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A Linguistic Critique of Tag Jurisdiction: Justice Scalia and the Zombie Metonymy

Andrea D. Coles-Bjerre

University of Oregon School of Law, acoles@uoregon.edu

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A Linguistic Critique of Tag Jurisdiction: Justice Scalia and the Zombie Metonymy

LEAD ARTICLE

A LINGUISTIC CRITIQUE
OF TAG JURISDICTION:
JUSTICE SCALIA AND THE ZOMBIE METONYMY

ANDREA COLES-BJERRE*

This Article takes an innovative linguistic and cognitive perspective in order to construct a fresh critique of Justice Scalia’s opinion in Burnham v. Superior Court, which famously upholds “tag jurisdiction” based merely on a defendant’s transient presence in the forum state. Presence in the forum state, this Article demonstrates, was likely never anything more than a subconscious cognitive device—a metonymy—for more abstract and fairness-based concepts like the minimum contacts standard separately developed by the Supreme Court in International Shoe Co. v. Washington. Metonymy is a common and useful tool that assists people’s thought processes in law as in everyday life, and judges of an earlier era were justified in using it. But justice demands that law must mature over time, much like an individual’s own thought processes do, outgrowing metonymies that have ceased to be useful. Thus, in Burnham, Justice Scalia should have recognized the cognitive origins of the presence-in-forum criterion, instead of complacently accepting the presence-in-forum criterion as inherently persuasive. This Article poses a radical challenge to Burnham that goes far beyond policy arguments and into the linguistic roots of judicial thought. With Justice Gorsuch replacing Justice Scalia on the bench, will Burnham be buried, or will its outdated metonymic reasoning continue to lurch zombie-like onward?

* Associate Professor, *University of Oregon School of Law*. For helpful comments and guidance, I thank Kevin Clermont, Antonio Barcelona, Eric Pederson, and Carl Bjerre. Thanks also to participants at the Stockholm Metaphor Festival’s workshop on topics in metonymy, the West Coast Regional Conference on Language and Law, and the Law and Society Annual Meeting in Honolulu.

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INTRODUCTION

“What, then, is truth? A mobile army of metaphors, metonyms, and anthropomorphisms—in short, a sum of human relations, which have been enhanced, transposed, and embellished poetically and rhetorically, and which after long use seem firm, canonical, and obligatory to a people”

—Friedrich Nietzsche¹

This Article brings a powerful new perspective to well-known doctrinal developments in United States personal jurisdiction law, with a particular focus on Justice Scalia’s notorious opinion in *Burnham v. Superior Court*,² which famously upholds “tag jurisdiction” against

1. Friedrich Nietzsche, *On Truth and Lie in an Extra-Moral Sense*, in THE PORTABLE NIETZSCHE 46–47 (Walter Kaufmann ed., trans., 1954) (1873).

2. 495 U.S. 604 (1990) (plurality opinion).

constitutional challenge.³ This Article uses insights from cognitive linguistics to show that the *Burnham* opinion is best understood as the unjustified perpetuation of a metonymy by which a person's physical presence in a jurisdiction is used as a convenient, but inexact, approximation for the person's contacts with that jurisdiction.

Metonymy is a very pervasive linguistic and cognitive device, used by all human beings in our daily thinking—including judges. Metonymy subconsciously affords mental access to one entity or concept, by means of reference to another entity or concept, with the latter often being more convenient or easily articulable. To take just one example, a newscaster might report that “the White House today announced a new such-and-such policy,” even though the building on Pennsylvania Avenue obviously did not itself make any announcement at all. The newscaster's expression instantiates a PLACE FOR INHABITANTS metonymy, with the place (the White House) being articulated in order to signify its inhabitants (the policymakers); or, a CONTROLLED FOR CONTROLLER metonymy, with the controlled entity (the building) being articulated in order to signify the controller entity (the policymakers in the building).⁴

The metonymy that Justice Scalia's *Burnham* opinion rests on can conveniently be called PRESENCE FOR CONTACTS. This Article shows that when PRESENCE FOR CONTACTS was initially developed as a mental phenomenon by judges of earlier generations, it was perfectly justifiable and even entirely natural. But by the time of *Burnham*, intervening social developments had rendered the PRESENCE FOR CONTACTS metonymy outdated, and, rather than perpetuating it, Justice Scalia should have abandoned it. In particular, the vastly greater ease and frequency of travel in our modern age has made it much more common for defendants to be physically present in a jurisdiction without any relevant contacts. The PRESENCE FOR CONTACTS metonymy should, therefore, have been recognized for what this Article now shows it was, and subjected to modern due process standards.

It is well established that Justice Scalia's *Burnham* opinion fits poorly with the Supreme Court's evolution from a physically-based jurisprudence of personal jurisdiction—exemplified by the nineteenth

3. *Id.* at 612, 622 (alluding to “tag jurisdiction” as jurisdiction based on personal service upon a physically present defendant, regardless of the duration of the defendant's presence or whether the cause of action was related to her activities in the state).

4. See Günter Radden & Zoltán Kövecses, *Towards a Theory of Metonymy*, in 4 METONYMY IN LANGUAGE AND THOUGHT 39, 40–41 (Klaus-Uwe Panther & Günter Radden eds., 1999).

century landmark case, *Pennoyer v. Neff*,⁵ which required service of process while the defendant is present in the forum state—to the more abstract and conceptual approach to personal jurisdiction announced by *International Shoe Co. v. Washington*.⁶ This Article analogizes this doctrinal evolution to a second linguistic and conceptual phenomenon, namely the maturation of children into adults. Law is a form of what scholars call “distributed cognition,” enabling the judges of the present day to learn from the judges of the past, and thus enabling the law itself to mature over time.⁷ Researchers in linguistics have shown that children use metonymies because of their relatively scant vocabularies and life experience⁸ and by analogy, the judges of the pre-*Pennoyer* era were justified in using presence as a metonymy for contacts. But, under this same analogy, Justice Scalia should have benefited from the greater experience of the modern judicial age and freed himself from the no longer justified PRESENCE FOR CONTACTS metonymy.

The point of this Article is not that social evolution has rendered Scalia’s *Burnham* opinion unsound as a doctrinal or policy matter. Rather, the point is linguistic and jurisprudential. Perhaps even the pre-*Pennoyer* judges who first developed the service-while-present-in-forum-state test, if they had had the historical experience enabling them to distinguish between presence and effects, would have tended to formulate their rule in the more supple terms that *International Shoe* suggests. The pre-*Pennoyer* judges would have acknowledged that what really matters for purposes of personal jurisdiction is the nature and degree of the defendant’s contacts with the forum, and that jurisdiction based on service within the jurisdiction must accordingly be limited—just as in rem and quasi in rem jurisdiction were limited in *Shaffer v. Heitner*.⁹ But, because the pre-*Pennoyer* judges lacked that historical experience, they filled the gaps with the PRESENCE FOR

5. 95 U.S. 714 (1878), *overruled in part* by *Shaffer v. Heitner*, 433 U.S. 168 (1977).

6. 326 U.S. 310 (1945).

7. See Jennifer Mnookin & David Kaye, *Confronting Science: Expert Evidence and the Confrontation Clause*, 2012 SUP. CT. REV. 99, 151 (2012) (explaining that “distributed cognition” allows groups of individuals to produce knowledge that would be unavailable to any single individual).

8. Brigitte Nerlich et al., “Mummy, I Like Being a Sandwich”: *Metonymy in Language Acquisition*, in 4 METONYMY IN LANGUAGE AND THOUGHT 361, 362–63 (Klaus-Uwe Panther & Günter Radden eds., 1999) (illustrating how metonymy is an “abbreviation device” used by children to overextend their vocabulary and by adults for “cost-effective communication”).

9. 433 U.S. 186, 207 (1977) (holding that in rem and quasi in rem jurisdiction must also be justified by the minimum contacts standard established in *International Shoe*).

CONTACTS metonymy. And, in *Burnham*, Justice Scalia relied on the same metonymy despite having the greater historical experience that should have enabled him to see beyond it.¹⁰ With the recent turning over of Justice Scalia's seat on the Court, it is time to abolish the PRESENCE FOR CONTACTS metonymy once and for all—but the outlook for this is not bright, given what we know of Justice Gorsuch's style of judicial reasoning.

The law of personal jurisdiction is currently undergoing a great deal of ferment. To name just three significant developments, the Supreme Court has issued a spate of important opinions on both the general and the specific aspects of personal jurisdiction;¹¹ scale-tipping *Burnham* author Justice Antonin Scalia has died and been replaced on the bench by Neil Gorsuch;¹² and under the auspices of the Hague Conference on Private International Law, the once-dormant negotiations for a treaty on the recognition and enforcement of foreign judgments have gained new life and momentum.¹³ All of these developments bring new urgency to the question of *Burnham's* legitimacy. But this Article's primary purpose is not to argue against that legitimacy on mere policy grounds; instead, this Article takes a more archeological approach, exploring the origins of tag jurisdiction for the sake of the light those origins shed on judicial thinking in general (and human cognition in general). The result is indeed a new

10. *Burnham v. Superior Court*, 495 U.S. 604, 617–22 (1990) (plurality opinion).

11. See, e.g., *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) (declining to extend specific jurisdiction to non-residents of California who suffered the same injuries as California residents); *Daimler AG v. Bauman*, 571 U.S. 117, 135–40 (2014) (rejecting general jurisdiction where the in-state contacts of a foreign corporation's U.S. subsidiary were insufficient to render the corporation "at home in the forum state" (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011))); *Walden v. Fiore*, 571 U.S. 277, 288–89 (2014) (rejecting specific jurisdiction after finding that the lower court improperly focused its analysis on the defendant's knowledge of the plaintiffs' connection to the forum rather than the defendant's own contacts with the forum); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 920 (2011) (rejecting general jurisdiction where a products manufactured by a foreign subsidiary of a U.S. corporation "reached the forum state through the "stream of commerce" and the complaint is unrelated to those contacts); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 886 (2011) (plurality opinion) (instructing that courts should consider a foreign corporation's purposeful contacts with the forum state, not with the United States itself). The bearing of these cases on this Article is shown *infra* 124 and accompanying text.

12. See *infra* notes 220–239 and accompanying text (illustrating why Gorsuch is likely to perpetuate tag jurisdiction).

13. See *The Judgments Project*, HAGUE CONF. ON PRIV. INT'L L. <https://www.hcch.net/en/projects/legislative-projects/judgments> (last visited Oct. 17, 2018) (describing recent and upcoming negotiations); *infra* notes 216–219 and accompanying text.

attack on *Burnham*, but this is a favorable side-effect of an inquiry that is already jurisprudentially valuable and exciting on its own.

I. BACKGROUND ON PERSONAL JURISDICTION

Jurisdiction is a set of limitations on the power of a court. As the roots of the word “jurisdiction” suggest, these limitations concern a court’s power to “say law”—to pronounce an authoritative outcome in adjudicating a dispute.¹⁴ More specifically, “personal jurisdiction” is the court’s power of “law saying” over the person of the defendant, and over the defendant’s rights and property, by issuing a legally enforceable judgment against the defendant.¹⁵ The in personam branch of personal jurisdiction is one subset of a court’s territorial authority to adjudicate, with another subset being the in rem branch of personal jurisdiction.¹⁶ For clarity of exposition, this Part concentrates on in personam jurisdiction, as this is the branch of territorial authority with which *Burnham* deals.¹⁷

When a court has in personam, as opposed to in rem personal jurisdiction, the court has the power to issue a judgment against the defendant that can affect any or all of the defendant’s assets.¹⁸ The issuance of a civil judgment against a person is one of the most direct and dramatic instances, outside of the criminal law context, in which the power of the state is exercised against a person. An armed officer of the state will come and seize the assets that the defendant then owns—land, bank accounts, jewelry—or that the defendant may own in the future, like future wage payments or inheritances, and keep collecting these assets until the judgment is satisfied. It is no surprise that this exercise of governmental authority is controlled, in the United States, by the Constitution, specifically its Due Process Clause.¹⁹ And just as in other

14. See *Jurisdiction*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (showing that “jurisdiction” derives from the Latin *dicere*, “to say”).

15. See KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 7 (1st ed. 1999) (elaborating that an in personam judgment can “diminish[] the personal rights of a party in favor of another party”).

16. See *id.* at 7–8. Unlike in rem jurisdiction, in personam jurisdiction can result in the imposition of personal liability or obligation upon the defendant. *Id.* In rem jurisdiction is “[t]heoretically and formally” an action against a thing to determine the interests of persons in that thing. *Id.* at 8.

17. *Burnham v. Superior Court*, 495 U.S. 604, 607, 609–10 (1990) (plurality opinion).

18. In contrast, a court with in rem or quasi in rem jurisdiction generally has power only over certain of the defendant’s assets. See *infra* note 72 and accompanying text.

19. Where the power of the states rather than the federal government is at issue, as in most questions of state-court jurisdiction, the Due Process Clause is that of the

aspects of constitutional law, judges have altered the meaning and application of this aspect of the Due Process Clause over the decades.

Oliver Wendell Holmes declared that “[t]he foundation of jurisdiction is physical power.”²⁰ This Article’s concern is not about the fairness, constitutionality, or other jurisprudential desirability of tag jurisdiction, as distinct from the soundness, or lack thereof, of the reasoning in Scalia’s *Burnham* opinion. Nonetheless, I readily acknowledge that I am in sympathy with the anti-Holmesian arguments of Albert Ehrenzweig²¹ and more recently, Kevin Clermont,²² to the

Fourteenth Amendment: “No state shall . . . deprive any person of life, liberty, or property, without due process of law” U.S. CONST. amend. XIV, § 1; *see also* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918–19 (2011) (stating that personal jurisdiction is controlled by the Fourteenth Amendment’s Due Process Clause because exercising jurisdiction “exposes defendants to the State’s coercive power” (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))).

20. *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). A fuller version of the quotation is interesting as a venerable statement of the basic service-while-in-the-forum rule that would later be asserted as supporting tag jurisdiction:

The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings *properly begun*, and although submission to the jurisdiction by appearance may take the place of service upon the person. No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind. Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice. And in States bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adherence to fact.

Id. (emphasis added) (citations omitted). The case involved a defendant who had been served by publication in the forum state after leaving that forum state with an intent to establish domicile elsewhere. *Id.* The opinion holds the service invalid. *Id.* at 93.

21. *See generally* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956). Ehrenzweig methodically attacks Holmes’s power principle quoted above, calling it “both factually unsupported and functionally unsupportable under modern conditions.” *Id.* at 296.

Apparently unnoticed by Ehrenzweig is that Holmes himself, at the end of the same paragraph in which he declares the importance of physical power, invokes the “fair play” that physical power implicates. *See supra* note 20. When we remember that the Court in *McDonald v. Mabee* found jurisdiction *not* to exist because service by publication was not sufficient on those facts, the Holmesian declaration emerges as just dictum. It is easy to make absolutist statements about physical power when no such physical power is involved in the case. Still less, of course, is *McDonald v. Mabee* a tag jurisdiction case.

22.

The United States, prompted by the inherent tensions among states in a federation, early adopted a theory of exclusive power based on territoriality. The theory originated with the seventeenth-century Dutch theorist Ulric

effect that personal jurisdiction has always been—and should be—limited by factors other than the raw power of a sovereign to control events within its borders. My linguistic or cognitive hypothesis presumably has the effect of bolstering the descriptive dimension of Ehrenzweig's and Clermont's, and I welcome this fact.

In fact, "power" can be an ambiguous concept, and in law we must be careful to distinguish its two possible main meanings. In some contexts, the word "power" refers simply to raw physical ability: an Olympic weight lifter has the power to lift a 190-kilogram barbell; a lawfully arrested suspect with training from Houdini may have the power to escape her handcuffs; and a sovereign has the power to exercise force over persons within its territory. Judging from Holmes's careful reference to "*physical power*,"²³ this first sense is evidently the one he had in mind (and against which Ehrenzweig and Clermont clearly argue). But in other contexts, the word "power" may refer to physical ability as limited or circumscribed by rightfulness.²⁴ For example a debate about, say, the constitutionality of torture may often

Huber, who contended that each sovereign had jurisdiction, exclusive of all other sovereigns' jurisdictions, to bind persons and things present within its territorial boundaries. However, the principal thrust of the U.S. power theory was not authorization, not a delineation of the outer bounds of actual sovereign power. True, courts used the theory to justify nonrecognition of judgments of foreign courts lacking jurisdiction. More significantly, though, courts used the theory to impose self-limitation, to specify when the sovereign should choose not to exercise its actual power. After all, any full sovereign had the raw power to adjudicate any dispute when and how it pleased, as well as the power to enforce its adjudication on persons and things over which it eventually acquired physical power. Yet, sovereigns did not act this way. Jurisdictional law was a limit on how far the sovereign would reach to exercise its existing power, a limit imposed not only in the hope that other sovereigns would restrain themselves similarly, but also increasingly with the intuition that such restraint was fair. In other words, the power theory never linked to raw power, but served merely as a metaphorical label for jurisdictional actualities. Accordingly, power was never the true rationale of U.S. jurisdiction in any realistic sense. The true rationale was always the desirable allocation of jurisdictional authority.

See Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 99–100 (1999) [hereinafter Clermont, *Jurisdictional Salvation*]; see also CLERMONT, *supra* note 15, at 6–7 ("Jurisdictional law was a limit on how far the sovereign would reach to exercise its existing power, a limit imposed . . . increasingly with the intuition that such restraint was fair.").

23. *McDonald*, 243 U.S. at 91 (emphasis added).

