also* *Deshaney v. Winnebago County*, 489 U.S. 189, 203 (1989). I commend the reader to review David Dudley Field’s written brief and oral argument transcript in the *Cruikshank* case, and then review current due process cases, such as *Deshaney*, for comparison. David’s brief and argument is reprinted in 7 Philip B. Kurland & Gerhard Casper, *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 411, 420 (1975).

\(^{224}\) This included the Paris Commune uprising. Field stated specifically to Deady:

I have not written to you for a long time simply because I have had nothing to write which could be of interest to you. For months the stirring events occurring in Europe have absorbed my thoughts to the exclusion of almost everything else, except the duties which I have been obliged to discharge from day to day.


\(^{225}\) The 1876 presidential election between Samuel Tilden and Rutherford Hayes resulted in a dispute over popular and electoral college votes. An electoral commission was appointed by Congress in January 1877 to resolve the matter. Field, along with four other Justices, five senators, and five congressmen served on the commission. The vote split on party lines, with Field and the other six Democrats voting for Tilden, and the eight Republicans voting for Hayes. Hayes was given the nod, amidst much scandal and criticism. David Dudley, among others, represented Tilden in the process. Stephen Field wrote of this, “The President, who owes his seat to the success of a gigantic conspiracy
even concerned that the election dispute could lead to another Civil War. All these events hardened Field’s existing views on the sanctity of established order and the need for a strong judiciary to maintain that order.

Stephen Field saw the Fourteenth Amendment as providing a critical bridge to help preserve economic order after the Civil War. His colleagues did not share this view, and as a result, Field’s Fourteenth Amendment dissents during the 1870s created a constant tension on the Court concerning how broadly to construe the Amendment. Field believed strongly that all citizens had certain natural rights not granted by their government but by their Creator. He saw the Fourteenth Amendment as securing protection of those rights (which for Field were heavily property oriented) for all citizens. Of course, this was the very point that so frightened the Court’s majority. They saw Field’s approach as a threat to the fabric of federalism. If the Fourteenth Amendment transferred or expanded the security of civil rights from the states to the federal government, then Congress would have the power to enforce those rights. This would shift the balance of power completely from the

and fraud, is not finding his place a bed of roses. It is right that it should be so. He is evidently a very weak man, and hardly knows what to do.” Letter from Stephen J. Field to Matthew Deady (Apr. 2, 1877) (Or. Historical Soc’y, Portland, Or.) (on file with the Seton Hall Law Review).

One example of this is when Field stated:

It would be a great reproach to us if the contest between the two great parties should lead to civil war. If either Mr. Hayes or Mr. Tilden is inaugurated without the general acquiescence of the country he will be utterly powerless in office. He would be resisted in every way and form, short of absolute force, known to our law.


Stephen’s personal life was also undergoing a series of disappointments, primarily involving his brother David. By 1870, David was no longer the darling of the American bar. He developed a reputation for representing the most corrupt of clients, as long as they paid his high fees. These included Jay Gould and Jim Fisk in the “Erie Wars,” (a five-year struggle for control of New York’s Erie railroad), and New York’s “Boss” William Tweed of Tammany Hall. A Harper’s Weekly cartoon on February 24, 1877, even depicted David as taking money from Satan himself. See BERGAN, supra note 178, at 47. Despite this public criticism of David, Stephen always supported him. See id. at 42-52.


The Fourteenth “[A]mendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes.” Slaughterhouse, 83 U.S. at 105 (Field, J., dissenting).

As the Slaughterhouse majority stated:

Was it the purpose of the fourteenth amendment, by the simple declaration
states to Washington. Field thought this fear ill-founded, as states would always have the greatest influence on how these property oriented rights were exercised locally.

What Field could not persuade his fellow Justices to do on the Supreme Court, he was able to do on the Ninth Circuit. While Field railed against removal of habeas corpus appellate jurisdiction from the Supreme Court in 1868 during *Ex parte McCordle*,

that removal of Supreme Court review was a boon to Field in his circuit.

It must have secretly pleased him immensely.

Field was now the final arbiter of most federal law in the west, and he made annual trips to California and Oregon to cover the circuit. While there, he developed close friendships with many of his subordinate judges, including Matthew Deady. Unable to gain a majority for his Fourteenth Amendment views on the Supreme Court, Field expounded on them elaborately in Ninth Circuit cases. Most notably, his cases involving the Chinese outlined an expansive view of the Fourteenth Amendment Equal Protection Clause that has stood the test of time.

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*Id.* at 77.

231 74 U.S. (7 Wall.) 506 (1868).

232 "Certain mischievous tendencies are observable in the Federal courts, which the scheme of reporting circuit court decisions according to circuits is calculated to promote... [The judges] in the Ninth Circuit... have certain ideas [which]... are alluded to as "the law of the Ninth Circuit." The leading characteristic of this new law is an unwarrantable enlargement of Federal jurisdiction, the erection of a general and irresponsible superintendency over the police regulations of the States, over their process of interstate extradition, and over the administration of their criminal laws. It is quite time that this matter were checked." See Graham, *supra* note 152, at 881 n.114 (citation omitted).

233 Field only missed his circuit trip twice during his entire tenure, both times because he was in Europe.

234 There are 156 letters from Field to Deady in the Oregon Historical Society, Portland, Oregon.

235 For whatever reason, Field saw the Fourteenth Amendment Equal Protection Clause as affording a much broader range of individual liberty protection than did the Due Process Clause. See, e.g., *In re Ah Kee*, 21 F. 701 (C.C.D. Cal. 1884) (involving immigration of Chinese laborers); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6546) (the famous "Queue" case); *In re Ah Fong*, 1 F. Cas. 213 (C.C.D. Cal. 1874) (No. 102) (involving Chinese prostitutes). In *Ah Fong*, Field stated:

[e]quality of privilege is the constitutional right of all citizens, and equality of protection is the constitutional right of all persons. And equality of protection implies not only equal accessibility to the courts for the prevention or redress of wrongs, and the enforcement or rights, but equal exemption with others of the same class from all charges and burdens of every kind.
The irony is that Field's use of the Fourteenth Amendment did not generally extend to the non-economic sphere. His approach to the personal liberty aspects of the Fourteenth Amendment was sadly colored by his own prejudices and sense of the proper social order.\textsuperscript{236} Despite his life-long abolitionist views, Field could not find support in the Fourteenth Amendment for the voting rights of blacks or women,\textsuperscript{237} for the right of women to practice law,\textsuperscript{238} or for protection of blacks against acts of individual discrimination.\textsuperscript{239} As a result, his Fourteenth Amendment analyses seem strangely constricted and inconsistent today. They are important to our \textit{Pennoyer} review chiefly because they help us understand Field's overall views on the Fourteenth Amendment. In his \textit{Munn} dissent, Field noted that the Fourteenth Amendment placed property under the same protection as life and liberty.\textsuperscript{240} As such, it should be afforded the same if not more protection and should not be left to the whimsy of a state legislature.\textsuperscript{241}

Nowhere was Field's zealous protection of property rights more apparent than in the Confiscation Act cases. A solid grounding in these cases is needed to understand the background to \textit{Pennoyer}. On August 6, 1861, Congress passed what became known as the Confiscation Act (the Act).\textsuperscript{242} One provision provided that the government could seize and confiscate the property of rebels. This did not just apply to confederates, but to any citizen whose property was allegedly used to aid, abet, or promote the insurrection against the United States Government.\textsuperscript{243} The procedural aspects of enforcement, such as notice and sufficiency of evidence, were knowingly left vague by Congress.\textsuperscript{244} This gave enforcing

\textsuperscript{1} F. Cas. at 218.
\textsuperscript{236} Field wrote to a friend in 1882: "The manners, habits, mode of living, and everything connected with the Chinese prevent the possibility of their ever assimilating with our people. They are a different race, and, even if they could assimilate, assimilation would not be desirable." BERGAN, supra note 178, at 17.
\textsuperscript{238} See Bradwell v. The State, 83 U.S. (16 Wall.) 130, 139 (1872). In the Bradwell concurrence, which Field joined, Justice Bradley stated: "[I]n my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men . . . ." Id. at 142 (Bradley, J., concurring).
\textsuperscript{239} See The Civil Rights Cases, 109 U.S. 3, 25 (1883).
\textsuperscript{240} See Munn v. Illinois, 94 U.S. 113, 141 (1876) (Field, J., dissenting).
\textsuperscript{241} See id. at 140 (Field, J., dissenting).
\textsuperscript{242} 12 Stat. 319 (1861), as amended by 12 Stat. 589 (1862). The Act is described in detail in Miller v. United States, 78 U.S. (11 Wall.) 268 (1870), the first major case to interpret it.
\textsuperscript{243} See Miller, 78 U.S. at 269.
\textsuperscript{244} See Tyler v. Defrees, 78 U.S. (11 Wall.) 331, 346 (1870).
courts broad discretion. The proceedings were simply to “conform as nearly as may be to proceedings in admiralty or revenue cases.”

In 1870, Justices Field and Clifford dissented in the first two major Confiscation Act cases, Miller v. United States and Tyler v. Defries. Field made it clear that he believed the law to be, at least in part, unconstitutional. He likened the Act to one that allowed confiscation of property of a burglar, highwayman, or murderer, not as a result of his or her criminal conviction, but as a result of ex parte charges of his or her guilt nailed on the court-house door. Nonetheless, Field soon ceased his attacks on the Act itself and by 1876 was writing majority opinions construing it. What caused this apparent about-face? I suspect it was simple pragmatism. While Field had strong opinions, he was no fool. It was apparent that Congress, the President, and the majority of the Supreme Court found the Confiscation Act constitutional. Field was never going to change that, and he was not the type to cry out for years in lonely dissent. His method was to cajole and persuade and twist things just enough so that eventually he and his colleagues would meet somewhere in the middle. Of course, since Stephen drew the center line, it was usually closer to his side.