24. See Carl S. Bjerre, *Mental Capacity as Metaphor*, 18 INT'L J. FOR SEMIOTICS L. 101, 116–18 (2005) (discussing locutions such as "can do" and "can't do" as expressions of moral authority that are metaphorical borrowings from the domain of raw physical ability).

be framed in terms of whether the government “has the power” to carry out the actions in question, but the substance of that debate is of course about the rightfulness of the actions—not the government’s physical ability to carry out those actions. (Everyone grimly concedes that the government has the personnel and tools and locations needed to do the job.) Ehrenzweig and Clermont might say, and I would agree, that power in the first sense is an inadequate basis for the exercise of personal jurisdiction, while power in the second sense is simply a convenient label for whatever our legal system determines the adequate bases for the exercise of personal jurisdiction to be. In this Article, I will use power in the first sense.

Section I.A examines the earlier vision, exemplified by *Pennoyer*; Section I.B explains the later vision, announced by *Shaffer*; and Section I.C shows how *Burnham* presents a conflict between the two visions. Schematizing greatly for convenience of discussion, the law has embraced two different visions of the Due Process limitations on personal jurisdiction: an earlier vision based solely on power, and a later vision according to which power is tempered by the additional requirement of reasonableness.

A. *Pennoyer and Power as the Sole Criterion*

The earlier articulation of the scope of personal jurisdiction comes from the Supreme Court in *Pennoyer v. Neff*. The case declares that the constitutional root of personal jurisdiction is the court’s power over the defendant (or, in the case of actions in rem or quasi in rem, the court’s power over the defendant’s property), and it treats physical location as being the determinant of whether that power exists.²⁵ The basis of power at issue in *Pennoyer*, and of principal concern in this Article, is that the defendant must be served with process while present within the forum state.²⁶

25. See *Pennoyer v. Neff*, 95 U.S. 714, 730–31, 733–34 (1878), *overruled in part by* *Shaffer v. Heitner*, 433 U.S. 168 (1977).

26. *Id.* at 734–36. There are other bases of power that are beyond the scope of this Article. See, e.g., *Milliken v. Meyer*, 311 U.S. 457, 464 (1940) (finding power over a defendant domiciled in the forum state); *York v. Texas*, 137 U.S. 15, 21 (1890) (finding power over a defendant who voluntarily appeared in the proceeding); *Pennoyer*, 95 U.S. at 735 (noting that a court has power over a defendant who appointed an agent in the forum for service of process); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1382 (2015) (discussing various forms of implied consent to jurisdiction). Power in an in rem or quasi in rem case based on the defendant’s property being located in the forum state is discussed *infra* notes 72–74

Part of what is confusing about *Pennoyer* is that it is a case about a case.²⁷ Case One serves as a kind of prologue, generating the judgment and other procedural facts that later come to be at issue in *Pennoyer* itself, which is Case Two. Correspondingly, Case Two is a collateral attack on the validity of the judgment in Case One.²⁸

In Case One, an Oregon lawyer, Mitchell, sued his client, Neff, in Oregon state court for attorney's fees.²⁹ Neff lived in California and did not happen to be in Oregon at the time, so Mitchell could not serve Neff within Oregon's borders,³⁰ and instead he sued Neff by publishing the summons in a newspaper as directed by the court.³¹ Neff did not respond to the summons, presumably because he was not reading the Oregon newspapers and so did not know about the summons, and hence Neff defaulted in the lawsuit, so that Mitchell won a judgment against him.³² Mitchell turned this judgment into an actual financial recovery in the same way that winners of judgments often do: he executed the judgment by having the sheriff seize and sell property

and accompanying text. Jurisdiction limited to persons' status, for example a declaration of divorce, is recognized in *Pennoyer*, 95 U.S. at 735, and might be analogized to jurisdiction in rem. See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 7 (AM. LAW INST. 1982) ("A state may exercise jurisdiction to establish or terminate a status if the status has a sufficient relationship to the state."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 71 (AM. LAW INST. 1971) ("A state has power to exercise judicial jurisdiction to dissolve the marriage of spouses one of whom is domiciled in the state.").

27. *Pennoyer*, 95 U.S. at 719–20.

28. *Id.* at 719, 721–22, 736.

29. *Id.* at 719–20.

30. *Id.* at 716–20.

31. See *id.* at 720. The Oregon statute at the time permitted service by publication on the facts of this case. It provided in pertinent part:

When service of the summons cannot be made [in person within the state], and the defendant after due diligence cannot be found within the state, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, and it in like manner appears that a cause of action exists against the defendant . . . such court or judge may grant an order that the service be made by publication of summons . . . [w]hen the defendant is not a resident of the state but has property therein, and the court has jurisdiction of the subject of the action.

CODE OF CIVIL PROCEDURE AND OTHER GENERAL STATUTES OF OREGON ENACTED IN 1862, at 14–15 (1863) (emphasis added) (repealed 1979); see also *Pike v. Kennedy*, 15 P. 637, 638 (Or. 1887). Neff was not a resident of Oregon but did own property there, namely the real estate against which Mitchell later had the sheriff execute. *Pennoyer*, 95 U.S. at 714. The "court ha[ving] jurisdiction of the subject of the action" presumably refers to subject-matter rather than territorial jurisdiction, and most state trial courts are courts of general jurisdiction, so this aspect of the statute was not an issue. *Id.* at 720.

32. *Pennoyer*, 95 U.S. at 719–20.

owned by Neff (in this case a tract of land in Oregon).³³ Mitchell got the money from the sale of the land, and a third-party buyer named Pennoyer got the land.³⁴

In Case Two, Neff sued Pennoyer in federal court to get the land back.³⁵ Neff had been given the land by the U.S. government as part of the government's efforts to "settle" the West, and the property could now belong to Pennoyer instead of Neff only if the sheriff's sale—and thus the judgment—in Case One was valid. The lower court in Case Two ruled in Neff's favor: the judgment in Case One was not valid, for peripheral reasons that will not detain us here. Pennoyer appealed but the U.S. Supreme Court upheld the lower court's decision on broad grounds.³⁶ Much of the Supreme Court's opinion, by Justice Field, is a hymn in praise of territoriality.³⁷ According to the opinion, the Oregon court in Case One could not reach Neff in personam because he had been served outside the state.³⁸ It is "a principle of general, if not universal, law" that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."³⁹ Two "well-established principles of public law respecting the jurisdiction of an independent State over persons and property" are, first, that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and, second and conversely, that "no State can exercise direct jurisdiction and authority over persons or property without its territory."⁴⁰

Expressed in this way, the Court's emphasis on territorial exclusivity might be seen primarily as a matter of harmonious relations between the several sovereign states, rather than as a matter of individual rights. But Justice Field proceeded to bolster his holding with dictum based on individual rights under the newly-adopted Fourteenth Amendment's Due Process clause.⁴¹

33. *Id.* at 719.

34. *Id.* at 719–20.

35. *Id.* at 719.

36. *See id.* at 732–34.

37. *See id.* at 720, 723 (explicating the role of territoriality in jurisdictional debates and applying those principles).

38. *Id.* at 726, 736.

39. *Id.* at 720.

40. *Id.* at 722.

41. *Id.* at 733. Relying on this dictum, Justice Field declared that the Fourth Amendment's Due Process Clause requires that in personam jurisdiction only be exercised by a competent court and after the defendant is served process within the state or voluntarily appears. *Id.* Fifty years later, in *Hess v. Pawloski*, the Court summarized

We can say that *Pennoyer* thus made in-state service of process constitutionally necessary for in personam jurisdiction (absent the other bases of jurisdiction). But it is crucial to note that making in-state service constitutionally *necessary* is different from making it constitutionally *sufficient*. Service on Neff while he was outside of Oregon was not enough to support in personam jurisdiction—but would service on Neff while he was inside Oregon automatically have been enough? Even if Neff were there only for a short time? Even if he were just passing through on the way to Seattle? Even if he were drawn into Oregon more or less against his will, for example by compelling personal circumstances such as the illness of a close relative? These sufficiency questions are what the constitutionality of tag jurisdiction is all about.⁴² *Pennoyer* is silent on them, and the Supreme Court would not rule on these sufficiency questions until over a century had passed, in *Shaffer v. Heitner* and the case of central concern to this Article, *Burnham*.⁴³

At this point, one should also take note that the in-state service requirement, whether necessary or sufficient, has a blatantly physical nature. It centers on the individual defendant's flesh-and-blood body and how it relates to a certain geographical boundary at a certain time. The body is either within the boundary, or it is not. Part II below demonstrates that physicality of this sort is a very important attribute of metonymy.⁴⁴

Pennoyer's teaching as follows: "The process of a court of one State cannot run into another and summon a party there domiciled to respond to proceedings against him. Notice sent outside the State to a non-resident is unavailing to give jurisdiction in an action against him personally for money recovery." 274 U.S. 352, 355 (1927).

42. See *Burnham v. Superior Court*, 495 U.S. 604, 611–13 (1990) (plurality opinion) (noting that most states uphold tag jurisdiction where the defendant was only briefly in the state, unless the defendant is brought into the forum by fraud or force).

43. On the other hand, during this interim and heightening the importance of the topic, other courts apparently did treat in-state service of process as being sufficient for in personam jurisdiction, that is, they did treat tag jurisdiction as being legitimate. See Ehrenzweig, *supra* note 21. Ehrenzweig writes that before *Pennoyer*, "[f]orum *conveniens*—to use an unusual, but I believe helpful, phrase—was . . . the basis of all personal jurisdiction." *Id.* at 292. He goes on to argue that "only" with *Pennoyer*:

when transient service [i.e. tag jurisdiction], hitherto a harmless adjunct of convenient jurisdiction, thus came to be *required* for the establishment of personal jurisdiction over nonresident defendants, did such service also become generally *sufficient* for this purpose The common law and common sense jurisdiction of the forum *conveniens* yielded to a dogmatic rule of personal service precariously balanced by a doctrine of forum *non conveniens*.

Id.

44. See *infra* Part II.

B. International Shoe, Shaffer,
and Reasonableness as a Separate Criterion

With the arrival and roaring progress of the twentieth century, dramatic advancements in communication and transportation made it possible for a defendant to have a significant impact in a state, or on a plaintiff within that state, without necessarily being physically present there.⁴⁵ The defendant's effects within the state (or "contacts" with the state)⁴⁶ readily cross borders even when the defendant herself does not. In keeping with the purposive nature of judging, the Supreme Court gradually accommodated these historical developments by shifting in personam jurisdiction from the single-criterion approach, just described, to a much more nuanced dual-criterion approach with which it still struggles today.⁴⁷ For purposes of this schematized discussion, one may say that the dual-criterion approach is more abstract than the single-criterion approach in two ways. First, the dual-criterion approach no longer focuses solely on the simple physical question of whether the defendant is present in the forum state when served with process;⁴⁸ instead, it focuses on all of the contacts between the defendant and the jurisdiction—whether or not the defendant is present there at any time.⁴⁹ And second (and more significant for purposes of this Article), the dual-criterion approach evaluates those contacts by a new standard of reasonableness, which is imposed in addition to the requirement of power.⁵⁰

45. See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957) (claiming that conducting business by mail "fundamental[ly] transfor[med]" the national economy by allowing individuals to engage with parties "separated by the full continent").

46. The term "contacts" in this context is metaphorical, as opposed to metonymical. See *infra* Section II.A.

47. See Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 423 (1981) (delineating that, when courts determine state court jurisdiction, they first "categorize the action" and then "apply both the power and the reasonableness tests").

48. *Id.* (illustrating how *International Shoe's* minimum contacts approach has weakened *Pennoyer's* rigid physical-power jurisdictional approach).

49. *Id.* at 423–24 (explaining that the "metaphorical basis" of purposefully-directed minimum contacts expands the basis of personal jurisdiction beyond physical presence, domicile, or consent).

50. See *id.* at 424 (explaining that courts should consider the interests of the defendant, plaintiff, and forum state to determine whether jurisdiction is reasonable).

Others have delved into the intermediate evolutionary stages,⁵¹ but for purposes of this discussion, the first important post-*Pennoyer* point of reference is *International Shoe Co. v. State of Washington*. An ambiguity of *International Shoe* is resolved by later cases including *Shaffer v. Heitner*, which also sets up a striking contrast with *Burnham* itself.

In *International Shoe*, a company incorporated in Delaware with its principal place of business in St. Louis, Missouri was conducting its shoe-selling business in the state of Washington though somewhat indirectly. The company had no offices or inventory in Washington, except a single sample shoe of each model.⁵² However, the company employed sales persons who lived in Washington to solicit prospective customers in the state.⁵³ All orders were sent by the customers to the St. Louis office, and the offers were accepted or rejected there, rather than in Washington.⁵⁴ However, sales to Washington customers were substantial, with commissions to the salespersons being over \$31,000 per year (equivalent today to about \$420,000 with adjustments for inflation).⁵⁵ The state of Washington sought to compel the company to contribute to the state's unemployment compensation fund, and the crucial issue was whether the Washington state courts could constitutionally render an in personam judgment against the company.⁵⁶

An individual, having a literally corporeal body, is either present or not in a forum state at the time of service. By contrast, corporations and other artificial business entities obviously cannot be analyzed so literally and simplistically.⁵⁷ Instead the Court recognized that

51. See, e.g., *id.* at 414–16; Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts from Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 573 (1958).

52. Perhaps this is why the company called itself International Shoe, in the singular, rather than International Shoes.

53. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 313–14 (1945).

54. *Id.* at 314.

55. See CPI Inflation Calculator, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm (last visited Oct. 17, 2018).

56. *Int'l Shoe*, 326 U.S. at 311.

57. Ten years before *International Shoe*, the great legal philosopher Felix Cohen had mockingly skewered Benjamin Cardozo of the New York Court of Appeals for grappling literalistically with the question, “Where is a corporation?,” and failing to acknowledge that the question is metaphorical. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809–12 (1935). Cohen equated this exercise with asking, “How many angels can stand on the point of a needle?,” and used it as a prime example of what he called “transcendental nonsense.” *Id.* at 810–11. Cohen has more to teach us as well, see *infra* note 210 and accompanying text.

corporate “presence” is a matter of degree, and that whether a court declares a corporation to be present within the state depends on whether the corporation’s contacts with the state are sufficiently substantial to satisfy due process.⁵⁸ In a single powerful paragraph, the Court explicitly rejected *Pennoyer’s* physical presence requirement and announced the new standard:

Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant’s person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”⁵⁹

In fact the case that Cohen discusses has a strong family resemblance with *International Shoe* itself, involving a Pennsylvania corporation that was held amenable to suit in a New York court by virtue of its New York activities. *Id.* at 809–10 (discussing *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (1917)). In that case, Judge Cardozo wrote,

[w]e are to say . . . whether [the corporation’s] business is such that it is here. If in fact it is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity, then, whether its business is interstate or local, it is within the jurisdiction of our courts Unless a foreign corporation is engaged in business within the state, it is not brought within the state by the presence of its agents. But there is no precise test of the nature or extent of the business that must be done. All that is requisite is that enough be done to enable us to say that the corporation is here. . . . If it is here it may be served.

Tauza, 115 N.E. at 917–18 (citations omitted).

58. The Court wrote:

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its “presence” without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far “present” there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms “present” or “presence” are used merely to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process.

Int’l Shoe, 326 U.S. at 316–17 (citations omitted). Clearly someone on the Court had been reading his Felix Cohen.

59. *Id.* at 316 (citations omitted). The *capias ad respondendum* was an old common law writ under which the sheriff would physically bring the defendant to the forum to answer the complaint. As explained in an older version of Black’s Law Dictionary,

Corporations and their fictional presence aside, this passage clearly validates in personam jurisdiction over a defendant not served within the forum, at least under certain circumstances. And its key passage describing those circumstances, namely the having of certain “minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice,”⁶⁰ has remained at the core of personal jurisdiction jurisprudence to the present day.⁶¹

Note that this minimum contacts language constitutes a “standard” as opposed to a “rule.” That is, the minimum contacts standard is flexible, or malleable, in that it relies heavily on the nuances of particular facts of a case, and on a given judge’s assessment of how those facts stack up against the standard.⁶² In the bulk of its opinion following the announcement of the minimum contacts standard, the *International Shoe* Court imposes a certain amount of structure on which facts must be considered and how these facts must be assessed, but this structure does very little to reduce the standard’s flexibility. The structure amounts only to two dimensions along which the facts

capias was a judicial order “by which actions at law were frequently commenced; and which commands the sheriff to *take* the defendant, and him safely keep, so that he may have his body before the court on a certain day, to *answer* the plaintiff in the action. It notifies defendant to defend suit and procures his arrest until security for plaintiff’s claim is furnished.” *Capias Ad Respondendum*, BLACK’S LAW DICTIONARY (rev. 4th ed. 1968); *see also Capias Ad Respondendum*, BLACK’S LAW DICTIONARY (10th ed. 2014) (current and more concise definition). For the way in which the capias writ fits with this Article’s main arguments, *see infra* note 192 and accompanying text.

60. *Int’l Shoe*, 326 U.S. at 316.

61. Moreover, one way of rephrasing this Article’s central thesis, appearing in Part II, is that this minimum contacts passage also reflects what courts were groping for *before* it appeared in *International Shoe*.

62. *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Kennedy explains that standards are flexible, indeterminate, and administrable only in light of detailed factual contexts. *Id.* at 1685, 1688. Accordingly, standards require a judge to exercise discretion in their application. *International Shoe*’s minimum contacts standard is a classic example, and other examples would include a prohibition on driving faster than is safe under the circumstances, or the “best interests of the child” rule in a child custody dispute. By contrast, rules are relatively rigid and determinate, and thus are readily administrable by reference to a limited number of facts, leaving little room for the exercise of discretion by judges or other law administrators. *Id.* at 1685. Examples include the sufficiency of service-while-present rule (i.e., the core of Scalia’s opinion in *Burnham*), a requirement to stop at a red traffic light, or a statute of limitations requiring commencement of a tort lawsuit within one year of the commission of the tort. For a detailed consideration of the standard versus rule dichotomy in another context, *see* Andrea Coles-Bjerre, *Trusting the Process and Mistrusting the Results: A Structural Perspective on Article 9’s Low-Price Foreclosure Rule*, 9 AM. BANKR. INST. L. REV. 351, 376–80 (2001).

might be arrayed, namely the level of the contacts and the relatedness of those contacts to the cause of action.⁶³ A moment's consideration makes clear that both of these dimensions are inherently matters of degree, not matters of kind. Indeed, the Court itself proceeds to stress the malleable nature of the new test:

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.⁶⁴

All of this is in the starkest contrast to *Pennoyer's* presence criterion. The presence criterion is a classic rule rather than a standard because it poses a black-and-white dichotomy that any given judge is likely to

63. According to the Court:

"Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there While it has been held, in cases on which appellant relies, that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit.