245 12 Stat. 589, 591.
246 78 U.S. (11 Wall.) 268, 314 (1870) (Field, J., dissenting).
247 78 U.S. (11 Wall.) 331, 349 (1870) (Field, J., dissenting).
248 See Miller, 78 U.S. at 323 (Field, J., dissenting); Tyler, 78 U.S. at 355 (Field, J., dissenting).
249 See Miller, 78 U.S. at 323 (Field, J., dissenting). Field would no doubt be surprised to find such confiscation allowed today, based on the notion of the property as guilty party with little regard to the guilt or innocence of the property owner. 1990s confiscation also often arises out of a war, the war on illegal drugs. See, for example, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), where Justice Brennan upheld the forfeiture of a yacht used to transport drugs, despite the fact that the yacht's owner was free of culpability. Innocence of the owner was rejected as a defense. See id. at 684. Brennan analogized the forfeiture to the ancient concept of deodand, or, "given to God." See id. at 682; see also Bennis v. Michigan, 116 S. Ct. 994 (1996) (dealing with the confiscation of a car that was jointly owned by a wife and her husband, even though he was convicted of gross indecency in connection with his sexual activity with a prostitute in the car).

The Crime Control Act of 1984 further expanded the nature of property subject to civil forfeiture federally, and there are now many expansive state provisions as well. The Crime Control Act provides that all right, title, and interest in property that is subject to civil forfeiture vests in the United States upon commission of the acts giving rise to the forfeiture. See 98 Stat. 2040, 2051 (1984) (codified as amended at 21 U.S.C. § 881 (1981 & Supp. 1997)). However, the vesting of title is not self-executing and occurs only when the Government wins a judgment of forfeiture. See United States v. A Parcel of Land, 113 S. Ct. 1126, 1135-36 (1993).
Even in his *Miller*\textsuperscript{250} and *Tyler*\textsuperscript{251} dissents, Field went on to discuss the facts of each case \textit{if} the Confiscation Act were found to be constitutional. Once he stopped challenging the inherent legality of the Act, he began parsing its interpretation more and more finely. For example, in *Tyler*, Justice Miller began his opinion with a sweeping statement implying that collateral attacks on judgments could only be made for defects based on "jurisdiction," which he did not define.\textsuperscript{252} Field jumped at this golden opportunity to chide Miller and, in dissent, promptly distinguished the "power" of a court over a person or property, from its subject matter "jurisdiction."\textsuperscript{253} He carefully explained that "power" over the defendant may exist, "and yet the decree may be so variant from that which the court was authorized to pronounce as to be void on its face," as when the law authorized a fine as punishment but the court ordered imprisonment.\textsuperscript{254} A self-evident distinction? Yes, and not a novel one. However, it displayed Field's capacity for technical distinctions that were often glossed over by his colleagues.\textsuperscript{255} Justice Miller took the point, and used Field's language in later cases delineating the "power" of a court.\textsuperscript{256}

More fundamentally, *Miller* and *Tyler* demonstrate Field's preoccupation with procedural details that were often deemed trivial by his fellow Justices. *Miller* involved the seizure of 543 shares of railroad stock certificates owned by Samuel Miller of Virginia.\textsuperscript{257} Miller was a rebel officer, legislator, and judge in the Confederate States of America.\textsuperscript{258} The United States District Attorney ordered Miller's stock certificates,
which were located in Michigan, to be confiscated under the provisions of the Confiscation Act. The issue in the case was whether or not the seizure of the stock certificates was valid under the Confiscation Act. The majority ruled that it was, with Justices Field and Clifford in dissent.

Tyler was an ejectment action to recover real property in Washington, DC, that was seized and sold under the Confiscation Act. Tyler was a confederate officer who also contributed money to support the rebellion. After the war, he attempted to recover his property. The issue was the validity of the notice given under the Confiscation Act. The marshall gave preliminary written and oral notice to the tenants of the property a few days before the district attorney instituted civil proceedings, and the marshall subsequently posted a notice of the order on the courthouse door and published notice in the local newspaper. Of course, Tyler was behind enemy lines at the time. The majority ruled that the notice was sufficient and upheld the sale. Justices Field and Clifford again dissented, finding it was a fatal error that the marshall failed to return and re-notify the tenants after the action was legally instituted.

Justice Field approached Miller and Tyler in a way that no doubt seemed ridiculous to his colleagues. In Miller and Tyler, the enforcing marshall made a preliminary seizure of the property based on authorization from the local district attorney. In both cases, the marshall was the only person making seizures either for the district attorney or the court. In neither case had the marshall returned after initiation of judicial proceedings to reseize the property. In Miller, the property was stock certificates, and the marshall took the stock into his possession. In Tyler, it was real property, and the marshall already gave personal notice to the occupants, posted a copy of the order in the local court house, and published notice in the local newspaper.

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259 See Miller, 78 U.S. at 293.
260 See id. at 313-14.
261 See Tyler v. Defrees, 78 U.S. (11 Wall.) 331, 331 (1870).
262 See id. at 332.
263 See id.
264 See id. at 333.
265 See id. at 355 (Field, J., dissenting).
266 See Miller v. United States, 78 U.S. (11 Wall.) 268, 294 (1870); Tyler, 78 U.S. at 347.
267 See Miller, 78 U.S. at 294; Tyler, 78 U.S. at 347.
268 See Miller, 78 U.S. at 295.
269 See Tyler, 78 U.S. at 332-33.
The majority in both cases found this form of seizure and notice sufficient, especially given the broad discretion of the local court and the lack of any "notice" provisions in the Confiscation Act.\textsuperscript{270} As Justice Strong stated in \textit{Miller}, "[t]o hold otherwise would be to sacrifice the spirit to the letter of form, the substance to the shadow."\textsuperscript{271} But Field would have done exactly that.\textsuperscript{272} He distinguished custody of the marshal preliminary to the commencement of judicial proceedings from custody by the marshall under order of the court. They were separate actions requiring separate seizures.\textsuperscript{273}

\textsuperscript{270} As the \textit{Tyler} Court stated:

Uncountably, it was within the power of Congress to provide a full code of procedure for these cases, but it chose to give a direction on the subject which, adopting, as a general rule, a well-established system of administering the law of capture, looked to the fact that departures from that system might be necessary, and invested the courts with a discretion in that regard.

\textit{Id.} at 346.

\textsuperscript{271} \textit{Miller}, 78 U.S. at 295. Justice Strong further commented: "The marshall had already seized the stock, and it remained in his possession. An order to seize property already in his hands would have been superfluous. All that was needed was that, having the property, he should hold it subject to the order of the court." \textit{Id.}

\textsuperscript{272} In \textit{Tyler}, a seeming exchange between Justice Miller for the majority and Justice Field in dissent illustrates the point. Justice Miller stated:

Now, suppose the property in this case had been personal property, how could the marshall make a seizure of that which was already in his manual possession? Whose possession would he displace? Could one hand represent the seizure under the monition and the other the seizure under the act of Congress? And can it be seriously contended that this must be done to give the court jurisdiction, when the officer of the court held the property already for condemnation or discharge as the court might order?

\textit{Tyler}, 78 U.S. at 348.

To which Field replied in dissent:

And yet we are told by the majority of the court that the objection that this preliminary seizure was insufficient to give the requisite jurisdiction, and that a new seizure, under judicial process, was necessary, is a very narrow and unsubstantial [sic] objection. I answer, that no objection is narrow or unsubstantial [sic] which goes to the jurisdiction of the court to forfeit the property of a citizen upon \textit{ex parte} proceedings, without a hearing.

\textit{Id.} at 352 (Field, J., dissenting).

Apparently, Field would have required that the marshall put down the certificates and then pick them up again under order of the court.

\textsuperscript{273} See \textit{Miller}, 78 U.S. at 324 (Field, J., dissenting). The statutory language did not remotely support Field's point of view. The majority was correct in finding that the statute left procedural details to the enforcing court. For example, in real estate, the Act provided:

[i]t is the several courts aforesaid shall have power to make such orders, estab-
lish such forms of decree and sale, and direct such deeds and conveyances

to be executed and delivered by the marshalls thereof where real estate
shall be the subject of sale, as shall fully and efficiently effect the purposes
of this act, and vest in the purchasers of such property good and valid titles
In these cases, Field did not seek strict adherence to plain statutory language. He used the power of the judiciary to fill a void left by Congress. Because the Confiscation Act required that the enforcing procedure conform, "as nearly as may be, to admiralty and revenue cases," Field interpreted this to require strict compliance with his own construction of admiralty jurisdiction requirements. This construction was not even an accurate representation of admiralty requirements at the time. As we saw earlier, admiralty required an actual seizure of the ship—but actual notice to the property owners was not critical. Field's attempt to make actual notice imperative in Confiscation Act cases, in alleged conformance with admiralty requirements, was a mischaracterization of both admiralty jurisdiction and Confiscation Act language.

Nevertheless, in his Miller dissent, Field began the journey, which would eventually bring us to Pennoyer, of merging admiralty notions with domestic attachment jurisdiction. In Miller, he quoted John Marshall as agreeing that seizure under order of the court was required for in rem jurisdiction, but the quote is taken from an admiralty case, not one of domestic quasi in rem seizure.

Further, Justice Field was of the same mind as Judge Deady on presumptions of jurisdictional validity in cases of limited or special jurisdiction such as these. For that matter, Justice Story felt the same way about presumptions concerning jurisdiction. While validity was usually assumed when judgments were collaterally attacked, that assumption of validity was discarded in cases of special or limited jurisdiction. There was no presumption of jurisdiction in such cases. Courts required all evidence supporting jurisdiction to appear affirmatively on the thereto.

12 Stat. 589, 591 (1862).

274 See Miller, 78 U.S. at 325 (Field, J., dissenting) (citing The Mary, 13 U.S. (9 Cranch) 126, 144 (1815)).

275 Compare Neff v. Pennoyer, 17 F. Cas. 1279, 1289 (C.C.D. Or. 1875) (No. 10,083) (Deady, J.) with Miller v. United States, 78 U.S. (11 Wall.) 268, 328 (1870) (Field, J., dissenting). One difficulty is in defining "courts of special or limited jurisdiction." While in personam jurisdiction was clearly not applicable, beyond that different judges defined "special or limited jurisdiction" in different ways. Sometimes quasi in rem cases fell into this category and sometimes they did not, depending on the judge and the case. See Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336, 350 (1850) (McLean, J.); Galpin v. Page, 9 F. Cas. 1126, 1138 (C.C.D. Cal. 1874) (No. 5206) (Field, J.); Picquet v. Swan, 19 F. Cas. 609, 616 (C.C.D. Mass. 1828) (No. 11,134) (Story, J.).

276 See Picquet, 19 F. Cas. at 616.

277 See the discussion on "presumptions" as applied to nineteenth-century jurisdiction law, supra note 120. McCormick notes that there are at least eight ways in which the term "presumption" is used by courts. See CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 342 (Edward W. Cleary ed., 3d ed. 1984).
record, as well as strict adherence to all statutes, or the judgment would be void.\textsuperscript{279}

Field also disagreed with his peers on the form of notice required. In the view of the majority, the Confiscation Act "treated the property as the guilty subject"\textsuperscript{280} because the property was used to support the war against the government. As in admiralty, after which the Act’s enforcement was patterned, no formal hearing was required after seizure and default.\textsuperscript{281} Field distinguished admiralty and revenue cases, in which the property was indeed the "offending thing,"\textsuperscript{282} from confiscation cases, in which the challenge, as Field saw it, was really against a person and his use of that property.\textsuperscript{283}

By 1873, Field had somewhat persuaded his colleagues to this view. In \textit{Day v. Micou},\textsuperscript{284} a unanimous Court ruled that the Confiscation Act did not pass the entire title of property to the buyer, but only the interest in the property by the "offending person."\textsuperscript{285} The Court distinguished admiralty and revenue cases, in which a condemnation generally passed the complete title to the condemned property, from Confiscation Act cases, in which only the rebel’s interest passed. \textit{Day} involved a life estate only, and the remainderman was not cut off by the Act. This was quite a remarkable shift given the emphasis that the Act placed on the property, rather than its owner, as the sinner.

In 1876, Field cut things even more finely in \textit{Windsor v. McVeigh}.\textsuperscript{286} There he wrote a majority Confiscation Act opinion, in which Justices Miller, Bradley, and Hunt dissented. Not content with shifting the focus from the property itself, as it was in \textit{Miller} and \textit{Tyler}, to the property owner, as had \textit{Day} in 1873, Field now addressed the opportunity of the property owner to respond to the charges against him.

In \textit{Windsor}, the property of a Richmond, Virginia, confederate officer was seized under authority of the Confiscation Act. The rebel attempted to appear and defend his property, but the judge refused to allow his appearance. The judge deemed Windsor an enemy with no standing

\textsuperscript{279} The twist is how to define "limited or special jurisdiction;" that ambiguity can be exploited either way. The \textit{Miller} majority also quotes Justice Story, which proves the point. \textit{See Miller}, 78 U.S. at 299-300.

\textsuperscript{280} \textit{See id.} at 308.

\textsuperscript{281} \textit{See id.} at 302.

\textsuperscript{282} \textit{See id.} at 322 (Field, J., dissenting).

\textsuperscript{283} \textit{See id.} at 162.

\textsuperscript{284} 85 U.S. (18 Wall.) 156 (1873).

\textsuperscript{285} \textit{See id.} at 162.

\textsuperscript{286} 94 U.S. 274 (1876).
in the court. Justice Field found this refusal to allow a defense fatal and ruled that the property transfer was invalid.

This may seem fairly obvious today. Seizure of one's property by a court who refuses to allow a defense of that property should be invalid, shouldn't it? It certainly seemed so to the five Justices who went along with Field. But for Justices Miller, Bradley, and Hunt, it turned the Confiscation Act on its head. The Act did not provide for elaborate opportunities to respond to charges. Its purpose was to "insure the speedy termination of the present rebellion." If the property was owned by or being used by one who supported the Confederacy, it was subject to seizure under the ex parte order of the President of the United States or his or her designee. No formal opportunities to respond to the charges were built into the Act. This was a war measure, designed to cut off the supply of money and other economic support to the Confederacy, not a routine eminent domain action.

In spite of Windsor, the niceties of notice were not always dear to Justice Field. In Ludlow v. Ramsey, decided the same term as Miller and Tyler, Field supported the majority in confiscation of a rebel's property. Confederate sympathizer J.G. Ramsey owned considerable property in Knoxville, Tennessee. When union troops entered Tennessee, Ramsey fled behind confederate lines. One Cynthia White proceeded to attach a large piece of Ramsey's land to satisfy a $300 debt. The Tennessee attachment statute allowed seizure "after action for any cause has been brought," and provided for notice of the attachment by publication. Since Ramsey was behind enemy lines, he did not see the publication and his property was sold. The Supreme Court, including Field, upheld the sale. The Court found Ramsey's absence a "voluntary" one.

On the one hand, Ludlow and Windsor are easy to distinguish. In Ludlow, the property owner was a rebel who removed himself from the territory and thus did not see the publication. In Windsor, the property owner tried to present a defense and was refused access to the court. But what is the difference between a person who goes behind enemy lines, and thus fails to see notice of his property being seized, and one who

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287 See id. at 276.
288 See id. at 283-84.
290 78 U.S. (11 Wall.) 581 (1870).
291 See id. at 589.
292 See id.
293 See id. at 582.
294 See id. at 589.
295 See id.
goes on holiday to Europe for six months, or moves to California as did Marcus Neff? How is Ramsey different from Field’s burglar or murderer in Miller, whose property was confiscated before the criminal was indicted? All the absences are voluntary, yet in Ludlow, Field would uphold the forced sale, and later, in Pennoyer, he would strike it down.

In 1870, the Court again interpreted the Tennessee attachment statute in Cooper v. Reynolds. Cooper is important to understanding Pennoyer, decided seven years later. Field dissented without opinion in Cooper, but in several later decisions he explained the reasons for his dissent. Cooper involved a suit for trespass and false imprisonment in which the property of Reynolds was attached to satisfy a $25,000 claim. The statute allowed service of process by publication in lieu of personal service when the defendant was absent from the state or failed to appear for other reasons. Tennessee statutes also provided that attachment should occur “after action for any cause has been brought, and either before or after judgment.” The writ of attachment was sworn out the same day suit was filed, and this failure to delay attachment until “after action for any cause” was one basis for Reynolds’s appeal. With Field in sole dissent, Justice Miller held that “[w]hether the writ should have been issued simultaneously with the institution of the suit, or at some other state of its progress, cannot be a question of jurisdiction.”

By now the reader should know why Field dissented from this view, without having to see his own words. Not only, at least arguably, was there not strict statutory compliance, as the writ was sworn out the same day suit was filed (and thus not “after” the cause of action was brought), but Field’s views on the presumption of jurisdictional validity differed from his peers. At the same time, he heartily endorsed what he saw as the two basic premises of the majority in Cooper, namely that judgments based on attachment could only be executed upon up to the value of the

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297 77 U.S. (10 Wall.) 308 (1870).
298 See Pennoyer v. Neff, 95 U.S. 714, 726 (1877) (“The writer of the present opinion considered that some of the objections to the preliminary proceedings in the attachment suit were well taken, and therefore dissented from the judgment of the court”).
299 See Cooper, 77 U.S. at 310.
300 See id. at 309-10.
301 Id. at 309.
302 See id. at 315.
303 Id. at 320.
attached property and that if the defendant owned no property to attach, the court's jurisdiction would cease.\textsuperscript{304}

Neither the \textit{Cooper} majority nor Field in his subsequent discussions of the case even mentions the most important element of the Tennessee statute as it relates to \textit{Pennoyer}, namely that the statute allowed attachment either before or \textit{after} judgment.\textsuperscript{305} The challenge to \textit{Cooper} dealt with attachment the same day suit was filed, when the Tennessee statute required attachment "after action for any cause has been brought."\textsuperscript{306} There is no discussion in the case about the validity of attachment after judgment, other than Justice Miller's clear comments, quoted above, that the time of an attachment writ "cannot be a question of jurisdiction."\textsuperscript{307} It is impossible to reconcile \textit{Cooper}'s pronouncements on the timing of attachment with \textit{Pennoyer}'s, seven years later. Something else must have occurred to explain the shift. As we have seen, the allowance of attachment after judgment was common statutory language, not just in Oregon where Judge Deady found nothing unusual about it, but throughout the country. But if it was so common, how did Field persuade his colleagues that it was a novelty in \textit{Pennoyer}? As we shall see, he did this by mixing together seizure requirements from admiralty law with actual notice requirements from in personam jurisdiction. \textit{Galpin v. Page},\textsuperscript{308} a case decided by Field four years before \textit{Pennoyer}, and three years after \textit{Cooper}, best illustrates how this was accomplished.

\textit{Galpin v. Page}\textsuperscript{309} is the best precursor to \textit{Pennoyer} that we have. Field was involved in the original case while on the California Supreme Court in 1857,\textsuperscript{310} wrote a circuit court opinion on a companion case in 1865,\textsuperscript{311} and later wrote the United States Supreme Court opinion in 1873.\textsuperscript{312} Finally, he wrote the follow-up opinion on remand in 1874 while sitting as a Ninth Circuit judge in California.\textsuperscript{313} Not only were Field's 1873 Supreme Court and 1874 circuit court opinions different in tone and approach, the two opinions would later be used by both sides in

\textsuperscript{304} In later cases, Field discussed his \textit{Cooper} dissent. \textit{See} Freeman v. Alderson, 119 U.S. 185, 188-89 (1886); \textit{Pennoyer v. Neff}, 95 U.S. 714, 724-26 (1877).