Int'l Shoe, 326 U.S. at 317–18 (citations omitted).

64. *Id.* at 319 (citations omitted). The Court's reference to "the purpose" of the due process clause as being ultimately determinative of whether the minimum contacts standard is satisfied is typical of legal standards generally. See, e.g., Kennedy, *supra* note 62, at 1688 ("The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.").

resolve with the same hard-and-fast results as any other judge.⁶⁵ The *Pennoyer* question can be answered mechanically, easily, and predictably. The *International Shoe* question requires a judge to do the hard work of, well, judging, and it demands that the legal system be willing to entrust the judge with the wise exercise of her discretion.

Lucid though it was, *International Shoe* left unanswered for the time being two questions that are central to this Article. First, is the reasonableness standard different from the power standard, or just a reformulation of it?⁶⁶ And second, assuming that the two standards are different, what is the relationship between them: are both necessary, or is either one on its own sufficient? Answers to both questions emerged in later cases (notably *Shaffer*, discussed shortly), but first it will be useful to further explore the questions themselves.

Today, *International Shoe* is accepted as standing for the proposition that personal jurisdiction has two separate requirements: the court's power must be measured not only by the older power test ("de facto power," as the court refers to *Pennoyer* in *International Shoe*'s key passage),⁶⁷ but also by a second requirement, newly announced, namely that it be reasonable for the state to exercise that power ("reasonableness," for short).⁶⁸ But, as Professor Clermont points out, *International Shoe* can also be read in an alternative way, under which the reasonableness standard more or less ousts the power test. Under this interpretation, reasonableness "reduc[es] the power test to the status of a rough rule of thumb."⁶⁹ Two of *International Shoe*'s fairly early progeny followed this interpretation,⁷⁰ and indeed the famous key passage of *International Shoe* itself, quoted above, supports such a reading.⁷¹

65. In the simplicity of their criteria, rules tend to resemble metonymies. See *infra* notes 133–136 and accompanying text.

66. See *Int'l Shoe*, 326 U.S. at 316 (explaining that "[h]istorically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person," but not stating whether the new reasonableness standard is a departure from or an extension of the prior approach).

67. See *supra* note 26 and accompanying text.

68. In support of the separateness of the two requirements, see the discussion of *Shaffer*, *infra* notes 74–82 and accompanying text; see also Clermont, *supra* note 47, at 415–23 (distinguishing the power and reasonableness tests based on *Kulko v. Superior Court*, 436 U.S. 84 (1978), *Rush v. Savchuk*, 444 U.S. 320 (1980), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), in addition to *Shaffer*).

69. Clermont, *supra* note 47, at 416.

70. See *id.* at 417–18 (discussing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *McGee v. Int'l Life Ins.*, 355 U.S. 220 (1957), in terms of the reasonableness test).

71. See *supra* note 70 and accompanying text. "Historically" a court's in personam jurisdiction was grounded on de facto power; hence the defendant's physical presence

Turning now to the relationship between the power test and the reasonableness standard, *International Shoe* itself already made clear that the reasonableness standard was *sufficient* for the court to exercise power. For example, the Court writes that the “demands” of due process “may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.”⁷² Thus, if the defendant has minimum contacts with the state that made it reasonable to maintain the suit there, then the court had personal jurisdiction over the defendant, without regard to his or her or its actual presence—and similarly without regard to domicile or consent.⁷³ But, saying that satisfying the reasonableness test is sufficient does not necessarily answer whether satisfying the reasonableness test is *necessary* even when the power test is also met. To set up a very pointed hypothetical example, suppose that the defendant satisfies the power test because she was physically present in the state when served with the summons, but that her contacts with the state are otherwise so slight as to keep it from being reasonable for the law to force her to defend a suit there. On facts like this, the suit may go forward only if we conclude that the reasonableness test is *not* necessary but only sufficient. *Burnham* eventually in fact so holds, but only in a surprising retrenchment from *Shaffer v. Heitner*.

Shaffer centers on the wing of *Pennoyer*'s power test that this Article has left aside until now, namely in rem and quasi in rem actions, in which the court's power is asserted over particular property of the

in the jurisdiction “*was prerequisite*” to the rendering of an in personam judgment; “[*b*]ut now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process *requires only*” that there be minimum contacts such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Int'l Shoe*, 326 U.S. at 316 (emphasis added).

The opinion's other references to reasonableness, quoted in *infra* note 72 immediately below and the accompanying text, are consistent with this reading. Separate references to a continuing power test are not found here. They are found elsewhere in the opinion when the court refers, always with scare-quotes, to the corporation's “‘presence’” in the state.

72. *Int'l Shoe*, 326 U.S. at 317. Similarly, after evaluating the shoe company's contacts with Washington, the Court concluded that the company's operations “establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there.” *Id.* at 320.

73. *Id.* at 316–17 (“For the terms ‘present’ or ‘presence’ are used merely to symbolize those activities of the corporation's agent within the state . . .”).

defendant, rather than over the defendant him or herself.⁷⁴ Heitner was a shareholder of Greyhound Corporation using the procedural device of a derivative suit to vindicate alleged mismanagement of the corporation by its officers and directors.⁷⁵ The suit was filed in Delaware Chancery Court, though the assertedly wrongful activities in question had taken place in Oregon and the defendants in question were not Delaware residents.⁷⁶ Jurisdiction over twenty-one of the defendants was asserted on a quasi in rem basis, pursuant to two Delaware statutes and the fact that the defendants owned Greyhound shares.⁷⁷ The first statute, called a sequestration statute, provided that the court could compel a defendant to appear in the lawsuit by seizing any of the defendant's property located in Delaware, holding it for sale if the plaintiff wins a judgment or if the defendant fails to appear or otherwise defaults.⁷⁸ The second statute, which we might call a situs statute, provided that all stock of corporations organized in Delaware—as Greyhound was—was deemed to be located in Delaware.⁷⁹ The state

74. Unlike in personam judgments, in rem judgments and quasi in rem judgments are limited to rights to particular property. In rem judgments affect the rights of all persons to the property, good examples being eminent domain proceedings, actions to quiet title, and partition actions. By contrast, quasi in rem judgments affect only the rights of particular persons to the property. See KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* 209 (1st ed. 2005); 4A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE CIVIL* § 1070 (4th ed. 2013). For example, in the type of quasi in rem action involved in *Shaffer*—sometimes called “attachment jurisdiction”—the plaintiff has a claim against the defendant that is unrelated to the property; seeks to apply the property to the satisfaction of the claim; and uses the presence of the property in the forum as the basis for bringing the defendant into court. 433 U.S. 186, 208–09 (1977). *Pennoyer* was not a valid in rem case, because the land was seized by the sheriff at the end of the legal proceedings as part of the execution of the judgment, and was not attached by the court at the beginning of the legal proceedings. 95 U.S. 714, 720 (1877), *overruled in part by* *Shaffer v. Heitner*, 433 U.S. 168 (1977).

75. *Shaffer*, 433 U.S. at 189–90.

76. *Id.* at 189–91.

77. *Id.* at 190–92.

78. DEL. CODE ANN., tit. 10, § 366 (1975); *see also Shaffer*, 433 U.S. at 190–91 n.4. The statute required the property owner to make a general appearance in the case in order to petition the court for a release of the property. Hence the statute appeared, unusually for a quasi in rem statute, to make no provision for a limited appearance, by which a defendant can defend his interest in the property without exposing himself to in personam liability.

79. DEL. CODE ANN., tit. 8, § 169 (1975); *see also Shaffer*, 433 U.S. at 192 (“The stock was considered to be in Delaware, and so subject to seizure, by virtue of [Delaware law], which makes Delaware the situs of ownership of all stock in Delaware corporations.”). In reality, the paper certificates representing the defendants’ Greyhound stock might have been physically located anywhere, most likely at their residences which as noted were outside of Delaware. In more modern times,

courts below were perfectly happy with this resulting syllogism: defendants had stock within the forum; therefore, the forum had power over the property; and, therefore, the forum had quasi in rem jurisdiction over the defendants.⁸⁰

The *Shaffer* Court rejected this syllogism and declared that *International Shoe's* reasonableness standard applies just as squarely to actions in rem or quasi in rem as it does to actions in personam.⁸¹ Adopting a Realist, substance-over-form style of exposition reminiscent of *International Shoe* itself, the Court declared that:

“[T]raditional notions of fair play and substantial justice” can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage. The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant. We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.⁸²

In other words, if the court is affecting the defendant's property, then the court is affecting the defendant him or herself, and before the court can affect the defendant, it must satisfy the standards of *International Shoe*.

To conclude this prologue to *Burnham*, then, the effects on *Pennoyer* of the *International Shoe*-type cases are twofold. First, *International Shoe* itself loosens *Pennoyer's* physical presence criterion so that it includes other contacts with the jurisdiction. And second, and more important to this

certificates representing the stock might not exist at all. The certificate's deemed location is thus transparently fictional, and Felix Cohen might have had fun with it. See *supra* note 57; see also Wendy Collins Perdue, *The Story of Shaffer: Allocating Jurisdictional Authority Among the States*, in *CIVIL PROCEDURE STORIES* 129, 137 & n.6 (Kevin M. Clermont ed., 2d ed. 2008) (noting the Cohen connection). The Supreme Court did not dwell on this fact, though one can speculate that the weakness of a power-based argument based on the stock's location might have helped the justices in ruling against Heitner on the reasonableness-based grounds.

80. *Greyhound Corp. v. Heitner*, 361 A.2d 225, 229 (Del. 1976), *rev'd sub nom.*, *Shaffer v. Heitner*, 433 U.S. 186 (1977) (“[J]urisdiction under § 366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum.”).

81. *Shaffer*, 433 U.S. at 212.

82. *Id.* (alteration in original) (citations omitted). Justice Marshall wrote for the majority, and Justices Powell, Stevens and Brennan concurred with all or most of the majority's key conclusion extending *International Shoe*.

Article, *Shaffer* shows that *International Shoe* restricts the exercise of *Pennoyer*'s power test so that the court's exercise of the power must be reasonable.

C. Burnham and the Grotesquerie of Tag Jurisdiction

The judicial grotesquerie of *Burnham v. Superior Court* arises from the factually sad but straightforward story of Dennis Burnham and his wife Francie.⁸³ They were happily—and subsequently unhappily—married in New Jersey, where they had begun to raise their two children.⁸⁴ The couple eventually decided to separate, and Francie moved with the children across the country to the San Francisco Bay Area.⁸⁵ Dennis remained in New Jersey, but when a business trip took him to Southern California he went up to the Bay Area to visit the children.⁸⁶ He took the older child into San Francisco, and when he brought the child back home, he was greeted by Francie and a summons for a divorce proceeding she had commenced in California.⁸⁷ Dennis objected to a California court having personal jurisdiction over him, a New Jersey resident.⁸⁸

Schematically, these facts—just like those of *Shaffer*—pose the question of whether the minimum contacts test represented by *International Shoe* is not only sufficient to support personal jurisdiction over a non-resident, but also necessary.⁸⁹ If Dennis's relationship with California was insufficient to satisfy the minimum contacts standard—an interesting and potentially difficult question, in light of the standard's fact-intensive nature⁹⁰—then his physical presence in the forum state at the time he was served with the summons is the *only* basis

83. *Burnham v. Superior Court*, 495 U.S. 604, 607 (1990) (plurality opinion).

84. *Id.*

85. *Id.* at 607–08.

86. *Id.* at 608.

87. *Id.* If all that were at issue between Dennis and Francie had been the marriage and divorce, then the only territorial authority that the court would have needed would have been in rem jurisdiction over this status. *See supra* note 26. But Francie was also seeking monetary relief against Dennis, thereby presenting the issue of the court's personal jurisdiction.

88. *Burnham*, 495 U.S. at 608.

89. *Id.* at 610 (“The question we must decide today is whether due process requires a similar connection between the litigation and the defendant's contacts with the State in cases where the defendant is physically present in the State at the time process is served upon him.”).

90. Justice Brennan's concurrence holds that Dennis's relationship with California did in fact satisfy the minimum contacts standard. *Id.* at 637–38 (Brennan, J., concurring). This, of course, is the reason that the opinion is a concurrence rather than a dissent. Scalia's opinion does not reach the question, presumably because it would be dictum in light of the plurality's overall reasoning. *Id.* at 619–20 (plurality opinion).

on which to uphold personal jurisdiction over him.⁹¹ This is constitutional only if *International Shoe's* modern test is simply a matter of sufficiency, but not of necessity.⁹²

Justice Scalia wrote the plurality opinion for the splintered bench.⁹³ This opinion upholds tag jurisdiction even in the absence of minimum contacts.⁹⁴ Dennis was subject to personal jurisdiction of the California court based on his physical presence at the time of service alone, even though his presence was merely transitory.⁹⁵ (The three days that Dennis spent in California might just as well have been fifteen minutes, in Scalia's view.)⁹⁶ Stated differently, the opinion holds that *International Shoe's* modern test is only a sufficient basis for personal jurisdiction—not a necessary one.⁹⁷ Presence in the forum state while being served with process is held here to remain an independently sufficient basis even after *International Shoe*. The structural inconsistency with *Shaffer* is clear: *Shaffer* had imposed a two-criteria structure on personal jurisdiction, at least in the in rem and quasi in rem cases, and *Burnham* reverts to a one-criterion structure. There is also a doctrinal tension with *Shaffer*, which had stated that “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”⁹⁸ Justice Scalia's ruling does not comport with this statement.⁹⁹

91. See *id.* at 619 (plurality opinion) (“The short of the matter is that jurisdiction based on physical presence alone constitutes due process . . .”).

92. See *id.* (explaining that nothing in *International Shoe* or its progeny suggests that physical presence within a forum state “is itself no longer sufficient to establish jurisdiction”).

93. Scalia was joined for all or most of this opinion by three other Justices: Rehnquist, Kennedy, and White, with only Justice White departing from this group for its relatively non-central Parts II.D and III. See *id.* at 607; see also *infra* note 99. The opinion of a competing group of four, with Justice Brennan writing for himself as well as Justices Marshall, Blackmun and O'Connor. See *Burnham*, 495 U.S. at 628 (Brennan, J., concurring); see also *infra* note 104. Justice Stevens wrote alone. See *Burnham*, 495 U.S. at 640 (Stevens, J., concurring in judgment). Overall, *Burnham* is characterized by two competing four-Justice opinions.

94. *Burnham*, 495 U.S. at 619 (plurality opinion).

95. *Id.* at 623–25.

96. *Id.* at 625 (objecting to Brennan's concurrence by supposing that Dennis enjoyed “not three days' worth of California's ‘benefits,’ but 15 minutes' worth”); see also *id.* at 610–11 (describing a view that states have power over a present defendant “no matter how fleeting his visit”).

97. See *id.* at 619 (“Nothing in *International Shoe* or the cases that have followed it . . . offers support for the . . . proposition . . . that a defendant's presence in the forum is not only unnecessary . . . but is itself no longer sufficient to establish jurisdiction.”).

98. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1972) (emphasis added).

99. Justice Scalia anticipates this objection and has a response that is perhaps too cute for his own good, because it turns out to support this Article's thesis. In Part II.D of

Justice Scalia relies on the long history of the service-while-present rule.¹⁰⁰ The relevant part of his opinion opens by declaring that power over a physically present defendant is “[a]mong the most firmly

the opinion, he asserts that the passage from *Shaffer* just quoted above must be read in the two-sentence “context” of its immediately preceding reference to in rem proceedings. See *Burnham*, 495 U.S. at 620–21; *supra* note 74 and accompanying text (discussing the context to which Scalia appeals). This “context,” plus the “meaning” of the statement, the “logic” of *Shaffer*, and what that opinion “was saying, in other words,” all assertedly prevent *Shaffer* from being read so broadly as to conflict with Scalia’s opinion in *Burnham*. Perhaps so—but if recourse to “context” is to be welcomed, along with recourse to the asserted “meaning” and the asserted “logic” of opinions, and if we are invited to express judicial opinions “in other words,” then the field for interpretation is vastly opened beyond what Scalia’s style of jurisprudence generally sanctioned.

Moreover, there is an important reminder about the common-law method to be had from the fact that the *Shaffer* majority was writing the “all assertions” passage of that opinion by reference only to the in rem and quasi in rem question before it, and not anticipating the later circumstances of *Burnham*’s tag jurisdiction question. The reminder is simply that opinions are written under the circumstances then existing, with the thoughts and concerns then presented to a judge’s mind. The same applies with full strength to judges of an earlier historical era and thus, the early judges who embraced the service-while-present rule, with no exception for transient presence, had no reason to make such an exception because the circumstances under which the exception would apply were not important to them. See *infra* Part II.B.3.

Justice White did not join *Burnham*’s *Shaffer*-limiting Part II.D, nor did he join Part III, which rejects the assertion in Brennan’s opinion that due process would require a full factual analysis of the case’s minimum contacts. Among those who do use *Burnham* to limit *Shaffer*, Justices Scalia and Kennedy had not yet been appointed to the Court at the time of *Shaffer* and, as noted above, Justice Rehnquist took no part in *Shaffer*.

In considering whether the Scalia opinion does in fact comport with *Shaffer*, it is also very valuable to consider a passage from *International Shoe* itself. After setting forth the matrix of contacts and relatedness, the Court explains that:

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot simply be mechanical or quantitative. . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.

Int’l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (citations omitted). Thus, Scalia’s reliance on the tradition growing from *Pennoyer* is in substantial tension with what the *International Shoe* Court viewed that tradition as being. “[O]ne would have thought that tag jurisdiction could not survive after *International Shoe* replaced territorial hegemony with a personal jurisdiction inquiry based on reasonable and fair connection between the defendants, the forum, and the action.” Jeffrey W. Stempel, *The Irrepressible Myth of Burnham and Its Increasing Indefensibility After Goodyear and Daimler*, 15 NEV. L.J. 1203, 1255 (2015).

100. *Burnham*, 495 U.S. at 610.

established principles of personal jurisdiction in American tradition.”¹⁰¹

The opinion continues:

The view developed early that each State had the power to hale before its courts any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the State could retain jurisdiction to enter judgment against him, *no matter how fleeting his visit*.¹⁰²

Indeed, Scalia’s argument rests chiefly on his assertion that a rule supporting tag jurisdiction is long standing, including that it was the understanding of American courts at the time of the Fourteenth Amendment’s adoption.¹⁰³ To this extent, the opinion is an originalist

101. *Id.*

102. *Id.* at 610–11 (emphasis added). No great imagination is needed to extend the *Burnham* rule to cases in which a defendant is served at a rest stop while cutting through a corner of the state on a highway, or on an airplane while in the airspace of the forum state below. “Ladies and gentlemen, if you’ll look out the windows to your left, you’ll see that we’re now passing over the Grand Canyon and entering the great state of Arizona, the courts of which you may now be subject to the jurisdiction of. Welcome to the West.” *See, e.g.,* *Grace v. MacArthur*, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (holding that service made on a defendant while flying in the airspace above the forum state was sufficient to create personal jurisdiction because the defendant was “within the ‘territorial limits’ of the State of Arkansas” at the time of service); *see also* Stempel, *supra* note 99, at 1225 (calling *Grace* “probably the most outlandish example of the exercise of tag service being used to establish personal jurisdiction notwithstanding the new jurisdictional paradigm of fairness and reasonable expectation”).

Clearly the Scalia opinion is consonant with what Ehrenzweig, Clermont, and others have called the power theory of personal jurisdiction. *See supra* notes 21–22 and accompanying text. In the oral arguments for a recent case involving the constitutionality of an Arizona statute empowering its state officials to take actions under federal immigration laws, *Arizona v. United States*, 132 S. Ct. 2492 (2012), Justice Scalia posed a question with overtones of *Burnham*’s power theory: “[I]f, in fact, somebody who does not belong in this country is in Arizona, Arizona has . . . no power? . . . [W]hat does sovereignty mean if it does not include the ability to defend your borders?” Transcript of Oral Argument at 34, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182).

103. As part of his historical argument, Scalia ably argues from the negative:

Most States, moreover, had statutes or common-law rules that exempted from service of process individuals who were brought into the forum by force or fraud, or who were there as a party or witness in unrelated judicial proceedings. These exceptions obviously rested upon the premise that service of process conferred jurisdiction.

Burnham, 495 U.S. at 613 (citations omitted). On the force or fraud exception, see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 82(a) (AM. LAW INST. 1971). However, the existence of all of these exceptions also supports this Article’s anti-*Burnham* thesis. Similarly, the four-justice concurrence authored by Brennan characterizes Scalia’s opinion as relying “solely on historical pedigree.” *See Burnham*, 495 U.S. at 629 (Brennan, J., concurring).

one—a mode of judicial reasoning on which cognitive linguistic analysis can sometimes shed new perspective as shown below.¹⁰⁴

Justice Scalia himself nonetheless acknowledges certain authorities that tend to undermine his historical assertion of the long-standing roots of tag jurisdiction.¹⁰⁵ This assertion was also a matter of contention in the *Burnham* opinion itself, including exegesis of quite a volume of old case law,¹⁰⁶ and the subject has continued to be examined since then.¹⁰⁷ It is not this Article's task to settle that matter, but the historical uncertainty is itself instructive for purposes that we will revisit below.¹⁰⁸

Burnham's other substantial opinion, written by Justice Brennan, also upholds the tag jurisdiction rule, so that the issues raised by Scalia's

104. See *infra* note 265 and accompanying text. Closing the loop on this aspect of the Scalia opinion's reasoning, the assertedly long-standing nature of the service-while-present rule makes the related Due Process Clause threshold easier to meet. "The distinction between what is needed to support novel procedures and what is needed to sustain traditional ones is fundamental The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'" *Burnham*, 495 U.S. at 619. The contrast that Scalia draws here with *Shaffer's* relatively newfangled and unique sequestration procedure is implicit here and made explicit later. See *id.* at 619–23, 622 n.4.

Justice Brennan responds that *International Shoe's* reference to "traditional notions of fair play and substantial justice" meant simply "that those concepts are indeed traditional ones," and did not mean that "their specific *content* was to be determined by tradition alone." *Id.* at 629 n.2 (Brennan, J., concurring). That the syntactic parsing of *International Shoe's* crucial phrase is so open to dispute should cause us all to moderate our confidence in being able to know the thinking process that underlies judges' opinions, particularly judges of the distant past. See *infra* Section III.A.

105. *Burnham*, 495 U.S. at 611 (plurality opinion) (citing Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 253–60 (1965), and Ehrenzweig, *supra* note 21) (noting that English law antecedents to tag jurisdiction are not as clear as Justice Story thought).

106. *Burnham*, 495 U.S. at 611–16, 613 n.2, 614 n.3 (listing case precedent in support of Scalia's reasoning); *id.* at 633–35, 633–36 n.8–10 (Brennan, J., concurring) (listing opposing case law to refute Scalia's majority opinion). Not cited by the Court is a scholarly response to Ehrenzweig by Nathan Levy, Jr., which doubted that there is enough evidence to make an absolute statement on the historical facts of a tag jurisdiction rule. See Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 94 (1968).

107. See James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1, 4 (1992) (taking issue with Scalia's assertion that transient jurisdiction was prevalent earlier in the nineteenth century).

108. See *infra* Section III.A (recognizing a puzzle about whether the contacts-as-presence metonymy was ever "live" as opposed to purely subconscious).

opinion are all the more important.¹⁰⁹ The Brennan opinion, however, crucially recognizes that *International Shoe* and *Shaffer* must control the inquiry,¹¹⁰ and by the same token, crucially recognizes that there are certain “outer limits” to the constitutionality of tag jurisdiction, based for example on involuntary or unknowing presence.¹¹¹ (The Scalia opinion mentions the possibility of such outer limits but only to wrest them into service as support for the historical argument that tag jurisdiction itself is of long standing.)¹¹² These outer limits are really the issue, from a judicial process point of view.¹¹³ The main question posed by the Scalia/Brennan divide is whether the legal system should allow today’s judges to judge the tradition against a new standard; or instead, neuter today’s judges by holding them to judgments made many decades ago—subconsciously and primitively, as the body of this Article will argue.¹¹⁴ And maybe *Burnham* itself is closer to the outer limits than Brennan thinks! Three days is not very long and part of those three days were for a business trip and therefore unrelated to the children, let alone to the divorce proceeding for which he was tagged.¹¹⁵ Moreover, that business trip was at the other end of California, a geographically large state.¹¹⁶ And finally, for Dennis to want to see his kids is not a lightly held human need—does due process really allow adverse parties to capitalize on this?¹¹⁷

109. *Burnham*, 495 U.S. at 628–29 (Brennan, J., concurring) (“I agree with Justice Scalia that the Due Process Clause of the Fourteenth Amendment generally permits a state court to exercise jurisdiction over a defendant if he is served with process while voluntarily present in the forum State.”).

110. *Id.* at 628–33.

111. *Id.* at 637 n.11. Suppose, for example, that Francie Burnham tagged Dennis with her summons while he was in California solely for the purpose of defending himself in an unrelated lawsuit. Or suppose that she tagged him while he was hiking in in the Lake Tahoe area of Nevada but had inadvertently strayed over the California state line. Scalia’s opinion in the case refers briefly to “force or fraud” and presence in the jurisdiction “as a party or witness in unrelated judicial proceedings.” *See supra* note 103.

112. *See supra* note 103. “These exceptions obviously rested upon the premise that service of process [would otherwise have] conferred jurisdiction.” *Burnham*, 495 U.S. at 613 (plurality opinion).

113. *See Burnham*, 495 U.S. at 613 (casually dismissing scenarios in which tag jurisdiction may unfairly burden defendants).

114. *See generally infra* Part II.

115. *Burnham*, 495 U.S. at 608.

116. *Id.*

117. *Cf. Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 927 (7th Cir. 1983) (recognizing that even promises extracted by duress may not be involuntary, “unless ‘involuntary’ is a conclusion rather than the description of a mental state”). “If the threat is ferocious (‘your money or your life’) and believed, the victim may be

Many criticisms of the *Burnham* case have been voiced by others,¹¹⁸ and it is not this Article's job to rehearse them. Instead, Part II of the Article will develop a new ground of critique.

D. Physical Presence or Minimum Contacts: Which One Really Came First?

It is crucial to note that the Scalia opinion takes for granted a certain relationship between the traditional approach and the modern approach, namely that physical presence is primary and that minimum contacts is secondary—not just temporally but also conceptually. Of course the minimum contacts standard was announced later in time than the physical presence test, but Scalia writes that the minimum contacts standard “was developed by *analogy* to ‘physical presence,’” and that accordingly “it would be perverse” to say that the minimum contacts standard could now be “turned against” physical presence’s “touchstone of jurisdiction.”¹¹⁹ According to the Scalia opinion, physical presence is primary, or original, while minimum contacts is secondary, or derivative.

desperately eager to fend it off with a promise.” *Id.* To flatly take “voluntary” presence in a jurisdiction, for even the most compelling circumstances, and proceed to equate that presence with “voluntary” subjection to wholly unrelated lawsuits in the forum, defies common sense and arguably the Due Process clause.

118. See, e.g., Peter Hay, *Transient Jurisdiction, Especially over International Defendants: Critical Comments on Burnham v. Superior Court of California*, 1990 U. ILL. L. REV. 593, 593 (1990); Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After Burnham v. Superior Court*, 22 RUTGERS L.J. 675, 678–81 (1991); Stanley E. Cox, *Would That Burnham Had Not Come to Be Done Insane! A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, an Explanation of Why Transient Presence Jurisdiction is Unconstitutional, and Some Thoughts About Divorce Jurisdiction in a Minimum Contacts World*, 58 TENN. L. REV. 497, 502–03, 542 (1991) (arguing that Scalia’s opinion “seems to yearn for the good old days of territoriality”); Allen R. Kamp, *The Counter-Revolutionary Nature of Justice Scalia’s “Traditionalism,”* 27 PAC. L.J. 99, 111 (1995) (comparing Scalia’s traditionalist opinion to the Anglican Church, which rejects evolving traditional models for ideal models of the past). Clermont writes that tag jurisdiction:

has also long been the recipient of criticism from academics and foreigners alike. Formerly the most important basis of U.S. jurisdiction, it is today far from essential. It is occasionally used to sue foreigners in the United States, even though the resulting judgment would be unlikely to receive recognition or enforcement abroad. Indeed, courts use transient jurisdiction, albeit inappropriately, only when all appropriate bases of jurisdiction are unavailing.

Kevin M. Clermont, *A Global Law of Jurisdiction and Judgments: Views from the United States and Japan*, 37 CORNELL INT’L L.J. 1, 17 (2004) (footnotes omitted).

119. *Burnham*, 495 U.S. at 619; see also *id.* at 618 (“As *International Shoe* suggests, the defendant’s litigation-related ‘minimum contacts’ may *take the place* of physical presence as the basis for jurisdiction . . .” (emphasis added)); *id.* at 620 (referring to “the ‘minimum contact’ that is a *substitute for* physical presence” (emphasis added)).

Part II of this Article suggests flipping the above relationship. Perhaps the relationship presumed by the Scalia opinion has actually always been the other way around. In other words, perhaps minimum contacts rather than physical presence has always been the primary concept—even pre-*International Shoe* and even pre-*Pennoyer*. And by the same token, perhaps physical presence has never been more than a secondary approximation of minimum contacts, again even pre-*International Shoe* and even pre-*Pennoyer*. Or alternatively, perhaps we can even view physical presence and minimum contacts as two facets of the same concept. If either of these is the case, then the reasoning of the Scalia opinion collapses. And metonymy theory, set forth in Part II, shows how compelling the case can be.

II. CRITIQUING SCALIA'S *BURNHAM* OPINION WITH METONYMY THEORY

At one level or another, all judicial decision making is purposive, and in the modern era that purposiveness has tended to come to the foreground of judges' expressed reasoning.¹²⁰ *International Shoe* is a clear example: the opinion forthrightly changes the law for the express purpose of accommodating inherited doctrine to new social realities.¹²¹ By contrast, Justice Scalia's opinion in *Burnham* expressly appeals not to purpose but solely to the authority of the past, namely physical presence having for so long been a "touchstone" of personal jurisdiction.¹²² Completely absent from the opinion is any attention to why the basic service-while-present rule developed in the first place, and of whether those reasons truly supported the related rule of tag jurisdiction (assuming that tag jurisdiction ever was truly a rule)¹²³—let

The assertedly longstanding nature of the physical presence rule is crucial to Justice Scalia's reasoning, because an ancient rule will more easily pass Due Process muster than a new one. See *supra* note 104.

120. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (recognizing that legal decisions need to reflect changing social norms).

121. *Id.*

122. *Burnham*, 495 U.S. at 619. Even this opinion is purposive, of course, though at a more subterranean and unarticulated level, presumably having much to do with the valuing of authority for its own sake and the constraining of judicial discretion. See generally *infra* Section III.B.

123. See *supra* note 106 and accompanying text.

let alone the vital question of whether those reasons continue to be convincing in the twentieth and now twenty-first centuries.¹²⁴ Purposeful

124. Justice Scalia's *Burnham* opinion is thus a departure not just from *International Shoe* but also from the main stream of recent personal jurisdiction jurisprudence. Notably, first, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court restricted a forum state's exercise of personal jurisdiction over corporations organized in other states to forums in which the corporation is "fairly regarded as at home," that is, forums roughly equivalent to an individual's domicile. 564 U.S. 915, 924 (2011). The Court invoked a classic law journal article naming domicile, place of incorporation, and principal place of business as "the paradigm bases for the exercise of general jurisdiction." *Id.* (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 782 (1988)). Later, in *Daimler AG v. Bauman*, the Court held the *Goodyear* paradigms to be exhaustive and rejected the exercise of personal jurisdiction even in another forum where the defendant "engages in a substantial, continuous, and systematic course of business." 571 U.S. 117, 138 (2014); see also Stempel, *supra* note 99, at 1250 (noting that general jurisdiction resembles tag jurisdiction insofar as the cause of action need not have any substantive relationship to the defendant's contacts with the forum and arguing that the retrenchment shown by *Goodyear* and *Daimler* supports a corresponding restriction on tag jurisdiction).

The incongruity between *Goodyear* and *Daimler* on one hand, and *Burnham* on the other, has been expressly noted. In her concurring opinion to *Daimler*, Justice Sotomayor notes the "incongruous result" that an individual can be tagged with process based on a one-time visit to the forum, while "a large corporation that owns property, employs workers, and does billions of dollars' worth of business in the State will not be, simply because the corporation has similar contacts elsewhere (though the visiting individual surely does as well)." 571 U.S. at 158 (Sotomayor, J., concurring in judgment); see also Allan R. Stein, *The Meaning of "Essentially at Home"* in *Goodyear Dunlop*, 63 S.C. L. REV. 527, 548 (2012) (pointing out the "bizarre fact" that after *Goodyear*, it is "much easier to establish general jurisdiction over individuals than over corporations" because of *Burnham*).

For a recent case closely analogous to *Burnham* and rejecting the exercise of general jurisdiction, see *King v. Am. Family Mut. Ins.*, 632 F.3d 570, 580 (9th Cir. 2011), finding that "beginning the process of applying to do business and appointing an agent for service of process" is merely dipping one's toe into the state and insufficient on due process grounds for exercising personal jurisdiction. For further consideration of the susceptibility of corporations or other entity defendants to tag jurisdiction, see Cody J. Jacobs, *If Corporations Are People, Why Can't They Play Tag?*, 46 N.M. L. REV. 1, 2 (2016), advocating for the availability of tag jurisdiction over corporations and other entities through in-state service on their officers; Tanya J. Monestier, *You're It! Tag Jurisdiction over Corporations in Canada*, 50 VAND. J. TRANSNAT'L L. 583, 583-84 (2017), critiquing a recent Supreme Court of Canada opinion that, in the author's view, essentially endorses tag jurisdiction over corporations.

Regarding specific jurisdiction as well as general jurisdiction, the Supreme Court has been narrowing the range of fora in which a corporation is subject to personal jurisdiction. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) (denying specific jurisdiction over drug manufacturer where many but not all of the drug user/plaintiffs lived in the forum state); *Walden v. Fiore*, 134 S. Ct. 1115, 1126 (2014) (finding that in suit by Nevada resident over Drug Enforcement

judges, lawyers, and scholars demand *reasons* for rules being the way they are; the only good rule is a rule supported by good reasons.¹²⁵

Part II of this Article suggests a highly plausible linguistic and cognitive reason that early judges might have adopted the service-while-present rule, and this reason leads to a rich critique of Scalia's *Burnham* opinion. The argument is that judges in earlier centuries would have subconsciously taken presence within the jurisdiction as a convenient approximation or reference point—a metonymy—for the defendant having a reasonable level of contacts with the jurisdiction.