\textsuperscript{305} \textit{See} \textit{Cooper}, 77 U.S. at 309-11.

\textsuperscript{306} \textit{See id.} at 309.

\textsuperscript{307} \textit{See id.} at 320. Justice Miller also stated, "[b]ut when the writ has been issued, the property seized, and that property been condemned and sold, we cannot hold that the court had no jurisdiction for want of a sufficient publication of notice." \textit{Id.} at 319.

\textsuperscript{308} 85 U.S. (18 Wall.) 350 (1873).

\textsuperscript{309} \textit{See id.}

\textsuperscript{310} \textit{See} \textit{Gray v. Palmer}, 9 Cal. 616 (1858).

\textsuperscript{311} \textit{See} \textit{Gray v. Larrimore}, 10 F. Cas. 1025 (C.C.D. Cal. 1865) (No. 5721).

\textsuperscript{312} \textit{See} \textit{Galpin v. Page}, 85 U.S. (18 Wall.) 350 (1873).

\textsuperscript{313} \textit{See} \textit{Galpin v. Page}, 9 F. Cas. 1126 (C.C.D. Cal. 1874) (No. 5206).
Pennoyer to support their respective positions. Judge Deady quoted both the Galpin circuit court and Supreme Court opinions,314 lawyers for both Neff and Pennoyer used Galpin,315 and Justice Hunt in his Pennoyer dissent cited the Galpin Supreme Court opinion in support of his view.316 There is indication in Justice Hunt's dissent that Justice Field's original draft of Pennoyer also referred to Galpin,317 but there is no mention of Galpin in Field's final Pennoyer opinion. Thus, Galpin not only gives us Field's most succinct views of jurisdiction before Pennoyer, it was deemed crucial by all parties to the Pennoyer decision.

The story in Galpin was a sad one of fraud and deceit. It is also exceptionally complex, but unraveling that complexity is imperative if one hopes to understand the case. Franklin Gray died intestate in New York in 1853, leaving a wife, Matilda, and infant daughter, Franklina.318 Gray owned a large amount of real estate in and around San Francisco, valued at around $237,000.319 Under New York and California law, the wife and daughter shared equally in the estate.320 A California probate court appointed J.C. Palmer and C.J. Eaton as administrators of Franklin's estate in January 1854.321 In February 1854, Franklin's brother William sued Palmer, Eaton, Matilda, and Franklina in California state court alleging that he had been partners with Franklin and that the California land constituted partnership property.322 The probate court appointed a guardian ad litem for Franklina in June 1854.323 In January 1855, Eaton resigned as administrator of Franklin's estate, and in April 1855, Eaton also sued Palmer and others, alleging his own partnership with Frank-

314 Judge Deady cites the Galpin Supreme Court opinion in Neff v. Pennoyer, 17 F. Cas. 1279, 1281, 1288 (C.C.D. Or. 1875) (No. 10,083). Deady also cites the Galpin circuit court opinion in Neff, 17 F. Cas. at 1281, 1283, 1284, 1289.
315 See id. at 1281, 1283, 1288.
317 Justice Hunt stated: "The case of Galpin v. Page... is cited in hostility to the views I have expressed. There may be general expressions which will justify this suggestion, but the judgment is in harmony with those principles." Id. at 743-44 (Hunt, J., dissenting).
319 See Gray v. Brignardello, 68 U.S. (1 Wall.) 627, 627-28 (1863). One can search in vain through the Galpin v. Page sequence of opinions for a clear rendering of the underlying factual situation. Those facts can be pieced together by branching off into the other actions brought by Matilda Gray to recover her property. See, e.g., Gray v. Larrimore, 10 F. Cas. 1025 (C.C.D. Cal. 1865) (No. 5721); Brignardello, 68 U.S. (1 Wall.) 627; Eaton v. Palmer, 11 Cal. 341 (1858); Gray v. Eaton, 5 Cal. 448 (1855).
320 See Brignardello, 68 U.S. at 631.
321 See id. at 628.
322 See id.
323 See id.
In October 1855, the Eaton and Gray actions were consolidated in state court. There was no written proof of either partnership agreement.

California law provided for service by publication under court order if a defendant or an indispensable party to litigation was absent from the state. Notice to Franklina and her mother, who were all the while in New York, was allegedly made by publication but never under order of the court. In October 1855, the state court upheld both partnerships, finding that they covered all real and personal property owned by Franklin. Further, the court ruled that one-fourth of all Franklin's property belonged to Eaton under the terms of their partnership, that one-third of the remaining three-fourths belonged to William, and the balance to Matilda and Franklina. All of Franklin's debts were to be paid before any proceeds could be distributed to the estate.

The court then appointed James Thornton as commissioner to take account of all partnership transactions and to prepare a report for the probate court. It was alleged that Franklin Gray spent money from the partnership as freely as if it were his own and that he was deeply in debt to the partnership when he died. Thornton prepared a report to the court in March 1856 that stated that Franklin Gray's debts to the partnership exceeded all his assets by over $3,500. Without waiting for approval or order of the probate court, Thornton proceeded to seize and sell Gray's California property to various buyers. The sale yielded only about $70,000, all of which went to pay off debts allegedly owed by Franklin to C.J. Eaton and William Gray. As a result, Matilda and

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324 See id.
325 See id.
327 See id. at 354.
328 See id.
329 See Brignardello, 68 U.S. at 629.
330 See Gray v. Larrimore, 10 F. Cas. 1025, 1027 (C.C.D. Cal. 1865) (No. 5721).
331 See id.
332 See Brignardello, 68 U.S. at 628.
333 See Larrimore, 10 F. Cas. at 1027.
334 See id.
335 See Brignardello, 68 U.S. at 635. Of course, Thornton could not do this on his own. He presumably corralled a foolish or corrupt San Francisco sheriff who actually sold the property without approval of the probate court.
336 See id. at 629. Remember to multiply these dollars by at least a factor of 10 for 1997 conversion. On that basis, the buyers obtained property valued at about $2.3 million for $700,000.
Franklina were left with nothing, not even enough to pay for Franklin's tombstone. 337

In 1857, Matilda appealed to the California Supreme Court. The court reversed, finding that Eaton failed to prove service by publication on Franklina and her mother and also that there was no evidence that a partnership between William and Franklin Gray ever existed. 338 The court remanded the case for a new trial. By this time, the property was in possession of various parties. For unknown reasons—perhaps because Matilda was without funds and could not retain California counsel—the state court case lay dormant for over a year. It was finally dismissed in 1859. 339

In 1860, Matilda found a lawyer to take her case: Philip G. Galpin. He sued a man named Brignardello in federal court for ejectment from a parcel of the original Franklin lands outside San Francisco. 340 Matilda and Franklina lost in the circuit court, which found Brignardello a bona fide purchaser who had taken the land under a valid court order. 341 On appeal to the United States Supreme Court in 1863, Justice Davis spoke for the Court in finding the sale to Brignardello invalid. 342 The reasoning was simple. Brignardello purchased on the authority of Probate Commissioner Thornton’s report in May 1856. At that time, the probate court had not approved Thornton’s report or authorized the sale of any of Gray’s property, including this parcel. 343 Purchasers at a judicial sale are only protected when that sale is under order of a court. 344 Here, the sale was without such authority. The purchasers of the various properties, including Brignardello, acquired no title as a result of these transactions and no rights against the heirs of Franklin Gray. 345 Justice Davis remanded the case for a new trial. That new trial was presided over in 1865 by Stephen Field in circuit court, and Field ordered the Brignardello property returned to Matilda and Franklina. 346

337 See id. at 630.
339 See Larrimore, 10 F. Cas. at 1028.
340 See Brignardello, 68 U.S. at 631.
341 See id. at 631-32.
342 See id. at 637. Note that the Gray v. Brignardello Supreme Court opinion was decided in December 1863, the same month that Justice Field took his seat on the United States Supreme Court. Given Stephen Field’s wide range of contacts in San Francisco at the time, it is likely that he personally knew the principals in these cases.
343 See id. at 635.
344 See id. at 636.
345 See id.
346 See Gray v. Larrimore, 10 F. Cas. 1025, 1031 (C.C.D. Cal. 1865) (No. 5721).
Matilda then assigned her rights to the rest of the property to her lawyer, Philip Galpin; perhaps this was to pay outstanding fees. Galpin filed another federal court ejectment action, this time against Gwyn Page—attorney for William Gray in the original action and now owner of most of the rest of Franklin Gray’s land. Galpin lost at the circuit court level, and appealed to the United States Supreme Court. There, Justice Field in 1873 spoke for the Court in reversing the circuit court, finding that Page took the land with full knowledge of the defects in jurisdiction over Matilda and Franklin. Field remanded the case for a new trial. On circuit court remand in 1874, Field also heard the case, leading to the two Galpin opinions by Field.

The interesting thing about Galpin is the restraint shown by Field in discussing jurisdiction in the 1873 United States Supreme Court opinion, compared with his more expansive approach the next year in the Ninth Circuit. His circuit court opinion discusses two of the cases he would later cite in Pennoyer, neither of which he mentioned in the Supreme Court Galpin opinion.