After all, in the pre-modern era, with cross-border transportation and communication being so laborious, a person could not, as a practical matter, have much, if any, contacts with a jurisdiction without being present there, and the need for tag jurisdiction would rarely, if ever, arise. So, the argument goes, it is not that presence, for these early judges, had some kind of inherent significance of its own; rather, presence was associated with contacts. We can say, in other words, that the thinking behind *International Shoe* actually predated the thinking behind *Pennoyer*! Minimum contacts, not presence, has always been the “touchstone”¹²⁶ of personal jurisdiction. It just wasn't always articulated this way because the PRESENCE FOR CONTACTS metonymy was subconscious.

From this insight, it becomes easy to demolish Scalia's *Burnham* opinion. The twentieth century's easy and rapid modern transportation made it possible for persons to be physically located in a jurisdiction without having a level of contacts that makes it reasonable for them to be haled into that jurisdiction's courts. To uphold tag jurisdiction under these circumstances is, in *Shaffer's* words, to support “an ancient form without substantial modern justification.”¹²⁷ Presence in the jurisdiction is only a formal approximation, dating from an earlier era, and contacts with the jurisdiction is the substance for which those early judges were

Administration deputy for allegedly tortious conduct at Georgia airport, Nevada court lacked specific jurisdiction because the asserted Nevada injury did not meaningfully connect the defendant to the forum); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 886 (2011) (holding, in a personal injury suit against a non-U.S. manufacturer of a shearing machine, that the court did not have specific jurisdiction over the defendant because its conduct had not been purposefully directed toward the forum state).

125. See *Burnham*, 495 U.S. at 628 (White, J., concurring in part and concurring in the judgment) (explaining that rules that are “arbitrary and lacking in common sense” should not stand).

126. *Id.* at 619 (plurality opinion).

127. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977); see also *supra* note 82 and accompanying text.

reaching. Scalia should have followed that earlier substance rather than supporting the ancient form.

In sum, Scalia treats service-while-present in the jurisdiction as being conceptually and historically primary, with minimum contacts being a mere later approximation of presence. This Article suggests, by contrast, that minimum contacts is conceptually and historically primary, with presence in the jurisdiction having been an early distortion of minimum contacts. The distortion was first introduced by judges of an earlier era, but they, of course, are blameless because the society in which they lived and reasoned had no reason to distinguish between presence and effects. That this distortion was accepted and perpetuated by the Scalia opinion, though, is thoroughly blameworthy.

A. *Metonymy and Metaphor, Live and Dead*

Metonymy is a linguistic and conceptual device in which a person refers to one thing for the conscious or subconscious purpose of denoting another thing. To elaborate on this Article's initial example, a newscaster might say, "The White House today nominated fourteen individuals to fill vacancies on the federal bench." Of course, the newscaster does not mean that a white building from the Federal-style of architecture somehow uttered the words of nomination; instead, he or she is referring to the building as a way of referring to the persons and powers of the executive branch of the U.S. government.

But simply describing metonymy as a reference to one thing in order to denote another does not adequately distinguish metonymy from metaphor; and, in fact, metonymy is perhaps most easily described by contrast to metaphor. Both devices are tools for abstract reasoning, often at the subconscious level. Metaphor draws upon a relationship of similarity between things in two different domains—that is, two different areas of human experience. For example, when a professor inquires whether her students are "grasping the concept" under discussion, she of course is not asking whether the students are literally holding the concept firmly in their hands; instead, she is making use of the similarities between manual holding and mental understanding. Of course, on one level, the domain of holding is very different from the domain of understanding: the first is physical, observable, and relates to objects, while the second is mental, invisible, and relates to thoughts. Nonetheless, there is a network of similarities between the two domains—for example, if we grasp something, then we can look at it closely or from different angles, and we can pass it along to another person. Indeed, a moment's reflection makes clear that people very

often conceive of thinking or understanding (the second domain) in terms of holding or manipulating objects (the first domain).¹²⁸ In sum, metaphor connects two different domains and thereby posits certain similarities between them. In common speech, understanding is posited to be similar to grasping; to Shakespeare's Romeo, Juliet is similar to the sun;¹²⁹ and to Katy Perry, having a unique and vital personality is similar to giving off light that sparkles in darkness.¹³⁰

In contrast to metaphor with its two different domains, metonymy involves only one domain, and the two elements of the single metonymic domain are connected by a relationship not of similarity but of *contiguity*—that is, physical or conceptual connectedness, or closeness, or strong association.¹³¹ In the newscaster example above,

128. A few examples from ordinary speech help to establish the prevalent nature of the conceptual linkage:

[I]deas are objects that you can *play with*, *toss around*, or *turn over in your mind*. To understand an idea is to *grasp* it, to *get* it, to *have it firmly in mind*. Communication is *exchanging ideas*. Thus, you can *give* someone ideas and *get ideas across* to people. Teaching is *putting ideas into* the minds of students, *cramming their heads full of ideas*. To fail to understand is to fail to grasp, as when an idea *goes over your head* or *right past you*. Problems with understanding may arise when an idea is *slippery*, when someone *throws too many things at you at once*, or when someone *throws you a curve*.

GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT* 240 (1999) [hereinafter LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*].

Theorists today generally view metaphors as being conceptual rather than purely linguistic, so that spoken or written phrases like “grasping the concept” are “metaphorical expressions” as distinct from the underlying, more general conceptual relationship of MANUAL HOLDING FOR MENTAL UNDERSTANDING. Retracing this thesis is beyond the scope of this Article but is well explored in *PHILOSOPHY IN THE FLESH* and elsewhere. See, e.g., *id.* at 240–41; GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* xi (1987) [hereinafter LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS*]. In law, see STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* xi (2001). On thinking as object manipulation in particular, see Bjerre, *supra* note 24, at 112–14.

129. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2, line 3 (J.A. Bryant, Jr. ed., 1986) (“But, soft! what light through yonder window breaks? It is the east, and Juliet is the sun.”).

130. Katy Perry, *Firework*, on *TEENAGE DREAM* (Capitol Records 2010) (“Baby, you’re a firework[.]”).

131. “Metonymy is a cognitive process in which one conceptual entity, the *vehicle*, provides mental access to another conceptual entity, the *target*, within the same idealized cognitive model.” Radden & Kövecses, *supra* note 4, at 21 (emphasis added). “In the example of *She’s a pretty face*, the ‘pretty face’ serves as the vehicle for accessing the ‘person’ as the target; in the reverse description, *She’s a pretty person*, the ‘person’ serves as the vehicle for accessing the person’s ‘pretty face’ as the target.” *Id.* at 19. See generally DIRK GEERAERTS, *DIACHRONIC PROTOTYPE SEMANTICS: A CONTRIBUTION TO*

there is no particular similarity between the white Federal-style building (the vehicle) and the powers of the executive branch (the target), but they are connected to each other because the former is the symbol of the latter, and the former is the primary location from which the public perceives the latter as being exercised. To take another common example, if one server at a diner tells another that “[t]he ham sandwich is waiting for his check,”¹³² of course the clear meaning of the

HISTORICAL LEXICOLOGY 97 (1997) (describing how “entities . . . related by contiguity can be said to have something to do with each other in an objective sense: they interact or co-occur in reality, and not just in the mind of the beholder”).

The concept of idealized cognitive model, or ICM, is beyond the scope of this Article, but one can gloss it as referring to abstractions based on domains or realms of experience. Cf. Radden & Kövecses, *supra* note 4, at 21 (describing metonymic processes as linking different “ontological realms”). The idea of sameness or singleness of a domain is what is important here. The term “contiguity” literally denotes physical connectedness, but in modern discussions of metonymy the term is used more loosely (metaphorically, in fact) to mean relatedness. See, e.g., JOHN R. TAYLOR, LINGUISTIC CATEGORIZATION: PROTOTYPES IN LINGUISTIC THEORY 123–24 (2d ed. 1995) (“[C]onnections between entities which co-occur within a given conceptual structure The entities need not be contiguous, in any spatial sense.”).

In 1956, the great Russian structuralist, Roman Jakobson, provided an incisive contrast of metaphor and metonymy in the context of aphasia patients. See Roman Jakobson, *Two Aspects of Language and Two Types of Aphasic Disturbances*, in FUNDAMENTALS OF LANGUAGE 57, 58–82 (1956). Jakobson identifies two poles of aphasia, the “contiguity disorder” and the “similarity disorder,” as constituting a spectrum along which patients can be classified. *Id.* at 63, 71. Patients near the former pole are unable to linguistically express contiguity and must instead resort to metaphor (i.e. to expressions of similarity), while patients near the latter pole are unable to linguistically express similarity and must instead resort to metonymy (i.e. to expressions of contiguity). *Id.* at 76. For patients near the pole of similarity disorder, “contiguity determines the patients’ whole verbal behavior” *Id.* at 70. As Jakobson suggests by referring to poles rather than clear-cut categories, the distinctions between metaphor and metonymy are not always clear-cut. See, e.g., KATHRYN ALLAN, METAPHOR AND METONYMY: A DIACHRONIC APPROACH 182 (2008) (noting that metaphor and metonymy should be viewed on a continuum with “uncontroversial cases” at either end and “‘messier,’ less prototypical cases which involve a greater degree of subjective judgment somewhere between the two”); Nick Riemer, *When is a Metonymy No Longer a Metonymy?*, in METAPHOR AND METONYMY IN COMPARISON AND CONTRAST 379, 383–88 (René Dirven & Ralf Pörings eds., 2003) (discussing ambiguities and indeterminacy in the line between metaphor and metonymy, for example, with regard to an expression like “the landlady kicked him out of the house”).

132. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 35 (1980) [hereinafter LAKOFF & JOHNSON, METAPHORS WE LIVE BY]. Remarks by coffee shop servers about menu items seem to have fascinated metonymy theorists for some reason. See, e.g., *id.* at 38 (“The BLT is a lousy tipper.”); LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS, *supra* note 128, at 77 (“The ham sandwich just spilled beer all over himself.”); RAY JACKENDOFF, THE ARCHITECTURE OF THE LANGUAGE FACULTY 54 (1997) (“The ham

sentence is that *the customer who ordered* the ham sandwich—rather than the construct of white bread, yellow mustard, and lunch meat—is waiting for the check.¹³³ The real meaning (i.e. the customer as target) and the surface expression (i.e. the sandwich as vehicle) are related, though, at least by the fact that the former ordered the latter.

Metonymy often takes a relatively complex intended referent, such as an intricate concept or social phenomenon (think a defendant's contacts with a forum state), and substitutes for it a simpler surface referent such as a physical object or physical relationship (think a defendant's presence in the forum state).¹³⁴ Examples from everyday life might include saying, "My cousin is a brain," instead of describing the cousin's intelligence, introverted personality, or the like; or, saying, "Senator So-and-So is an empty suit," instead of describing the senator's ineffectuality, insincerity, or tendency to rely on style rather than substance. Alternatively, metonymy may take a phrase that is relatively cumbersome to articulate (for example because it demands more words, or contextually superfluous words), and substitutes for it

sandwich in the corner wants some more coffee."); TAYLOR, *supra* note 131, at 123 ("The pork chop left without paying." (emphasis omitted)); Geoffrey Nunberg, *The Non-Uniqueness of Semantic Solutions: Polysemy*, 3 LINGUISTICS AND PHIL. 143, 149 (1979) [hereinafter Nunberg, *Non-Uniqueness of Semantic Solutions*] ("The ham sandwich is sitting at table 20."); Geoffrey Nunberg, *Transfers of Meaning*, 12 J. OF SEMANTICS 109, 115 (1995) [hereinafter Nunberg, *Transfers of Meaning*] ("Who is the ham sandwich?" and "The ham sandwich is at table 7."); David Stallard, *Two Kinds of Metonymy*, PROCEEDINGS OF THE 31ST ANNUAL MEETING ON THE ASSOCIATION FOR COMPUTATIONAL LINGUISTICS 87 (1993) ("The hamburger is waiting for his check.").

The contrast between ham sandwiches on one hand, and a defendant's susceptibility to personal jurisdiction on the other, highlights the enormous practical importance that the linguistic theory of metonymy (not to mention metaphor and other linguistic devices) can carry, when brought out of the relatively controlled precincts of linguistics and into the unruly realities of law.

133. Apart from common sense, grammar helps to prove that the customer, rather than the sandwich, is the real referent of the sentence in the text above. Otherwise the possessive pronoun "his" would not be used. See Nunberg, *Transfers of Meaning*, *supra* note 132, at 115 (pointing out that, "That french fries is getting impatient" is a normal English sentence, but "Those french fries are getting impatient" is not).

134. The idea of "substitution" in this context is, today, considered to be only a simplified or approximate way of describing the operation of metonymy. The current more precise thinking is that a metonymy's source or vehicle "activates" the conceptually more complex target in the hearer or reader's mind. See generally Antonio Barcelona, *The Cognitive Theory of Metaphor and Metonymy*, in METAPHOR AND METONYMY AT THE CROSSROADS: A COGNITIVE PERSPECTIVE 1 (Barcelona ed., 2003).

a phrase that is more economical to articulate.¹³⁵ In “The ham sandwich is waiting for his check,” superfluous words are saved, because of course the source of the impatience to which the first server is alerting the second server is a person, and when that fact is so obvious, there is no need for the busy servers to make explicit reference to that person himself rather than his relevant distinguishing factor.¹³⁶ In either case—complexity of the referent or complexity of the proper locution of the referent—the process of mental simplification is surely one of the reasons why ordinary human minds have tended to make metonymy such a prevalent device. It helps people’s thought and language processes to function, so, of course, people often use it.¹³⁷

Some metaphors are said to be “dead” rather than “live,” and the concept can apply to metonymy too. The proper dividing line between

135. Lakoff generalizes, in the slightly different context of models of categories, that a vehicle will be chosen when compared to the target; the vehicle is “either easier to understand, easier to remember, easier to recognize, or more immediately useful for the given purpose in the given context.” LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS*, *supra* note 128, at 84.

136. Informal evidence (the author’s father owned a coffee shop) suggests that ham sandwiches are a relatively distinctive item to order from the menu.

A similar example would be a departing restaurant patron handing her car key to a parking lot attendant and saying, “I’m parked out back,” saving the unnecessary reference to the car itself, which goes without saying in the context of this interaction. See Nunberg, *Transfers of Meaning*, *supra* note 132, at 110 (giving a similar example without reference to the expression being economical). Nunberg’s article shows that metonymy and metaphor are both devices that enable transfers of meaning, that is, “us[ing] the same expression to refer to what are intuitively distinct sorts of categories of things.” *Id.* at 109.

137. Professor Langacker describes metonymy in terms of a “reference-point construction”:

[T]he entity that is normally designated by a metonymic expression serves as a reference point affording mental access to the desired target (i.e., the entity actually being referred to) Metonymy . . . occurs in the first place because it serves a useful cognitive and communicative function. What is this function? Metonymy allows an efficient reconciliation of two conflicting factors: the need to be accurate, i.e., of being sure that the addressee’s attention is directed to the intended target; and our natural inclination to think and talk explicitly about those entities that have the greatest cognitive salience for us [A] well-chosen metonymic expression lets us mention one entity that is salient and easily coded, and thereby evoke—essentially automatically—a target that is either of lesser interest or harder to name.

Ronald W. Langacker, *Reference-Point Constructions*, 4 *COGNITIVE LINGUISTICS* 1, 30 (1993) [hereinafter Langacker, *Reference-Point Constructions*]; see also RONALD W. LANGACKER, *GRAMMAR AND CONCEPTUALIZATION* 199 (1999) (chapter 6 being an adaptation of the 1993 article).

dead and live metaphors is unsettled; however, the standard view is that a dead metaphor is one that has become “conventional.” This means that the metaphor has been adopted as a standard part of linguistic expression, so that speakers and hearers treat it literally, without the metaphor reflecting an imaginative act of cognition.¹³⁸ For example, the expression, “We’re at a crossroads in our relationship,” is metaphorical, comparing the domains of having a romantic relationship and traveling along a path—but this expression can more specifically be said to be a dead metaphor, because it has become a conventional part of the modern English language such that “crossroads” can now literally mean not just an intersection, but also any important decision-point.¹³⁹

138. *E.g.*, H.W. FOWLER, *A DICTIONARY OF MODERN ENGLISH USAGE* 348–49 (1937) (distinguishing between live metaphors, which “are offered and accepted with a consciousness of their nature as substitutes for their literal equivalents” and dead metaphors, which “have been so often used that speaker & hearer have ceased to be aware that the words are not literal”); *cf.* GEORGE LAKOFF & MARK TURNER, *MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR* 55 (1989); CORNELIA MÜLLER, *METAPHORS DEAD AND ALIVE, SLEEPING AND WAKING: A DYNAMIC VIEW* 221 (2008) (“[D]ead metaphors may be activated in speaking and writing and become very much alive indeed. Regarded as elements of a linguistic system they may be dead, entrenched, or novel; as elements used in speech, they oscillate between sleeping and waking, depending on the degrees of activated metaphoricity in given contexts of use.”). The Pat Benatar song title, *Love is a Battlefield*, on *LIVE FROM EARTH* (Chrysalis 1983), is one good example of a live metaphor. *See also* Zadie Smith, *On the Road: American Writers and Their Hair*, spoken word performance at Neal Pollack’s & Timothy McSweeney’s Festival of Literature, Theater, and Music (July 26, 2001), transcript available at <http://eyeshot.net/zadiesmith.html> (last visited Oct. 17, 2018) (“Kansas City is oven hot, dead metaphor or no dead metaphor.”).

The fact that the dividing line between dead and live metaphors is unsettled might reflect the fact that the label “dead metaphor” is itself metaphorical, because it draws together the domains of life or death on one hand and cognitive activity on the other. *See* Bjerre, *supra* note 24, at 127 n.83. In fact, among linguists, the expression “dead metaphor” is probably not only metaphorical but also a dead metaphor.

139. *See Crossroad*, *OXFORD ENGLISH DICTIONARY* 59 (2nd ed. 1989) (defining “crossroad” as both “[t]he place where two roads cross each other” and “[a] point at which two or more courses of action diverge; a critical turning point”).

Lakoff, Johnson, and most other cognitivists contend that the category of dead metaphors is actually much smaller than just described. In their view, a metaphor must be judged as live or dead at the level of its underlying concepts, not at the level of the particular expressions that instantiate the metaphor. *See* LAKOFF & TURNER, *supra* note 138, at 97. The particular expression, “We’re at a crossroads in our relationship” is just one instantiation of the conceptual metaphor *love is a journey*, which continues to be alive and productive of new expressions that have not been conventionalized. *E.g.*, LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*, *supra* note 128,

A metonymy, similarly, might be said to “die” when it becomes conventionalized.¹⁴⁰ Nick Riemer discusses the example of “breast beating,”¹⁴¹ which is well understood as referring to an ostentatious expression of sadness or guilt—for example, a politician’s flowery lamenting of a problem, unconnected with constructive efforts to solve it. Riemer argues that “breast beating” is not metaphorical, even though the domain of physically striking one’s own body is different from the domain of expressing emotion; instead “breast beating” is a metonymy that has become conventionalized and is accordingly dubbed by Riemer a post-metonymy.¹⁴² Similarly the political terms “left” and “right” are relatively dead metonymies, having originally referred literally to legislative seating arrangements during the French Revolution.¹⁴³ If the expression “nice wheels” as a way of expressing admiration for means of transportation survives into future years in which people use jet-packs and no longer remember cars, the expression will have become a dead metonymy. Nonetheless “the relevance of metonymy or metaphor as the explanatory principle behind an extension does not disappear when an extended meaning becomes conventionalized or generalized.”¹⁴⁴

Regardless of whether they are live or dead, metaphors and metonymies are overwhelmingly subconscious, both in how speakers or writers produce them and in how hearers or readers understand them.¹⁴⁵

at 122–27; LAKOFF & TURNER, *supra* note 138, at 55. On dead metaphors generally, see MÜLLER, *supra* note 138, at 221.

140. There is a parallel in metonymy theory to the thinking discussed in *supra* note 139 about the continuing vitality of seemingly dead metaphors. “A linguistic expression may eventually cease to be used metaphorically or metonymically but the corresponding conceptual projection may still be alive and be reflected in other linguistic expressions. And the more entrenched conceptual metaphors or metonymies, those with a more direct bodily basis seldom, if ever, die.” Barcelona, *supra* note 134, at 5 (citing LAKOFF & TURNER, *supra* note 138, at 49–67).

141. Riemer, *supra* note 131, at 392–94.

142. *Id.* The expression “breast beating” is “a metonymy that is no longer manifest in most of the occurrences of the figure, where no breast beating will occur.” *Id.* at 393. With expressions like this, “their contexts of use have ‘overshot’ the domains of their original appropriateness . . .” *Id.* at 394.

143. *E.g.*, Jesse Norman, *Where Did the Right and the Left Come From?*, THE SPECTATOR (Feb. 15, 2014, 9:00 AM), <https://www.spectator.co.uk/2014/02/the-great-debate-by-yuval-levin-review>.

144. NICK RIEMER, THE SEMANTICS OF POLYSEMY: READING MEANING IN ENGLISH AND WARLPURI 203 (2005).

145. On the initially surprising notion of a metaphor being subconscious but still live, see LAKOFF & TURNER, *supra* note 138, at 129 (noting that it is a mistake to discount

With metaphor, in 99 out of 100 cases, when one friend confides to another that he or she is “in a relationship that is going nowhere,” the speaker is not consciously choosing to highlight similarities between the domains of having a relationship and of going down a path, nor is the hearer noticing and then decoding the fact that one domain is being described in terms of another. Similarly, with metonymy, when one busy diner server warns another that “the ham sandwich is waiting for his check,” the speaker is acting subconsciously, and for convenience as noted above, when he or she omits the direct reference to the customer. (It is absurdly entertaining to imagine this metonymy being conscious. “Hmm, all of the checks that I and my co-worker write are for human beings, and when I warn my co-worker about one of those human beings becoming impatient, both I and my co-worker really just want the check to be written and delivered, so that the most salient aspect in this context is the dish for which the customer is being charged. I might as well do us both a favor by cutting directly to that chase rather than making a needless reference to the human being.”)¹⁴⁶

the cognitive importance of dead metaphors, and explaining that those things in our cognition that are most alive and active are not necessarily those that are conscious; instead, those that are most alive are so automatic as to be unconscious).

146. Sometimes metaphor and metonymy are deployed rhetorically, as the result of conscious choice on the part of the speaker. See, e.g., JONATHAN CHARTERIS-BLACK, *POLITICIANS AND RHETORIC: THE PERSUASIVE POWER OF METAPHOR 2* (2005) (discussing the use of metaphor in political messages); GEORGE LAKOFF, *DON'T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE* 56 (2004) (examining the strategic use of metaphorical framing in political discourse); KATHLEEN AHRENS, *POLITICS, GENDER AND CONCEPTUAL METAPHORS 1* (Kathleen Ahrens ed., 2009) (discussing the use of metaphorical framing as applied to gender-related issues); Radden & Kövecses, *supra* note 4, at 52–53 (exploring the use of metonymy for specific rhetorical purposes); Judith A. Harris, *Recognizing Legal Tropes: Metonymy as Manipulative Mode*, 34 AM. U. L. REV. 1215, 1223 (1985) (discussing the Jakobson model and exploring manipulability of choice of law doctrine); Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949, 955–57 (2007) (analyzing the framework from Lakoff and Johnson); Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy*, 18 WM. & MARY BILL RTS. J. 327, 329 (2009) (exploring the way canonical texts can be invoked as arguments for larger associated ideas). Marketing experts still commonly use metonymy with brand names, such as Impala for a car, presumably intending to efficiently capture otherwise nebulous qualities like swiftness, grace, and strength. See STEVEN PINKER, *THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE* 303 (2007) (stating that companies choose brand names to “connote a quality they wished to ascribe”). Even in these conscious deployments of metaphor and metonymy, economy and convenience of the hearer or reader’s thought is still a primary motivator, and so too, often, is the hearer or reader’s subconscious.

Indeed, the subconscious nature of metaphor and metonymy is a large part of what makes them so useful. Our conscious minds are crowded and busy, like the calendar of a C.E.O., and for the mind to relegate certain forms of thought to the subconscious is somewhat like the C.E.O. delegating certain tasks to her legions of staff members. It frees the valuable conscious attention for other things. By the same token, it creates risks of things going wrong, as explored with presence in Section II.B.

B. Presence as a Metonymy for Minimum Contacts

This Section II.B. presents the heart of this Article's argument, namely that the longstanding criterion of service-while-present in the jurisdiction is perhaps best understood as never having been more than a metonymy for what is now familiar to us as the minimum contacts standard. The service-while-present rule predates *Pennoyer*, but the Scalia opinion in *Burnham* bizarrely perpetuated it as being sufficient to support tag jurisdiction, even in the absence of the minimum contacts that *International Shoe* found to be at the heart of due process. My argument is that the pre-*Pennoyer* judges who developed the service-while-present rule did so because, in their era predating modern communication, a defendant's contacts with a jurisdiction were always accompanied by the defendant's presence in the jurisdiction—hence, there was no practical need to distinguish contacts from presence, and the judges articulated the rule in terms of presence rather than contacts in accordance with the ordinary principles of metonymy.

Overall, the central issue that this Section II.B. addresses is the question of why the pre-*Pennoyer* judges chose to express the rule in terms of presence, rather than in terms of contacts, if indeed what they really meant is the contacts rather than the presence. In linguistic terms, the question is why the judges employed any metonymy at all, and in particular why they employed presence as the metonymy's vehicle.¹⁴⁷

The answers are rich, taking several forms. They are set out below, some of them echoing and some of them deepening the basic understanding of metonymy already presented in Section II.A. When all of the following are taken together, it becomes apparent that the metonymy of PRESENCE FOR CONTACTS is strongly motivated—that is, a number of selection principles converge in establishing the

147. See *supra* note 131 for a discussion of vehicle and target as the constituent elements of metonymy. Generally, the vehicle, which is articulated, provides cognitive access to the target, which is not articulated.

naturalness and expectability of the judges having articulated the rule as they did.¹⁴⁸ The judges selected a highly natural vehicle with which to access their target.

1. Simplification by reference to a contiguous and closely associated feature

As seen in Section II.A, simplification by reference to a contiguous feature is one of the basic reasons why a speaker or writer (in this case, the judges of the early service-while-present era) would use a metonymy at all. Presence in a jurisdiction is of course a simpler concept than “minimum contacts with that jurisdiction such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice,”¹⁴⁹ or any similar notion.¹⁵⁰ Presence is a simple black-or-white criterion that can be determined with little or no effort on a judge’s part—a boilerplate affidavit by the process server will suffice. By contrast, the minimum contacts standard is highly nuanced and fact sensitive; there will often be cases close to the line with which the judge’s mind and conscience must wrestle.¹⁵¹

Presence in the jurisdiction is contiguous with contacts therewith, because presence and contacts are both aspects of the same domain of life experience. That is, both are elementary and utterly familiar facets of the fact that a person (the defendant) exists: he or she goes to places and occupies their space; he or she does things while in that space, and those actions have effects. Moreover, physical presence is closely associated with effects. During the historical era in which the service-while-present rule was promulgated, it was unusual for a person to have

148. Thus, PRESENCE FOR CONTACTS is a better motivated metonymy than some others, in which some selection principles are at odds with others. *E.g.*, Radden & Kövecses, *supra* note 4, at 51 (discussing an example, “*The buses are on strike*,” which fits with principles such as interactional over non-interactional but does not fit with other principles such as human over non-human).

149. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

150. The quotation marks in this sentence risk conveying the unintended impression that the target of a metonymy must itself be linguistic. *See infra* notes 153–157 and accompanying text.

151. *See, e.g.*, *Roth v. Garcia Marquez*, 942 F.2d 617, 622 (9th Cir. 1991) (stating “[t]hough neither side decisively triumphs under this analysis, it appears that there was enough . . . to compel a finding of jurisdiction”); *Synopsys, Inc. v. Ubiquiti Networks, Inc.*, No. 17-cv-00561, 2017 WL 3485881, at *26 (N.D. Cal. Aug. 15, 2017) (denying a motion to dismiss for lack of personal jurisdiction when the requisite knowledge was not proven but certain “allegations make it sufficiently plausible to infer knowledge”); *Hosain v. Malik*, 671 A.2d 988, 1009–11 (Md. Ct. Spec. App. 1996) (discussing the competing interests to protect a child from hardship and discourage circumvention of foreign law in declining to exercise personal jurisdiction in a custody dispute).

effects in a place without being physically present there. Before the modern advent of easy transportation and communication, contacts with a forum were impossible without physical presence.

At first glance, there is a notable difference between the judicial thinking process that this Article posits and the examples of metonymy described above; namely, that in the examples above, a careful and self-conscious speaker or writer would have been able to avoid the metonymy if he or she wished. (The coffee shop server could have referred explicitly to the customer who ordered the ham sandwich; the newscaster could have referred to the particular Executive Branch official who nominated the prospective judges, or to the constitutional basis from which the official derives his or her power). In other words, at first glance, metonymy is a purely linguistic phenomenon, limited to the simple substitution of one articulation for another, with the unused articulation nonetheless being relatively easily available to the speaker, albeit disfavored as discussed above. And by contrast, the PRESENCE FOR CONTACTS metonymy as used by the pre-*Pennoy* judges involves the use of one articulation for an as-yet unformulated concept—indeed a rather abstruse concept which would not be articulated by anyone until the era of *International Shoe*.¹⁵² So the PRESENCE FOR CONTACTS metonymy does not involve a simple substitution of one articulation for another and hence it is different from the other metonymies discussed heretofore in a way that must be explained if the hypothesis is to be sustained.

The explanation lies in the idea, well recognized in cognitive linguistics, that metonymy is not solely linguistic—metonymy is also and perhaps primarily cognitive. That is, metonymy operates at the level of thinking and understanding, not just at the level of speaking. Professors Radden and Kövecses explicitly reject the idea that “metonymy operates on names of things” or “involves the substitution of the name of one thing for that of another thing,”¹⁵³ and instead argue that metonymy is cognitive in that it leads to the formation of “new, complex meaning.”¹⁵⁴ Similarly, Professor Barcelona points out that metonymy is frequently involved in a number of “generally ‘invisible’ conceptual operations or conceptual structures (i.e. operations/structures *not directly coded by a particular linguistic form*) that

152. *Int'l Shoe*, 326 U.S. at 316.

153. Radden & Kövecses, *supra* note 4, at 17.

154. *Id.* at 19.

underlie online linguistic processing,”¹⁵⁵ and that this is evidence “both of the *conceptual nature* of metonymy and of the fact that metonymy is not confined to lexical meaning.”¹⁵⁶

Once one realizes that metonymy is cognitive and not simply linguistic,¹⁵⁷ its use by the pre-*Pennoyer* judges in initially and clumsily formulating ideas such as contacts with the jurisdiction is perfectly natural, and PRESENCE FOR CONTACTS ceases to look like a troubling or aberrant case. Instead, the fact that the targets in examples like the ham sandwich and the White House could have been so easily paraphrased by those speakers is an accidental attribute. The most noteworthy aspect of all of these metonymies is simply their subconscious nature. The vehicle is always articulated, but the target is not necessarily something that could have been articulated instead.

2. *Patterns of salience*

Professor Langacker points out that metonymy is a device that lets us mention a vehicle that is “salient and easily coded” in order to evoke a less salient or harder to name target.¹⁵⁸ Salient means prominent or conspicuous,¹⁵⁹ and Langacker and others have identified a number of principles that help to make a given vehicle salient to ordinary human beings based on their ordinary life experience.¹⁶⁰

One prime principle is that humans are more salient than non-humans. (Following this principle, the defendant him or herself would be more salient than his or her effects.) Langacker remarks that “[p]eople make

155. Antonio Barcelona, *Metonymy is Not Just a Lexical Phenomenon: On the Operation of Metonymy in Grammar and Discourse*, in *SELECTED PAPERS FROM THE 2008 STOCKHOLM METAPHOR FESTIVAL* 13, 17 (Nils-Lennart Johannesson & David C. Minugh, eds., 2009) (emphasis added).

156. *Id.* (emphasis added).

157. Indeed, thinking of metonymy in purely linguistic terms is metonymic. The relatively easy to access and articulate vehicle of language is substituted for the more amorphous and difficult to articulate target of cognition.

158. Langacker, *Reference-Point Constructions*, *supra* note 137, at 30.

159. See *Salient*, OXFORD ENGLISH DICTIONARY 392 (2nd ed. 1989) (“Of immaterial things, qualities, etc.: Standing out from the rest; prominent, conspicuous”). The word is etymologically and metaphorically related to “jumping out.” *Id.* at 392.

160. At the risk of stating the obvious, the category of ordinary human beings includes judges. See Andrea Coles-Bjerre, *Bankruptcy Theory and the Acceptance of Ambiguity*, 80 AM. BANKR. L.J. 327, 376 (2006) (“In this modern era we have come far enough to know that law is not an artificial mode of reasoning, to recognize that judges are no more or less human than the rest of us, and even to accept that judicial minds work in much the same way as ordinary people’s minds.”).

especially good reference points,¹⁶¹ and Radden and Kövecses write that “[o]ur basic human experiences are derived from our anthropocentric view of the world and our interaction in the world,” in which “humans take precedence over non-humans.”¹⁶² As applied to metonymy this is evidenced, for example, by the frequency with which we refer to “a Picasso” rather than the more accurate “a painting by Picasso” or even more difficult related concepts.¹⁶³ Langacker further observes that “a person is often selected [as a vehicle] even when absent, non-visible, or no longer in existence (as an integral whole).”¹⁶⁴ My argument is that in formulating the service-while-present rule in terms of PRESENCE FOR CONTACTS, the early judges articulated the rule in terms of the presence of the defendant herself, rather than in terms of the effects of the defendant who in many cases may be present but in other cases *may not be present*. Langacker helps us to see that the defendant herself remains a good vehicle for the metonymy even in cases where she is not present.¹⁶⁵

Another important principle is that a whole is more salient than a part. (Accordingly, the defendant as a whole is more salient than particular facets of his contacts with the forum.)¹⁶⁶ Langacker links

161. Langacker, *Reference-Point Constructions*, *supra* note 137, at 30.

162. Radden & Kövecses, *supra* note 4, at 45.

163. “When we think of *a Picasso*, we are not just thinking of a work of art alone, in and of itself. We think of it in terms of its relation to the artist, that is, his conception of art, his technique, his role in art history, etc. We act with reverence toward *a Picasso*, even a sketch he made as a teen-ager, because of its relation to the artist.” LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*, *supra* note 128, at 39.

164. Langacker, *Reference-Point Constructions*, *supra* note 137, at 30. His examples include, “She bought Lakoff and Johnson, used and in paper, for just \$1.50” and one involving gravediggers comparing two skulls and saying “Yorick is slightly larger than Polonius.” *Id.* at 29 (emphasis omitted).

165. If humans are more salient than non-humans, one may wonder why our friends the coffee-shop servers refer to their customer, who is surely human, as a ham sandwich, which is not. The answer is “the skewing of salience relationships that specific circumstances often induce.” *Id.* at 30. Using the example of one nurse telling another, “The (vasectomy/herniated disc) in 304 needs a sleeping pill,” Langacker explains that:

nurses may well know virtually nothing about their individual patients except the nature of their malady or medical procedure; this is what they are primarily responsible for dealing with. Consequently, when they have to mention a particular patient (whose name they may not even recall), the malady or procedure suggests itself as an obvious reference point.

Id. at 29–31.