The Supreme Court Galpin opinion is easy to understand from Field’s perspective, but a bit more difficult to reconcile for the rest of the Court. It is true that the underlying statute requiring notice was not followed but the trial court still upheld jurisdiction. So far, this is no different from Cooper. However, on appeal in Galpin, the California Supreme Court struck the original judgment for lack of jurisdiction, whereas in Cooper the original case never went to the Tennessee Supreme Court. Rather, a separate action was brought by Reynolds against Cooper in federal court challenging the original court’s jurisdiction, and it was this collateral attack that was heard by the United States Supreme Court.

In the Supreme Court Galpin opinion, Justice Field held that when constructive service of process by publication is substituted for personal service, “every principle of justice exacts a strict and literal compliance with the statutory provisions.” Field also had his way on the presumption of jurisdictional validity, finding that the traditional presump-
tation of jurisdiction was not available when jurisdiction over the person was acquired by publication. Of course, this was a sleight of hand on Field’s part. His entire discussion on presumptions in *Galpin* assumes that the court was seeking in personam jurisdiction over Franklina and her mother. If that were the case, there was abundant authority that service by publication required strict adherence to the underlying statute. In fact, the jurisdiction sought involved the rights to property: classic in rem or quasi in rem jurisdiction. Only the ex parte appointment of a guardian ad litem for Franklina might be seen as an attempt at in personam jurisdiction over her, and even that is dubious.

Field, however, played up what clearly was a shameful attempt by Gray’s brother, his lawyers, and the court to steal property from an absent widow and child. The power of a state to dispose of property within its territory was not questioned. Instead, it was affirmed, with Field citing Story’s *Conflict of Laws* to that effect. In the circuit court opinion, Field went so far as to state that “over property and persons within those limits the authority of the state is supreme, except as restrained by the federal constitution.” Of course, as of then, no court had ever given content to such asserted federal restrictions. It was this passage from *Galpin* that Judge Deady would quote in *Neff v. Pennoyer* to support his position that had Oregon statutes been properly followed, Mitchell’s judgment against Neff would have been upheld.

The extent of notice required for attachment jurisdiction was not discussed in the Supreme Court opinion, because the underlying case was portrayed by Field as solely involving in personam jurisdiction over Franklina and Matilda. In the circuit court, Field posited that the effort to dispose of the California property was an in rem proceeding and that only the appointment of Franklina’s guardian exercised improper jurisdiction over the person. However, Field inferred that the in rem proceeding was also invalid, not just because service by publication did not follow the statute, but because the property was not seized at the onset of litigation. None of this was mentioned in the Supreme Court opinion.

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355 See id. at 370.
356 Field cites numerous cases to that effect. See id. at 369-71. In *Galpin*, Field’s sleight of hand focus on personal rather than in rem jurisdiction continues to influence current analyses of *Galpin*. See Borchers, *Pennoyer’s Limited Legacy: A Reply to Professor Oakley*, supra note 3, at 115.
357 See *Galpin*, 85 U.S. at 367 (citing JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 539 (Hilliard Gray & Co. 1834)).
359 See *Neff v. Pennoyer*, 17 F. Cas. 1279, 1281 (C.C.D. Or. 1875) (No. 10,083).
360 See *Galpin*, 9 F. Cas. at 1138.
In the circuit court opinion, Field divided in rem suits into four classes: (1) those directed against particular property and valid against the whole world, as in admiralty; (2) those that determine the status of particular property and persons only, as in probate on a will; (3) attachment suits as against debtors; and (4) those that seek to dispose of property or an interest therein as in a conveyance of real property.\footnote{See id.}

Field stated that some kind of notice is needed for all in rem actions. For the first two types, constructive notice is given by seizure of the property itself and no further “actual notice” is required.\footnote{See id.} We know that this is a correct portrayal of notice in admiralty actions. For the last two types, Field posited that if the property was not seized at the onset of litigation, as was required in admiralty, there was no constructive notice and the court should proceed as if in personam jurisdiction were needed. Field cited only one case for this novel approach, \textit{Woodruff v. Taylor},\footnote{20 Vt. 65 (1847).} a state court decision from Vermont. In fact, \textit{Woodruff} was not applicable, as it did not address constructive notice by publication. Yet with this broad statement in his circuit opinion in \textit{Galpin}, Field swept away by implication all statutes allowing for service by publication against absent debtors, with seizure before or after judgment.

Field also ignored another issue raised by Page, that even if the judgment against Franklina were void, the one against her mother was valid. He did not even mention the service by publication against Matilda in the Supreme Court opinion, perhaps because he feared not gaining the support of his peers on that point. Luckily, they overlooked it. When it was raised on circuit, Field simply stated that “there was but one decree,” and the lack of jurisdiction over Franklina affected all aspects of the consolidated suits.\footnote{See \textit{Galpin}, 9 F. Cas. at 1139. Today, this would be characterized as an indispensable party argument under Federal Rule of Civil Procedure 19.}

It should be apparent that Justice Field could slice the onion paper-thin, or in chunks, as he saw fit. His \textit{Galpin} analysis in the circuit court sets the stage for \textit{Pennoyer} by requiring seizure as a prerequisite to attachment jurisdiction, just as was required in admiralty. But in admiralty, seizure imparted notice, not just because the vessel was always presumed in possession of her owners, but because she maintained her own identity. In attachment jurisdiction, seizure alone had never served to impart notice. Every state had elaborate requirements on how constructive notice, usually by publication, would be given to absent debtors. By fusing admiralty’s requirement for seizure with the in personam require-
ment of notice, Field was able in Galpin to combine two of his favorite themes: an expansive judiciary that shielded citizens from thieves and villains, and protection of private property. In Pennoyer, Field would add a third theme just for good measure, namely the use of due process to protect economic rights.

III. Pennoyer v. Neff in the Supreme Court

By now, the actual opinion is somewhat anti-climactic. With the backdrop given, Stephen Field’s text is quite predictable. He used his talent at patching together bits and pieces of various concepts to stitch a quilt that cannot bear close scrutiny. In particular, he focused on the original Mitchell v. Neff judgment as an attempt at in personam jurisdiction, and then found that attempt invalid. He fails to mention that Judge Deady and Sylvester Pennoyer both conceded that there was no personal jurisdiction at the outset of the district court case and subsequent opinion.365

Early in Field’s Supreme Court opinion, we learn why he felt compelled to take this tortured approach. We also learn why the majority could support the lack of jurisdiction in Galpin v. Page366 based on non-compliance with the California statute, yet find this same non-compliance not subject to judicial review in Cooper v. Reynolds.367 It was indeed because Cooper was a collateral attack with no challenge to the statutory compliance ever made on direct appeal within Tennessee state courts. This is clear from the beginning of Field’s opinion.

He starts by summarizing Neff’s four district court arguments. He begins by detailing the two that Judge Deady found so persuasive, namely the lack of evidence on the record that Mitchell made reasonable efforts to locate Neff, and the signing of the affidavit by the newspaper

365 See Neff v. Pennoyer, 17 F. Cas. 1279, 1280-81 (C.C.D. Or. 1875) (No. 10,083). In fact, Judge Deady cites the very authorities that Field cites to support the lack of in personam jurisdiction. See D’Arcy v. Ketchum, 52 U.S. (11 How.) 165, 174 (1850); STORY, supra note 357, § 539. See also Oregon Code of Civil Procedure § 506, which at the time stated:

No natural person is subject to the jurisdiction of a court of this state, unless he appears in the court, or be found within the state, or be a resident thereof, or have property therein; and in the last case only to the extent of such property at the time the jurisdiction attached.

Neff, 17 F. Cas. at 1281 (citation omitted). Deady went on to state: “Neither is it claimed by the defendant that this judgment had any other or greater effect than to enable the plaintiff therein to subject this property to the payment of the debt owed him by Neff.” Id.

366 85 U.S. (18 Wall.) 350 (1873).

367 77 U.S. (10 Wall.) 308 (1870).
editor rather than the printer. Field states quite clearly what generations have read but perhaps not fully grasped the significance of—that:

There is some difference of opinion among the members of this court as to the rulings upon these alleged defects. The majority are of the opinion that inasmuch as the statute requires, for an order by publication, that certain facts shall appear by affidavit to the satisfaction of the court or judge, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally. The majority of the court are also of the opinion that the provision of the statute requiring proof of the publication in a newspaper to be made by the “affidavit of the printer, or his foreman or his principal clerk,” is satisfied when the affidavit is made by the editor of the paper... If, therefore, we were confined to the rulings of the court below upon the defects in the affidavits mentioned, we should be unable to uphold its decision.

While Field does not explicitly state his own views on these arguments, I think that by now most will agree that the member of the Court who agreed with Deady and created the difference of opinion he refers to was himself. Field would have affirmed Judge Deady point for point, were the decision his alone to make. After all, this is the same man who would have had the marshall in Miller v. United States remove the stock certificates from his left hand and pass them to his right hand as clear demonstration that he now held them under order of the court, rather than just as a result of preliminary seizure.

Now we imagine Stephen Field in his study, trying to decide what to do about this case. He is the logical choice to write the opinion—the case arose from his circuit and he is the most familiar with Oregon land laws. His great friend Matthew Deady overturned a judgment on procedural details that Field well understands. He knows that the original judgment was probably the result of collusion between scoundrels, and he

369 78 U.S. (11 Wall.) 268 (1870).
370 In fairness, Field contended in Miller that the marshall's affidavit did not clearly confirm that he actually had the stock certificates in hand after the preliminary seizure, but only that he had served “notice of said seizure personally upon the vice-president of one company, and upon the president of the other.” See id. at 295 (Field, J., dissenting). The majority believed that it was irrelevant whether the marshall had the stocks in hand or not. If he did, to require, as Field would have, that he shift the stocks from one hand to the other was foolish. Even if the marshall did not possess the actual certificates, his seizure still complied with the law, as “seizure may be either actual or constructive.” Id. at 296 (Field, J., dissenting). Since a corporation holds its stock as a quasi-trustee for its stockholders, service of an attachment on the corporate officers “binds the debt or the stock in the hands of the garnishee, from the time of service.” Id. at 297 (Field, J., dissenting). To require the marshall to return to the officers to reaffirm the seizure, now under order of the court, was unnecessary.
would like to use the power of his Court to strike it down. He also knows that his peers will not support a resolution based solely on strict statutory construction, given their actions in Miller, Cooper, and Tyler. So what does he do? Like so many judges before and after him, he crafts an opinion that makes the remarkable seem familiar, and the sharp turn seem only a slight curve.

He could not focus on the issue of insufficient specificity in the original Mitchell affidavit on money damages owed. That technical detail had not even persuaded Judge Deady, so it was a hopeless route in the Supreme Court. That left him with Neff's first and original argument that actual seizure was required at the commencement of legal proceedings or before judgment. Neff's attorneys artfully used Field's own language from the Galpin circuit court opinion to support this view in the district court. This created a conundrum for Field. How could he focus on the timing of seizure without challenging the essential right of a state to control property within its borders? Field surely knew that a direct and explicit challenge to such basic power of a sovereign state would be going too far. After all, he was engaged in a long-term struggle with the Court on that very issue, the latest manifestation of which was Munn v. Illinois. In Munn, the majority stated that a person had "no property, no vested interest, in any rule of the common law." Rules governing property could be changed "at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations."

Field took a bold approach. He apparently affirmed the right of a state to control property within its borders, using all the comfortable authorities that everyone knew. He started with that old favorite, D'Arcy v. Ketchum, to establish the principle of territorial limitations of each state. Of course in D'Arcy, the absent defendant owned no property in New York, and the case was solely about in personam jurisdiction. Field neglected to remind the Court about that point. He then moved on to Justice Story's Conflict of Laws, paraphrasing Story's two well-

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[372] 94 U.S. 113 (1876).
[373] Id. at 134.
[374] Id. Field's Munn dissent quoted Story: "That government, can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint." Id. (Field, J., dissenting) (quoting Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829)). Story was just as distrustful of legislatures as was Field, having served in Congress for the fall 1808 to spring 1809 term and in the Massachusetts Legislature twice. For an excellent discussion of Story's views in this area, see generally R. Kent Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic (1985).
established "principles of public law": First, "every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and second, "no state can exercise direct jurisdiction and authority over persons or property without its territory." So far, pretty routine stuff.

Field then used a number of cases to make his point about a state's inability to exert in personam jurisdiction over a person beyond its borders. The problem with this approach is a simple one. It is irrelevant. Not only was there no dispute between Neff and Pennoyer on this point (despite Field's characterization), but the case law was also quite clear. It did not need reiteration. The issue was whether Mitchell's attachment judgment on Neff's Oregon property was valid, not whether Oregon could reach out beyond its borders to bind Neff personally at some undisclosed California location. Nevertheless, Field discussed the leading in personam cases at length, even though most do not address either the attachment issue or the relevance of timing. He also takes language out of context in many of these cases, perhaps in an effort to make them stand for something more than they do.

He started with Picquet v. Swan, citing it for the proposition that a state cannot render an in personam judgment against a person outside its territory. However, in Picquet, Justice Story also took great pains to affirm the right of a state to exercise jurisdiction over an absent debtor's property. In fact, Story made it clear that the legislature possessed the power to determine how that property would be disposed and that the court's role was simply to see that the statute was followed. Picquet makes no mention of timing being a relevant subject for in rem jurisdiction. Field omitted all this in Pennoyer.

Field then moved on to Boswell's Lessee v. Otis, implying that it upheld the notion that a personal judgment could not be rendered simply

\[377\] See id. at 722.
\[378\] Id. These statements are taken almost verbatim from sections 18 and 20 of Story, supra note 357, except Story uses "nation" rather than "state."
\[379\] 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134).
\[380\] See Pennoyer, 95 U.S. at 724.
\[381\] See Picquet, 19 F. Cas. at 614, where Justice Story stated: If the state jurisprudence authorizes its own courts to take cognizance of suits against non-residents, by summoning their tenants, attorneys [sic], or agents, or attaching their property, whether it be a farm or a debt, or a glove, or a chip, it is not for us to say, that such legislation may not be rightful, and bind the state courts.
\[382\] Id. In Picquet, Story found no jurisdiction because the absent debtor was a United States citizen but a long-term resident of France, and the Massachusetts statute did not provide for how to deal with that situation. See id.
\[383\] 50 U.S. (9 How.) 336 (1850).
by publication. That was a mischaracterization of the *Boswell* holding, which in fact affirmed the very position that Sylvester Pennoyer would later take. In his discussion of *Boswell*, Field failed to explain that *Boswell* involved an in rem judgment against a number of properties owned by absent debtors. These properties were not attached and sold until after judgment. The only challenge was to a single lot to which the defendant-debtors did not themselves acquire title until after the judgment and original execution. The *Boswell* Court found nothing wrong with the seizure and sale post-judgment of the properties owned by the debtors during the action, but only with the seizure of after-acquired property. *Boswell* in fact supports Sylvester Pennoyer’s view of jurisdiction—not the position taken by Marcus Neff.

*Cooper v. Reynolds* was next covered, from which the reader will recall Field dissented in 1870. Now he embraced its two main points, that in rem judgments have no effect beyond the property attached, and that a court cannot proceed unless the defendant owns property on which to levy the writ of attachment. He did not remind the Court that the

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383 See *Pennoyer*, 95 U.S. at 724 (citing *Boswell’s Lessee*, 50 U.S. (9 How.) 336 (1850)). The *Boswell’s Lessee* case was an ejectment action brought in federal court by Boswell, a citizen of Kentucky, against Otis and others, citizens of Ohio. The land in dispute was located in Ohio. The case came to the United States Supreme Court on appeal from the Circuit Court of the United States for Ohio.

384 See *Boswell’s Lessee*, 50 U.S. at 337.

385 The original Ohio judgment against Boswell was rendered in 1826. He did not acquire title to the property involved in this ejectment action until 1831. See *id.* at 337. *Boswell’s Lessee* states:

Admit that a special jurisdiction was acquired against all the other lots, yet number seven was in no way connected with them. It was not named in the bill, nor was there any step taken in relation to it, until it was levied on by the sheriff to satisfy the general decree. It was not within any one of the categories named in the statute. Until long after the decree, the title to it was not obtained by defendants. If it can be made subject to such a procedure, then the special jurisdiction given by the statute is converted, by construction, into a general proceeding against the property of non-residents by a mere publication of notice.

*Id.* at 349. In addition:

The property of an individual is subject, in a certain sense, to the law of the State in which it is situated. It is liable for taxes and to such special proceedings against it as the law shall authorize. An attachment may be laid upon it, and it may be sold in satisfaction of an established claim. And the legislature may, perhaps, subject other lands to the payment of the judgment on the attachment after the sale of the lands first attached. But no such proceeding is authorized by the act under which this procedure was had.

*Id.*

386 77 U.S. (10 Wall.) 308 (1870).

387 See *Pennoyer*, 95 U.S. at 724-25 (discussing *Cooper*).
Tennessee statute involved in Cooper allowed seizure and sale after judgment, and that the majority upheld this provision.388

Field also touched on the full faith and credit389 afforded to sister-sovereign judgments.390 Had Field not been using Pennoyer to assert his Fourteenth Amendment agenda, he could have used full faith and credit as a singular basis for the Pennoyer opinion. After all, Neff sought relief in federal court from a state court judgment, and the Full Faith and Credit Act of 1790 applies to both state and federal courts.391 In Pennoyer, Field used Lafayette Insurance Co. v. French392 for the propositions that an enforcing court may always inquire into the jurisdiction of the rendering court, notice of a suit is required before one can be personally bound, and persons in one state are protected from the jurisdiction of another state’s courts.393 This was a correct statement of Lafayette’s holding but did not tell the whole story. The case involved an Ohio judgment against an Indiana insurer, Lafayette, with notice of the suit being served on Lafayette’s Ohio agent.394 French sought enforcement of the Ohio judgment in Indiana courts. On appeal, the United States Supreme Court upheld in personam jurisdiction over Lafayette, based on the valid service on its Ohio representative.395 Attachment of property was not involved.396

Field again raised full faith and credit by discussing Thompson v. Whitman,397 about which he stated, “[t]his whole subject has been very

388 The Attachment Code of Tennessee Section 3455 provided: “Any person having a debt or demand due at the commencement of an action; or a plaintiff after action for any cause has been brought, and either before or after judgment, may sue out an attachment at law or in equity against the property of a debtor or defendant.” Cooper, 77 U.S. at 309.

389 The Full Faith and Credit Clause of the United States Constitution states: “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.

390 See Pennoyer, 95 U.S. at 729-30.

391 See Full Faith and Credit Act of May 26, 1790, 1 Stat. 122 (1790). The Act reads, in part: “The said records and judicial proceedings authenticated as aforesaid, shall 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.” Id.

392 59 U.S. (18 How.) 404 (1855).

393 59 U.S. (18 How.) 405 (1855).

394 See Pennoyer, 95 U.S. at 730.

395 See Lafayette, 59 U.S. at 406.

396 See id. at 408.

397 See id. at 406. In fact, the Lafayette Court even stated: “No question has been made that this judgment would be held binding in the State of Ohio, and would there be satisfied out of any property of the defendants existing in that State.” Id.

398 85 U.S. (18 Wall.) 457 (1873).
fully and learnedly considered." In *Thompson*, Whitman's fishing boat was seized off the New Jersey coast by Thompson, the sheriff of Monmouth County, New Jersey. Thompson alleged that the vessel violated local oyster and clam poaching laws. Whitman, a New York citizen, challenged New Jersey state court jurisdiction in New York federal court. The district court struck down the jurisdiction, as the New Jersey statute required that vessels be seized from within local county waters, and Thompson's had been taken from well offshore. The United States Supreme Court affirmed.