166. Langacker uses his Yorick and Polonius example, *supra* note 164, to illustrate this principle as well as the previous one. Langacker, *Reference-Point Constructions*, *supra* note 137, at 30.

this principle to what he calls the *active-zone/profile discrepancy*.¹⁶⁷ In a sentence like “The dog bit the cat,” the dog as a whole and the cat as a whole are profiled (or highlighted by the explicit mention), even though the active zones (or parts of the dog doing the biting and parts of the cat being bitten) are much more specific. Langacker tells us that it is “normal,” “natural,” “expected” and “common” for the active zones to be left unprofiled. It would be bizarre for a person to say, instead, “The dog’s teeth, jaws, jaw muscles, and volition bit that portion of the cat’s tail extending from six to twelve centimeters from the tip.”¹⁶⁸ To be sure, such a sentence would be more accurate, but “there is a tension between the need to be accurate and our inclination to focus explicit attention on those entities that most concern us and have the greatest cognitive salience.”¹⁶⁹ Referring to the entity as a whole focuses attention on it, and “general knowledge and contextual frames”¹⁷⁰ tacitly supply the remainder of the desired accuracy. To us today, it is a crashingly obvious point that persons in an earlier era without ready modern communications could not have effects on a place without being in that place. And to a judge of that early era who was announcing the service-while-present rule, that same point—while not obvious, in the same way that water is non-obvious to a fish—would have certainly been squarely within the judge’s subconscious “general knowledge and contextual frames.”

Radden and Kövecses identify CAUSE FOR EFFECT as a common metonymic pattern, giving as an example a person saying “healthy complexion” instead of “the good state of health bringing about the effect of healthy complexion.”¹⁷¹ A person, or his or her presence, is, of course, often a cause of effects on his or her surroundings, and indeed as already seen it is difficult to imagine such effects happening in the person’s absence. Relatedly, Radden and Kövecses identify AGENT FOR

167. Ronald W. Langacker, *Active Zones*, in PROCEEDINGS OF THE TENTH ANNUAL MEETING OF THE BERKELEY LINGUISTICS SOCIETY 172 (1984) [hereinafter Langacker, *Active Zones*]; Langacker, *Reference-Point Constructions*, *supra* note 137, at 31–35. He also explains, on the other hand, that the active-zone/profile discrepancy is not limited to part/whole relationships. *Id.* at 32–33.

168. *Id.* at 32 (emphasis omitted).

169. *Id.*

170. *Id.*

171. Radden & Kövecses, *supra* note 4, at 38, 47 (emphasis omitted). Here they suggest that the contrary pattern, EFFECT FOR CAUSE, may be more natural because effects are more perceptible than causes, but I submit that where the cause is a human being and the effect is not, CAUSE FOR EFFECT is actually more natural in keeping with Langacker’s point about the salience of humans. See *supra* notes 158–165 and accompanying text.

ACTION as a further common metonymical pattern, giving as examples the phrase “to *author* a new book” and “to *butcher* the cow.”¹⁷² (Other authors identify similar subpatterns, including CONTROLLER FOR CONTROLLED¹⁷³ and PRODUCER FOR PRODUCT.¹⁷⁴). For a judge to refer to the defendant him- or herself, rather than to the effects of the defendant’s actions, is, of course, nicely consistent with these patterns.

And finally for this Section’s purposes is the relationship between place and event. Markert and Nissim observe that “[a] location name stands for something that happened there.”¹⁷⁵ They give as one clear example a sentence naming “Bosnia and so on” when the target is the war that took place in Bosnia and Herzegovina from 1992 to 1995.¹⁷⁶ Similarly, in a sentence like “He was shocked by Vietnam,” “the name of the location refers to the event (a war) that happened there.”¹⁷⁷ Radden and Kövecses articulate a broader version of the same idea, illustrating it with similar location/event examples:

Metonymy tends to make use of stereotypical, or idealized, relationships within an ICM. Thus, certain places tend to be associated with events which typically occur at the place. For example, the expression to go to bed may, depending on the situation, evoke the metonymic targets ‘to go to sleep,’ ‘to have sex’ or ‘to be sick.’ All these events are stereotypically associated with beds More generally, we may describe the conceptual relationship between space and event as one that is entrenched and may be exploited by metonymy.¹⁷⁸

The application of this pattern, too, to PRESENCE FOR CONTACTS is clear. The jurisdiction of the early judge articulating the service-while-

172. Radden & Kövecses, *supra* note 4, at 37–38; *see also* BEATRICE WARREN, SENSE DEVELOPMENTS: A CONTRASTIVE STUDY OF THE DEVELOPMENT OF SLANG SENSES AND NOVEL STANDARD SENSES IN ENGLISH 65, 67 (1992) (giving examples of “causer-result” and “result-causer” metonymies). Radden and Kövecses note that their examples involve changes of word class (for example, the vehicle noun author is being used as a verb to describe the target action of writing), and that such changes are typical but not universal. Radden & Kövecses, *supra* note 4, at 38.

173. LAKOFF & JOHNSON, METAPHORS WE LIVE BY, *supra* note 132, at 38 (giving examples such as “Nixon bombed Hanoi” and “Ozawa gave a terrible concert last night”).

174. *Id.* (giving examples such as “I’ll have a *Löwenbräu*” and “He’s got a *Picasso* in his den”); *see also* NEAL R. NORRICK, SEMIOTIC PRINCIPLES IN SEMANTIC THEORY 45–52 (1981) (providing a taxonomy of types of metonymy including producer/artifact, cause/effect, natural source/natural product, and instrument/product).

175. Katja Markert & Malvina Nissim, *Corpus-Based Metonymy Analysis*, 18 METAPHOR & SYMBOL 175, 180 (2003).

176. *Id.*

177. *Id.* at 175.

178. Radden & Kövecses, *supra* note 4, at 22 (emphasis omitted).

present rule is the place, used as the vehicle. The defendant's contacts with that place are, I argue, the target. And it is just as conceptually natural for the judge to speak in terms of the defendant being present (meaning that the defendant has had adequate contacts) as it is for a political observer to say that he is "shocked by Vietnam" (meaning shocked by the events that took place there).

As one should absolutely expect in light of metonymy's imaginative and contextual nature, the particular patterns of salience examined above are only a few among "a host" of metonymical patterns.¹⁷⁹ But these particular patterns are not random. On the contrary, they all fit within certain more overarching notions from metonymy theory which further bolster this Article's hypothesis.

For example, metonymy theory tells us that a more concrete vehicle is more likely to be chosen for a more abstract target. Radden and Kövecses observe that "[o]ur basic human experience relates to concrete physical objects, which have more salience for us than abstract objects,"¹⁸⁰ using this idea to explain why people say things like "having one's hands on something" instead of "controlling something."¹⁸¹ The defendant's physical body is of course more concrete than most of the remotely-caused effects (a broken promise, an economic loss, an infringed patent) that he or she has caused in the jurisdiction. Radden and Kövecses add that one subcase of the preference for concrete over abstract is the bodily over the actional, accounting for phrases like "hold your tongue" for the target of "stop speaking."¹⁸² Here, too, the significance of the defendant's body is clear.

Similarly, an immediate vehicle is more likely to be chosen for a non-immediate target, so that speakers or writers tend to use metonymies based on "stimuli in our spatial, temporal and causal immediacy."¹⁸³ Radden and Kövecses give the example of "I'll answer the phone" for "I'll answer the person speaking at the other end of the line" as being motivated by spatial immediacy, and, of course, the service-while-present rule involves the defendant's immediacy to the court—not only spatially, because the defendant is present in the jurisdiction, but

179. Riemer, *supra* note 131, at 382.

180. Radden & Kövecses, *supra* note 4, at 45; *see also* Langacker, *Reference-Point Constructions*, *supra* note 137, at 30 (identifying concrete over abstract as a principle of cognitive salience).

181. For more on this particular example in the legal context, see *supra* note 128 and accompanying text.

182. Radden & Kövecses, *supra* note 4, at 45.

183. *Id.* at 47.

also temporally, because the defendant's presence is measured at the time of the service.

In concluding this section, one should briefly note that there are similar metonymic expressions along the lines of PRESENCE FOR CONTACTS in today's everyday non-legal discourse.¹⁸⁴ One friend offering comfort to another will say, "I'm there for you," even if speaking by phone from thousands of miles away, and in this case the vehicle of being "there" evokes the target of having certain effects, namely emotional support. During the 1990s, the gay rights activist group Queer Nation popularized the slogan "We're here, we're queer, get used to it"¹⁸⁵ with the vehicle of being "here" evoking targets such as the assertion of social and political power. Conversely, a vehicle of absence can evoke targets of disengagement, as with Timothy Leary's counterculture slogan "Turn On, Tune In, Drop Out."¹⁸⁶ No doubt the examples could be multiplied.

3. *The analogy of children's naming efforts*

As already seen, most or all uses of metonymy are based on convenience or usefulness, but these terms should not be taken only in a trivial sense. Certain instances of metonymy usage are so extremely convenient and useful that they are, in effect, indispensable. Two instances should be examined here, which are in fact analogous to each other in important ways: first, a judge who is wrestling with a new legal concept, the contours of which have not yet become clear, and second, a child who is still at an early stage of language acquisition. Using the idea of distributed cognition, this subsection of the Article argues that a judge's metonymical wrestling with a not-fully-developed

184. Certain parallels in law as opposed to everyday discourse are addressed in Section III.C below, and the problem of instances from judicial discourse about personal jurisdiction in particular during the pre-*Pennoy* period is addressed in Section II.B.3.

185. See Susan Stryker, *Queer Nation*, GLBTQ ENCYCLOPEDIA (2004), http://www.glbqtarchive.com/ssh/queer_nation_S.pdf.

186. See TIMOTHY LEARY, FLASHBACKS: A PERSONAL AND CULTURAL HISTORY OF AN ERA 253 (1983):

Turn On meant go within to activate your neural and genetic equipment
Tune In meant interact harmoniously with the world around you *Drop Out* suggested an active, selective, graceful process of detachment from involuntary or unconscious commitments. *Drop Out* meant self-reliance, a discovery of one's singularity, a commitment to mobility, choice, and change Unhappily my explanations of this sequence of personal development were often misinterpreted to mean "get stoned and abandon all constructive activity."

concept is closely analogous to a child's metonymical grasping for a not-fully-rounded vocabulary. This analogy provides further support for this Article's hypothesis that early judges, in announcing the service-while-present rule, were grasping for a concept that in fact was more nuanced, but that the judges did not yet have the historical perspective necessary to grasp.

All adults have smiled to see a toddler exclaim "Doggie!" upon seeing a horse or a rhinoceros, when the toddler does not yet know the vocabulary words "horse" or "rhinoceros." The toddler presses into service what limited vocabulary she has, in order to deal with situations that are new to her—an extending of words beyond their accepted definitions that is structurally similar to metonymy. Indeed, Professors Nerlich, Clarke, and Todd, examining a corpus of such expressions by children up to age two and a half, call the expressions "compelled metonymical overextensions."¹⁸⁷ They explain that "at this age a child's vocabulary, category and conceptual systems are still relatively small and unstructured. This scarcity compels them to extend already known words to cope with increasing communicative needs, to comment on what they see and to request what they want."¹⁸⁸ Giving a number of examples of children's metonymical overextensions, Nerlich and her co-authors summarize that children with limited lexicons:

[f]ocus on one salient feature in a set framework or frame of repeated interactions with the caregiver or parent. They say *book* if they want to read, *blow* when referring to a match, they say *hello* for telephone, and so on. Gradually, through interaction with the caregiver or parent who grants their requests, the children elaborate on their comments. Finally, the metonymical overextensions, which function as place-markers in the interactional and conceptual

187. Nerlich et al., *supra* note 8, at 364. Nerlich and her co-authors also explore a second metonymical pattern in children's language, which they call "creative metonymical shrinking." *Id.* at 369. This pattern is based more on simple convenience than on necessity and is exemplified by the "I like being a sandwich" phrase in the article's title, which is a child's convenient way of referring to having the ability to bring his own lunch to school.

188. *Id.* at 364. We could say that the nature of a child's groping metonymy is that it underspecifies the concept in question, or by the same token, it over-extends the category. The child thinks that the category of doggie only has one criterion for membership, namely having four legs. A more mature understanding is that there are other criteria, too, such as barking. The child has two related reasons for over-extending the concept: a limited vocabulary and a limited range of experiences on which to base recognition of the need for additional words.

frameworks, will be replaced by the ‘proper’ words allocated them by the adults, such as *read*, *match* and *telephone*.¹⁸⁹

Now obviously the judges who developed the service-while-present rule had fine and nuanced vocabularies. These early judges were also surely unlike toddlers in being worldly gentlemen with extensive experience of the then prevailing society. Nonetheless, at a deeper level, there is a sound analogy here: the early judges are to judges of the modern era as children are to adults. The early judges simply lacked experience of future evolutions in communications and cross-border business transactions much as children lack life experience. As two writers on metonymy have noted, “our perception of the world is inseparable from our experience and cognition,”¹⁹⁰ and the overarching fact of any person’s historical era is obviously a compelling factor helping to constitute that person’s experience.

To spell out the rest of the logic, then, the early judges’ historical situation caused them to lack the associated vocabulary or conceptual structure with which to discriminate among the concepts of presence in a jurisdiction, contacts with the jurisdiction, and presence in the jurisdiction not generating minimum contacts with it. Hence, the early judges were unable to articulate the concept of minimum contacts with anything approaching the degree of nuance by which we know that concept today.¹⁹¹ Instead, they metonymically overextended their only

189. *Id.* at 369; see also RAYMOND W. GIBBS, JR., *THE POETICS OF MIND: FIGURATIVE THOUGHT, LANGUAGE, AND UNDERSTANDING* 422–24 (1994) (discussing children’s invention of verbs from nouns “to fill gaps in their lexicon in particular communicative situations”); Ewa Konieczna & Grzegorz A. Kleparski, *In Search of Evidence for Metonymically Motivated Innovative Nouns in Children’s Speech*, 2 SKASE J. THEORETICAL LINGUISTICS 43 (2005) (discussing similar children’s neologisms in English and Polish). On the topic of children’s comprehension rather than usage of metonymic expressions, see Gabriella Rundblad & Dagmara Annaz, *Development of Metaphor and Metonymy Comprehension: Receptive Vocabulary and Conceptual Knowledge*, 28 BRIT. J. DEVELOPMENTAL PSYCHOL. 547, 549 (2010).

190. Konieczna & Kleparski, *supra* note 189, at 44–45 (quoting in this context Immanuel Kant’s dictum from *Critique of Pure Reason*, “we see things not as they are but as we are”).

191. In noticing the early judges’ inability to articulate a concept, one might compare them not only to children but also to adults who truly lack linguistic ability, i.e. aphasics. In retrospect, it is wonderfully sensible that Roman Jakobson examined metonymy and metaphor in the context of aphasia. See *supra* note 131. After all, any person who lacks adequately precise literal language will naturally resort to approximations such as metonymy and metaphor; cf. Jeanne L. Schroeder & David Gray Carlson, *The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law*, 24 CARDOZO L. REV. 2481, 2515 (2003) (remarking in a different context that metonymy “is the attempt to invoke indirectly that which cannot be captured directly,” and that it is used for describing “parts of the signified, or that which surrounds or

available vocabulary, namely that of simple physical presence.¹⁹² In a later era, when social developments had made it necessary and feasible, the *International Shoe* Court achieved a greater vocabulary. As a historical matter, then, the hypothesis is strongly inviting: tag jurisdiction has always been a rhinoceros that early judges called a doggie.

Moreover, this analogy between toddlers and the judges of the past is supported by the powerful theory known as distributed cognition. In his landmark book, *Cognition in the Wild*,¹⁹³ Edwin Hutchins shows that organized groups have cognitive properties that are different from those of the individuals comprising the group. The organization can be thought of as a single cognizing entity, effectively a form of mind that is not confined to a single individual's body.¹⁹⁴ Focusing on the navigation of a large American war ship, Hutchins shows how the labor of cognition is distributed, both over space (for example, among the

accompanies it, or the traces of its retreat"). For other discussions involving metonymy, see Jeanne L. Schroeder, *Never Jam To-day: On the Impossibility of Takings Jurisprudence*, 84 GEO. L.J. 1531, 1553 (1996); Jeanne L. Schroeder, *The Laconomics of Apples and Oranges: A Speculative Analysis of the Economic Concept of Commensurability*, 15 YALE J. L. & HUMAN. 347, 377–80 (2003); Jeanne L. Schroeder & David Gray Carlson, *Law's Non-Existent Empire*, 57 U. MIAMI L. REV. 767, 784–85 (2003).

192. It is not this Article's business to assert as a matter of historical linguistics that this is in fact how the concept came to be. Indeed, it would surely be difficult for anyone to ever unearth proof of the subconscious thought processes of judges who are now long dead. See generally *infra* Section III.A. Instead this Article simply suggests that it is a reasonable and even compelling hypothesis, especially in light of the absence of other justifications.

This same hypothesis helps to shed light on the writ of *causas ad respondendum*, discussed *supra* note 59 and accompanying text. The writ is more a predecessor of modern service-of-process rules than of modern personal jurisdiction rules. (Indeed, the fact that the *causas* writ has now "given way to personal service of *summons* or other form of notice" helps substantiate the pervasiveness of metaphor and metonymy in law. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (emphasis added). The modern device is called a "summons" because, like the writ, it compels the defendant to make an "appearance" in court, albeit no longer necessarily in a bodily sense. To the judges of the early era in which the writ was used, making decisions based on their experience and historical situatedness (including notably the relative absence at that time of well-developed alternatives) it would have seemed natural to require a defendant to be bodily present in court for the purpose of answering the complaint.

For a descriptive perspective on the diachronic aspects of metonymy, not relying on this Article's analogy to distributed cognition, see Konieczna & Kleparski, *supra* note 189, at 50 and sources cited, describing the need to name new "technological developments within a particular society."