In citing *Thompson*, Field implies that the case holds that in actions involving seizure of property, the property must first be "brought under the control of the court in connection with the process against the person." That is not correct. In fact, the vessel in question had been illegally seized and converted by Sheriff Thompson, and the purpose of the litigation was for Whitman to recover his sloop or the proceeds from its sale. The holding in *Thompson* was only that illegal seizure did not create forfeiture jurisdiction under the applicable statute.

The only case Field discusses that is germane to the issue of attachment timing is the 1850 case of *Webster v. Reid*. There is language in *Webster* that could be construed as supporting the need for attachment before judgment, but it is not essential to the holding. *Webster* involved an attempt by rich Iowans to steal 119,000 acres from the Sac and Fox Indians. The land had been deeded to the Indians by the United States government in 1824, but in 1839 the Iowa territorial legislature took it

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398 See Pennoyer, 95 U.S. at 730 (discussing *Thompson*).
399 See *Thompson*, 85 U.S. at 471.
400 See Pennoyer, 95 U.S. at 730 (discussing *Thompson*).
401 Thompson conceded that the ship had been taken from beyond county waters, but argued that "seizure was continuous in character" and became valid when he entered Monmouth county with the vessel in tow. To this, Justice Bradley said: "A seizure is a single act, and not a continuous fact. Possession, which follows seizure, is continuous. It is the seizure which must be made within the county where the vessel is to be proceeded against and condemned." *Thompson*, 85 U.S. at 470-71.
402 52 U.S. (1 How.) 437 (1850). The original judgment in *Webster* was made by the Iowa Territorial Court before Iowa became a state. Thus, the appeal by Webster from the Iowa court to the United States Supreme Court was proper.
403 For example, the *Webster* Court stated:

These suits were not a proceeding in rem against the land, but were in personam against the owners of it. Whether they all resided within the Territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments.

upon itself to usurp the acreage. It passed a law allowing notice by publication against "[o]wners of the Half-breed [l]ands lying in Lee County" and requiring all who claimed title to the property under the treaty to come forward or lose their land. There was no attempt made to identify the owners of the property nor any effort made to determine if they resided within the territory of Iowa. This was a special act of legislation, not part of the Iowa attachment statute. Two of the three commissioners appointed to oversee the law pocketed the proceeds from the sale of the 119,000 acres.

The Iowa territorial court upheld the sale, and the case was appealed to the United States Supreme Court. There, Justice McLean found it "an extraordinary procedure from its commencement" and reversed the Iowa judgment. Three primary reasons were given. First, the Act under which the land was sold prohibited trial by jury in factual disputes concerning the sale. The court found this provision a violation of the Seventh Amendment, which required that the right to trial by jury be preserved in civil suits where the value in controversy exceeds twenty dollars. Second, the district court erred in overruling Webster's evidence that no publication was in fact made and that the sheriff's sale was fraudulent. Third, the district court erred in refusing to allow Webster to present evidence that he had title to the land, under a chain back to one Na-ma-tau-pas, a Sac Indian.

In Pennoyer, Justice Field cites Justice McLean's 1850 Webster opinion to hold that because there was no personal judgment nor attachment of land until after the judgment, the judgments were void. As we have just seen, that is not an accurate representation of the Webster holding. Had Field wished to use Webster to support his view of the need for attachment before judgment, he would have at least had to distinguish it from Boswell's Lessee, which he failed to do.

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404 See id. at 457.
405 See id.
406 See id. at 459.
407 See id at 459-60.
408 See Webster, 52 U.S. at 460.
409 See id.
410 See id. Webster was also discussed by Justice Bradley in Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 466 (1873). Bradley stated: "The defendant offered to prove that no service had ever been made upon any person in the suits in which judgments were rendered, and no notice by publication as required by the act. This court held that, as there was no service of process, the judgments were nullities." Id.
In his Pennoyer dissent, Justice Hunt chides Justice Field on this apparent ploy. Yet, Webster is the only case Field discusses that could arguably be construed as supporting any requirement of attachment before judgment, even in dicta. As Justice Hunt very directly states,

I have found no case in which it is adjudged that a statute must require a preliminary seizure of such property as necessary to the validity of the proceeding against it, or that there must have been a previous specific lien upon it; that is, I have found no case where such has been the judgment of the court upon facts making necessary the decision of the point.

Justice Hunt also discusses specific statutes from various states, as well as Drake on Attachment, to support his view that states clearly had the power to control real and personal property within their borders and could subject that property to payment of debts justly owed to citizens. Hunt agreed with Judge Deady that whether the property of a non-resident debtor was seized upon commencement of a suit or at some other point was a matter of "municipal regulation only," not constitutional power.

If the reader is anything like me, he or she first saw Justice Hunt's dissent in Pennoyer as a rather quaint, almost foolish portrayal of attachment law. Given our late-twentieth century lens, it was almost impossi-

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413 Commenting on Field's use of Webster as authority on the timing issue, Justice Hunt stated:
The court found abundant reasons, six in number, for refusing to sustain the title thus obtained. The act was apparently an attempt dishonestly to obtain the Indian title, and not intended to give a substitution for a personal service which would be likely, or was reasonably designed, to reach the persons to be affected.

Pennoyer, 95 U.S. at 745 (Hunt, J., dissenting).

414 Id. at 743 (Hunt, J., dissenting). Justice Hunt also cites many cases in which seizure after judgment has been expressly upheld, including Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870), in which the Court stated, "[w]hether the writ 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. If it is, any other error which affected a party's rights, could as well be held to affect the jurisdiction." Cooper, 77 U.S. at 320. Cooper is discussed by Justice Hunt in Pennoyer, 95 U.S. at 744-45 (Hunt, J., dissenting).

415 See Drake, supra note 84.

416 See Pennoyer, 95 U.S. at 737 (Hunt, J., dissenting).

417 Justice Hunt stated:
To say that a sovereign State has the power to ordain that the property of non-residents within its territory may be subjected to the payment of debts due to its citizens, if the property is levied upon at the commencement of a suit, but that it has not such power if the property is levied upon at the end of the suit, is a refinement and a depreciation of a great general principle that, in my judgment, cannot be sustained.

Id. at 738 (Hunt, J., dissenting).
ble to imagine that Justice Hunt’s description could have been remotely accurate as a statement of generally prevailing law. However, as we have seen, Justice Hunt and Judge Deady were absolutely correct in their characterization of traditional attachment law in the United States.

Given the weight of contrary authority, it is amazing that the majority of the Supreme Court could have gone along with Justice Field’s recasting of the rules of attachment jurisdiction. Furthermore, Field’s language implied that he was doing nothing more than reflecting current law. This is perhaps the most startling thing about Pennoyer. The reality of existing attachment law was erased from the legal culture by simply ignoring it, as effectively as any Stalinist effort to erase history in the former Soviet Union. It is a truly remarkable sleight of hand.

My own guess is that Field’s portrayal of the facts as a flawed attempt at personal jurisdiction over an absent debtor, rather than a simple attachment case, misdirected the attention of the Court. Stephen recited, almost ad nauseam, case after case in which in personam jurisdiction over absent defendants was struck down. Yet in most of the cases cited, attachment jurisdiction over the defendant was not an issue. When it was, Field made no effort to distinguish the cited case from the facts of Pennoyer. It is also puzzling that Justice Hunt’s dissent, which did accurately outline existing attachment law, did not capture the attention of the majority.  

See, for example, RESTATEMENT (SECOND) OF JUDGMENTS at 22 (1982), which states: “Historically, the territorial jurisdiction of courts was based upon the presence of a person or thing within the legal boundaries of the government that created the court. Pennoyer v. Neff, 95 U.S. 714 (1877).” Presumably, the RESTATEMENT authors believed that Pennoyer did not create that “history,” but accurately reflected it. In fact, Pennoyer was the first step in destroying the historical notion of “territorial jurisdiction.” See id. Perhaps the majority misunderstood the date Neff acquired title to the Oregon property. Field pointedly stated that Mitchell’s judgment was on February 19, 1866, and that Neff’s patent was not issued until March 19, 1866. See Pennoyer, 95 U.S. at 715-16. The majority may have thought that Neff did not meet the patent requirements until March, 1866. They surely could not have forgotten Stark v. Starrs, 73 U.S. (6 Wall.) 402, 418 (1867), that held property ownership effective when the patent vested. The court had just discussed Stark in United States v. State Bank, 96 U.S. 30, 32 (1877), decided the same term as Pennoyer.  

For example, Justice Field in Pennoyer cited a New York case by the name of Kilbourn v. Woodworth, where a Massachusetts personal judgment against an absent New York debtor was held invalid, but the attachment of his bedstead in Massachusetts was upheld. See id. at 731. It is even arguable that the majority did not understand “seizure” or “attachment” to require actual possession of the property. While Pennoyer is often interpreted to have required actual seizure, Justice Field was always careful to qualify “seizure” by the phrase “or some equivalent act.” See Pennoyer, 95 U.S. at 727. Lending credence to this construction of Pennoyer is Justice Matthews’s opinion in Heidritter v. Elizabeth Oil-
Think now of the swirl of events that preceded this case to the Supreme Court. Think also of the preoccupation of the Court with more complex Fourteenth Amendment cases, which were already beginning to clog the docket. Finally, imagine the near breakdown in civil order from November 1876 until late 1877 caused by the disputed Hayes-Tilden presidential election and the rancor surrounding the electoral commission. In the midst of all this, Justice David Davis resigned his post in March 1877 after being elected by the Illinois Legislature to represent Illinois in the United States Senate. Davis was replaced by Justice John Marshall Harlan in November 1877, the month after Pennoyer was decided. Surely, Field’s colleagues had more important things on their minds than a trivial Oregon land case. But in the end, we can only speculate on why the majority went along with Field. The only thing certain is that he was dead wrong in his account of existing American attachment law.

Finally, no discussion of Pennoyer would be complete without an analysis of its reference to due process as a requirement of jurisdiction. Given the spotlight put on this aspect of the case by historians, the substance of Field’s due process argument is quite slender. Field focused on the Fourteenth Amendment as a means to challenge the enforcement of judgments when those judgments were rendered by a court lacking either subject matter or personal jurisdiction over the parties. One should note that because the full faith and credit rationale was all that was necessary for the result in Pennoyer, the due process discussion was technically dictum. Perhaps that made it more acceptable to colleagues who resisted finding Fourteenth Amendment protections of various rights in

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\textit{Cloth Co.}, 112 U.S. 294 (1884), in which he interprets Pennoyer only to require the “public exercise of dominion over (property) for the purposes of the suit.” See Heidritter, 112 U.S. at 302. Presumably, this dominion could be exercised by simply naming the land in the complaint.

\textit{Davidson v. New Orleans}, 96 U.S. 97 (1877), decided the same term as Pennoyer:

\textit{Davidson}, 96 U.S. at 104.

\textit{Pennoyer} discuss due process and two of those are disclaimers on what he does \textit{not} mean, for example, that a state may not authorize proceedings to determine the status of a party, state controls on partnerships and contracts, and so on. See \textit{Pennoyer}, 95 U.S. at 734-35.

\textit{See id.} at 733.
previous cases. Dictum or not, the language was to have substantial ef-
fic in subsequent cases.

By inserting a discussion on due process, Field accomplished two
objectives. First, he effectively linked the jurisdictional requirements of
the Due Process Clause with those of the Full Faith and Credit Clause. This meant that a judgment rendered without jurisdiction was not only
unenforceable in a sister state or in a federal court, but it could not be en-
forced in the rendering state either. Second, Pennoyer gave Field a
somewhat neutral opportunity to discuss due process, and he was a mas-
ter at planting seeds that might yield later harvest.

In 1877, the parameters of the Fourteenth Amendment were still
being defined. In particular, the shape of the Due Process Clause was
fluid and subject to varied interpretation. As we have seen, Justice Field
was often at odds with his colleagues on the breadth of economic rights
sheltered by the due process umbrella. Justice Samuel Miller had sug-
gested in Davidson v. New Orleans that the Due Process Clause of the
Fourteenth Amendment should be defined by the “gradual process of ju-
dicial inclusion and exclusion.” Field used Pennoyer to accelerate the
development of that “gradual process,” in a context that his colleagues
might least expect.

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426 While the Fourteenth Amendment had not been ratified when Mitchell first ob-
tained his judgment against Neff’s property in 1866, Field’s focus on the enforcement of
that judgment made the relevant time frame the present, or 1877.

427 Justice Field stated:

Since the adoption of the Fourteenth Amendment to the Federal Constitu-
tion, the validity of such judgments may be directly questioned, and their
enforcement in the State resisted, on the ground that proceedings in a court
of justice to determine the personal rights and obligations of parties over
whom the court has no jurisdiction do not constitute due process of law.

Pennoyer, 95 U.S. at 733. For a comprehensive discussion of this point, see Ralph U.
Whitten, The Constitutional Limitations on State-Court Jurisdiction: A Historical-
Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part
One), 14 CREIGHTON L. REV. 499, 504-06 (1981). See also Patrick J. Borchers, Juris-
dictional Pragmatism: International Shoe’s Half-Buried Legacy, 28 U.C. DAVIS L. REV.

428 “Due process” in the context of established legal proceedings had long been seen
as an element of jurisdiction, both before and after the ratification of the Fourteenth
Amendment in 1868. See Walker v. Sauvinet, 92 U.S. 90, 92 (1875); Lafayette Ins. Co.
v. French, 59 U.S. (18 How.) 404, 408 (1855); The Palmyra, 25 U.S. (7 Wheat.) 1, 8
(1827). Walker was the first case to discuss the Due Process Clause of the Fourteenth
Amendment as an element of jurisdiction, but the Walker majority did not find it applica-
table to that case. No majority before Pennoyer ever gave affirmative content to the Four-
teenth Amendment as providing restrictions on state court jurisdiction.

429 96 U.S. 97 (1877).

430 See id. at 104.
Stephen Field's view of the Due Process Clause as offering affirmative protection of fundamental private rights from invasion by the states did ultimately prevail.\footnote{See Graham, supra note 152, at 869-70; see also Powell v. Pennsylvania, 127 U.S. 678, 690 (1887) (Field, J., dissenting); Ex parte Wall, 107 U.S. 265, 302 (1882) (Field, J., dissenting); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 105-06 (1872) (Field, J., dissenting).} In fact, Field's approach stood as a reminder of the due process analysis outlined by Justice Johnson in his 1819 opinion, Bank of Columbia v. Okely,\footnote{"[Due process is] . . . intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." Bank of Columbia v. Okeley, 17 U.S. (4 Wheat.) 235, 244 (1819). Bank of Columbia was a Fifth Amendment case interpreting due process.} and as a precursor to both Justice Matthew's 1884 opinion in Hurtado v. California\footnote{110 U.S. 516, 527 (1884) (quoting Bank of Columbia as having correctly analyzed due process). Because Hurtado involved the Fourteenth Amendment and Columbia involved the Fifth Amendment, Hurtado established the point that the foundations of the Fifth and Fourteenth Amendment Due Process Clauses are the same.} and to the substantive due process arguments of Lochner v. New York.\footnote{198 U.S. 45 (1905).} In spite of the demise of the expansive notion of substantive due process outlined in Lochner, the fundamental touchstone of due process even today remains the protection of individuals against arbitrary actions of the government,\footnote{See Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) (The Due Process Clause "was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression'.")} a notion that springs directly in its constitutional form from Pennoyer.

IV. CONCLUSION

We started this journey to see how one determined and strong-willed Justice could shape the opinion of the United States Supreme Court. Stephen Field was such a man. Yet, we have also questioned several popular ideas about Pennoyer. It was not the first case to articulate the limits of state court jurisdiction over non-residents. It was not the first case to explore the parameters of jurisdictional “power.” It was not the first case to discuss “due process” as essential to jurisdiction, and it did not “settle” the issue of attachment jurisdiction; that was not settled until Shaffer v. Heiner.\footnote{433 U.S. 186 (1977).}

The usual view of Pennoyer is that it restated and constitutionalized nineteenth-century jurisdiction doctrines. In reality, it radically undermined those doctrines and set the stage for International Shoe v. Washington\footnote{326 U.S. 310 (1945).} nearly seventy years later. Before Pennoyer, nineteenth-century
notions about what is now sometimes called "territorial" jurisdiction were firmly based on Joseph Story's twin pillars, namely that "every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and "that no state can exercise direct jurisdiction and authority over persons or property without its territory." A sovereign's authority over property within its territory was plenary, limited only by that sovereign's sense of fairness and good public policy.

In Pennoyer, Justice Field completely and masterfully shattered Justice Story's first pillar of complete state authority over property within its borders, and he undermined Story's second pillar. Remarkably, Field accomplished this while paying homage to Story and while ostensibly affirming Joseph Story's principles. After Pennoyer, a state's sovereign authority over property within its borders was no longer absolute. Perhaps more importantly, by showing that the standard paradigm of territorial jurisdiction was subject to reformulation, limited only by ideas of fairness, Pennoyer opened the door to the expansion of state power over personal jurisdiction. This led inevitably to the collapse of Joseph Story's second pillar of jurisdiction law in International Shoe. Whatever one thinks of the current state of American law on these issues, Pennoyer must be seen as the catalyst for change, not as the last bastion of nineteenth-century tradition. The modern reworking of territorial jurisdiction grew out of and because of Pennoyer, not in spite of it.

Pennoyer truly stands as a tribute to the forcefulness of Stephen Field. He was the last survivor of President Abraham Lincoln's appointed Justices. He earned the respect of his colleagues, both for his tireless ability to perform his duties and for his overpowering belief in the sanctity of judicial review.

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438 See RESTATEMENT (SECOND) OF JUDGMENTS §§ 4-10 (1982).
439 STORY, supra note 357, §§ 18, 20. As we saw, Story used the word "nation" rather than "state" in his Conflicts treatise, but Justice Field substituted "state" in Pennoyer v. Neff, 95 U.S. 714, 722 (1877).
440 Justice Field stated:

At the head of the court, when I became one of its members, was the venerable Chief Justice Taney, and among the Associate Justices was Mr. Justice Wayne, who had sat with Chief Justice Marshall, thus constituting a link between the past and the future, and, as it were, binding into unity nearly an entire century of the life of this court.

Resignation letter of Justice Field to the Chief Justice and Associate Justices, Oct. 12, 1897, 168 U.S. 713, 715 (1897) [hereinafter Field's Resignation Letter].

441 During his 40 years on the California and United States Supreme Court bench, Field wrote 1,042 opinions for the court. This does not include his dissents and concurrences. "The volumes of our reports show that I alone have written 620 opinions. If to these were added 57 opinions in the Circuit Court and 365 prepared while I was on the Supreme Court of California, it will be seen that I have voiced the decision in 1042 cases." Field's Resignation Letter, 168 U.S. at 716. It is noted that Field's count of the
However poorly *Pennoyer* was grounded in nineteenth-century law, it set the stage for all that was to follow in the twentieth century. Stephen Field’s ability to craft an opinion that so clearly misstated existing law, and yet which has been wrongly accepted as reflecting that very law for over one hundred years, is a remarkable achievement by any standard.

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In the number of opinions he wrote for the United States Supreme Court differs from that of the other historians. See BLAUSTEIN & MERSKY, *supra* note 174, at 100-01, 142-44.