193. EDWIN HUTCHINS, *COGNITION IN THE WILD* 175–76 (1995).

194. Distributed cognition can be thought of in terms of the mass/multiplex image schema, which the author explores in detail in a different context elsewhere. See Coles-Bjerre, *supra* note 160, at 373.

many sailors and other individuals at several stations on the vessel) and over time (for example, with the individuals taking advantage of records and tools that were built up by their predecessors over the years).¹⁹⁵ I submit that the development of case law, similarly, is another paradigmatic example of distributed cognition over time. A law library is a set of tools (an “external representation,” as Hutchins says) analogous to the measurements and devices used in navigation, and the presiding judge in any given case at bar draws on the accumulated wisdom of his or her past colleagues.¹⁹⁶

There is nothing pejorative, then, about analogizing the pre-*Pennoyer* judges to toddlers in their use of metonymy: it is simply a fact that the earlier judges’ work contributes to the outcomes of today’s judges’ cases, but not vice versa.

III. OH NO! IT’S NEITHER LIVE NOR DEAD!

With “dead metonymy” being a metaphor,¹⁹⁷ the entailments of that metaphor suggest that a dead metonymy or dead metonymic expression must once have been alive.¹⁹⁸ And some theorists take this proposition for granted.¹⁹⁹ But the metonymy of PRESENCE FOR CONTACTS presents a troublesome case for testing the proposition, and therein lies much of

195. “In an external representation, structure can be built up gradually—a distribution of cognitive effort over time—so that the final product may be something that no individual could represent all at once internally.” HUTCHINS, *supra* note 193, at 96. For example, the chart that a navigator uses is a product of “more observations than any one person could make in a lifetime” and “is an artifact that embodies generations of experience and measurement.” *Id.* at 111.

196. Others have written about other aspects of law as distributed cognition, for example the trial process:

Take a court of law. Its purpose is explicitly cognitive: to determine, beyond reasonable doubt, the truth-value of certain propositions (X is guilty of crime C). To do so, a number of individuals have specific roles to play, each of them cognitive The system is so built that, when everything works well (which is not always the case), none of the beliefs of the individuals involved *determines* the outcome. The decision process is, in some sense, supra-individual. As a cognitive process, evaluating the truth of the propositions is a system-level affair.

Pierre Poirier & Guillaume Chicoisne, *A Framework for Thinking About Distributed Cognition*, 14 PRAGMATICS & COGNITION 215, 215–16 (2006).

197. See Langacker, *Active Zones*, *supra* note 167 and accompanying text.

198. For a discussion of the aliveness or deadness of metaphorical and metonymic expressions, see *supra* notes 167–173 and accompanying text.

199. *E.g.*, DAN FASS, PROCESSING METONYMY AND METAPHOR 49 (1997) (“Dead metaphors and metonymies were formerly alive, but their meanings have become frozen or fossilized in word senses and phrases.”).

its value for legal as opposed to linguistic analysis. This Part of the Article suggests that the metonymy of PRESENCE FOR CONTACTS is neither live nor dead, but rather, a disturbing and poorly understood middle ground between live and dead. The metonymy lurches undead through the law, leaving destruction in its path, like a zombie.

A. *The Undead Among Us*

One very standard type of argument used by lawyers and legal academics is based on the intentions of those who formulated a rule. For example, statutory interpretation depends heavily on the intent of the legislature; contractual interpretation depends heavily on the intent of the parties; and the original intent of the framers is a robust school of constitutional interpretation as well.²⁰⁰ So, it is perhaps not surprising that when first hearing this Article's hypothesis that the service-while-present rule was a primitive metonymy for minimum contacts, some lawyers and legal academics have responded "Interesting—is that what the cases say?" This response is disappointing because, as careful readers will already realize, it misses the fundamental point of this Article's hypothesis that the formulation of the service-while-present rule was subconscious. Judges reached for the defendant's presence in the jurisdiction as a subconscious substitution for the much more abstract (and, at the time, difficult to conceptualize) criterion of the defendant having minimum contacts with the jurisdiction. If those early judges had shared the historical vantage point of the *International Shoe* Court and later judges, and had, therefore, been able to conceptualize the minimum contacts rule in literal terms, they would have done so.

Thus, one naturally searches in vain for nineteenth century judicial pronouncements about a defendant's presence in the jurisdiction being more or less equivalent to the defendant having sufficient contacts therewith. To imagine judges of the pre-*Pennoyer* era explicitly ruminating about the comparability of presence and contacts is just as absurd as imagining a coffee shop server consciously planning to refer to the ham sandwich rather than the customer.²⁰¹ Such a judicial opinion would have to say, for example, "This court is presented with a non-domiciliary defendant who was served while present within this state's borders and who, unsurprisingly in light of the non-transitory

200. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 284 (1989).

201. See *supra* note 133 and accompanying text.

nature of that presence in the current era of history, has had substantial contacts with this state related to the cause of action. But, it would be tedious and relatively difficult to articulate the details of those contacts, and hence, for convenience in the remainder of this opinion, we shall simply refer to the defendant as having been ‘present’.²⁰² This Article is not based on any such explicit statements gleaned from case-crunching. Whether PRESENCE FOR CONTACTS had an initial “conscious” stage is not this Article’s concern,²⁰³ though by now it should be clear to the reader that the cognitive theory at work here would strongly suggest a negative answer. The pre-*Pennoyer* judges would not have been conscious of their thoughts along these lines any more than the coffee-shop server above, or the toddler doing his or her best to label the rhinoceros.²⁰⁴

But the fact that PRESENCE FOR CONTACTS was always subconscious does not mean that it was never “live,” or even that it is now “dead.” If this Article’s hypothesis is correct, then the metonymy was certainly and obviously live at the time that the pre-*Pennoyer* judges developed the service-while-present rule. (As just explored, scholars of the present era cannot know directly what was in the early judges’ minds, but it is vastly more natural to suppose that when those judges referred to presence, it was a clumsy early attempt at naming something more flexible, rather than a consciously wooden selection of a criterion that is hard to justify on its own terms.) Moreover, the metonymy is not “dead” now, in the sense of being conventionalized; that is, no one would argue that the linkage of presence and contacts has become a standardized extension of the

202. And a concurrence to such an opinion might run like this: “Though I join my learned brethren in thinking that the reference to presence is a useful simplification in the case at hand, I am concerned that the mechanistic application of such a formulation to future cases, in which a defendant’s presence might be much more transitory because of as-yet uninvented advances in transportation, would create problematic assertions of power.”

203. Historians of linguistics or of jurisprudence who want to pursue this line of inquiry might want to look into the works of Ulrich Huber and their antecedents, among other sources. See, e.g., James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 73 (1990). The answer is probably that this metonymy never was conscious, and if such is the case, it supports this Article’s thesis.

204. Cf. Andrea Coles-Bjerre, *Ipsa Facto: The Pattern of Assumable Contracts in Bankruptcy*, 40 N.M. L. REV. 77, 117–18 (2010) (establishing the subconscious nature of judicial categorization related to ipso facto clauses); Coles-Bjerre, *supra* note 160, at 373–76 (critiquing judicial policy-making that, while purportedly relying on plain meaning, is subconsciously motivated by policy preference).

literal meaning of “present” or any other related word.²⁰⁵ (In today’s usages such as “I’m there for you,”²⁰⁶ the metonymy is live although unconscious.)

Even so, the PRESENCE FOR CONTACTS metonymy does have a dead aspect, in that its effect today—notably in *Burnham* and similar tag jurisdiction cases—is fixed, or frozen, or conventionalized in the service-while-present rule. In other words, the rule itself is fixed and conventionalized, even if the underlying metonymy that gave birth to the rule is not. As explored next, this is a disturbing—some would say horrifying—middle ground between life and death.

B. *The Destructive Effects of an Undead Rule*

Although live and dead metonymies impede ordinary human communication only to an extent that is virtually unnoticeable,²⁰⁷ the result can be very different when a live metonymy cloaks itself in a half-dead and decaying rule of law. The PRESENCE FOR CONTACTS metonymy, in particular, morphs into *Burnham*’s tag jurisdiction rule, which wreaks destruction on innocent defendants.²⁰⁸

In jurisprudence we have long been aware of the dangerous potential of metaphor. Cardozo famously wrote, “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”²⁰⁹ And the great Realist legal philosopher Felix Cohen wrote:

205. See *supra* notes 138–144 and accompanying text (explaining dead metonymy in terms of conventionalization).

206. See *supra* notes 183–186 and accompanying text (discussing PRESENCE FOR CONTACTS metonymic expression in everyday non-legal discourse).

207. One of Section II.A’s underlying premises was that people are so good at understanding metonymic communication in ordinary conversation and other non-legal discourse. In fact, one test that has been used to explore both metaphor and metonymy is to measure the reaction time of the hearer or reader, but even when the metaphor or metonymy does cause a reaction time, it is measured in milliseconds. See Steven Frisson & Martin J. Pickering, *The Processing of Metonymy: Evidence from Eye Movements*, 25 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 1366, 1366 (1999).

208. The Author has elsewhere also highlighted the unusual degree to which otherwise purely linguistic concerns can take on great practical importance in the judicial process. See Coles-Bjerre, *supra* note 160, at 327–28 (noting that the interpretation of an ambiguous expression as referring to a whole or to a part causes little problem “in daily life,” but “in law, and in the judicial process in particular, concerns of systemic legitimacy, transparency and soundness of reasoning demand that the subconscious choices be recognized and articulated”).

209. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (1926).

When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.²¹⁰

These same pernicious effects can flow from metonymy rather than metaphor—and PRESENCE FOR CONTACTS, as used in Scalia's *Burnham* concurrence, is a prime example. In keeping with Cohen, we have already seen how metonymy, like metaphor, is indeed a "poetical or mnemonic device" but also, and much more powerfully, a subconscious vehicle for thought. And the central doctrinal point about *Burnham* is that the service-while-present rule, though seemingly unproblematic during the historical era in which it was formulated, should not have been woodenly extended when later "social forces" led to the phenomenon of tag jurisdiction.

In American law we are not accustomed to simply taking for granted conclusions that were reached a hundred years ago. And in particular, if a century-old conclusion was initially reached by means of metaphor or metonymy, we in the present age should re-examine whether the mapping or contiguity that led to it remains persuasive. To close the books on a metaphor or metonymy and treat it as literal, is to put out of bounds for today's reconsideration the legitimacy of the imaginative choices that were made long ago. Yesterday's creativity becomes today's shackle. The rule's reasoning is dead, yet the rule itself lives—the horror!

Professors Lakoff and Turner discuss a particular metonymy that helps to further illuminate the harm that can flow from metonymy in the context of legal rules:

There is a general metonymy that words stand for the concepts they express In a sentence like "Those are foolish words," the words are taken as referring, via metonymy, to the concept expressed by the words, which are being called foolish. [. . .] When the distinction between the words and their conceptual content is clear, there is no harm in using this metonymy . . . [but] confusion arises when the metonymy goes unnoticed and no distinction is made between the words in themselves and concepts they express.²¹¹

210. Cohen, *supra* note 57, at 812.

211. LAKOFF & TURNER, *supra* note 138, at 108; *see also* Radden & Kövecses, *supra* note 5, at 42, 46 (stating that words for the concepts they express is a subcase of the metonymic salience of the concrete over the abstract).

Lakoff and Turner’s immediate point here is twofold. First, that metaphorical expressions, which are linguistic, are different from metaphors, which are conceptual.²¹² And second, that non-experts often use the term “metaphor” to refer, metonymically, to metaphorical expressions.²¹³ But this same point also has a much broader resonance for purposes of this Article. In law, the result of failing to keep in mind a metonymy is not only “confusion” (though that is part of the problem) but, more to the point, bad law—like an improper assertion of judicial power.²¹⁴

The great novelist William Faulkner famously said, “The past is never dead. It’s not even past.”²¹⁵ When a metonymy generates a legal rule, and then judges apply that legal rule literally, even when the reasons for the original metonymy have weakened, the result is not a dead metonymy but a zombie metonymy. It is as if the judges’ brains have been partially devoured.

The zombie-like nature of American law under *Burnham* is highlighted by contrasting it with ongoing international negotiations

212. See *supra* note 128 (discussing this distinction).

213. Hence, in Lakoff and Turner’s formulation as just quoted, “words” such as metaphor, when used by non-experts, metonymically stand for “the concept[.]” of metaphor as understood by linguists.

214. The field of Zombie Legal Studies is new, but it is lurching relentlessly along. See, e.g., Ethan J. Leib & Zev J. Eigen, *Consumer Form Contracting in the Age of Mechanical Reproduction: The Unread and the Undead*, 2017 U. ILL. L. REV. 65 (2017); Andrea Clark, *Amidst the Walking Dead: Judicial and Nonjudicial Approaches for Eradicating Zombie Mortgages*, 65 EMORY L.J. 795 (2016); Sutton James Smith, *Zombie Powers of Attorney: The Uniform Anatomical Gift Act of 2006 and the Undead Power of Attorney for Health Care*, 39 U. DAYTON L. REV. 285 (2014); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119 (2015); Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327 (2014); Adam P. Segal, *Zombie Copyrights: Copyright Restoration under the New 104A of the Copyright Act*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 71 (1997); see also Stempel, *supra* note 99, at 1255 (remarking at the end of the article that tag jurisdiction survives “[l]ike something from a bad zombie movie”); Kickstarter Campaign for *Zombie Law: Zombies in the Federal Courts, a casebook*, <https://www.kickstarter.com/projects/888628681/zombie-law-zombies-in-the-federal-courts-a-caseboo> (last visited Oct. 17, 2018) (raising funds for a legal casebook collecting federal court cases using the word zombie). *Zombielaw*, www.zombielaw.wordpress.com (last visited Oct. 17, 2018) (blogging on “zombies in law, politics and current events”).

Most of the Zombie Legal Studies publications to date have focused briefly on various once-dead, now-live aspects of their subject matter, without probing into the half-dead aspects of the related judicial reasoning, linguistic or otherwise. Leib & Eigen, above, is an exception and builds nicely on Grant Gilmore’s famous pronouncement about the “death of contract.” See GRANT GILMORE, *THE DEATH OF CONTRACT* (2d ed. 1995).

215. WILLIAM F. FAULKNER & RUTH FORD, *REQUIEM FOR A NUN*, act 1, sc. 3, at 33 (1950).

being conducted under the auspices of the Hague Conference on Private International Law.²¹⁶ These negotiations are part of what has proven to be a very lengthy multilateral project to draft a Convention²¹⁷ on the recognition and enforcement of judgments internationally²¹⁸—and tag jurisdiction is conspicuously absent from the current draft Convention.²¹⁹ Kevin Clermont, a leader in the field of courts’

216. The Hague Conference has eighty-two nation members, from Albania to Zambia, plus the European Union which belongs to the conference as a Regional Economic Integration Organization. See *HCCH Members*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, <https://www.hcch.net/en/states/hcch-members> (last visited Oct. 17, 2018). It first met in 1893 on the initiative of Nobel Peace Prize laureate Tobias Michel Karel Asser, and became a permanent inter-governmental organization in 1955. See *A World Organisation . . .*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, <https://www.hcch.net/en/about> (last visited Oct. 17, 2018).

217. A convention is a multilateral agreement among nations. See *Convention*, BLACK’S LAW DICTIONARY 405 (10th ed. 2014).

218. See The Permanent Bureau, *Continuation of the Judgments Project*, HAGUE CONFERENCE ON PRIVATE INT’L LAW 3 (Feb. 2010) <https://assets.hcch.net/docs/cd5f79f4-d710-44a1-a266-af0e73a6ffb4.pdf> (discussing “the variety of jurisdictional practices and approaches to [international] recognition and enforcement” to facilitate cross-border effects of judgments).

219. See *Special Commission on the Recognition and Enforcement of Foreign Judgments: February 2017 Draft Convention*, HAGUE CONFERENCE ON PRIVATE INT’L LAW 1, 3–5 (Feb. 2017) [hereinafter *February 2017 Draft*], <https://assets.hcch.net/docs/d6f58225-0427-4a65-8f8b-180e79cafddb.pdf> (setting forth the proposed “[b]ases for recognition and enforcement” of a judgment, Article 5 of the draft Convention omits any reference to service while the defendant is present in the jurisdiction).

More pointedly, earlier drafts of the Convention affirmatively abjured tag jurisdiction. See, e.g., *Preliminary Draft Convention on Jurisdiction and the Effects of Judgments in Civil and Commercial Matters*, HAGUE CONFERENCE ON PRIVATE INT’L LAW 9–10 (Oct. 30, 1999), <https://assets.hcch.net/upload/wop/jdgmpr11.pdf> (prohibiting jurisdiction based on “the service of a writ upon the defendant in that State”); Russell J. Weintraub, *How Substantial is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT’L L. 167, 189–90 (1998) (noting that “[the United States] will have to agree to black list tag jurisdiction if we want a convention”). In the February 2017 Draft, the point is made only obliquely. See *February 2017 Draft* at 6 (providing that a State, i.e. a nation adhering to the Convention, may refuse recognition or enforcement of a judgment if it “would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State”). Cf. Russell J. Weintraub, *Negotiating the Tort Long-Arm Provisions of the Judgments Convention*, 61 ALB. L. REV. 1269, 1270, 1278 (1998) (noting that tag jurisdiction is blacklisted under the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32, *reprinted as amended in* 29 I.L.M. 1413 (1990)). Similarly, the Restatement (Third) of Foreign Relations notes that in international litigation, “jurisdiction based on service of process on a person

territorial powers, notes that European nations regard transient presence as “too thin” a basis for asserting “any and all causes of action,” and opines that “[t]he Europeans are right on that point.”²²⁰

Unfortunately, the prospects for an end to tag jurisdiction as a matter of U.S. law appear far from bright, based at least on the jurisprudence of Neil Gorsuch—Justice Scalia’s direct replacement on the bench.²²¹ Two examples will have to suffice here. First, now-Justice Gorsuch’s dissent in the infamous “frozen trucker” case (penned while he was still on the Tenth Circuit),²²² is emblematic of his rejection rather than embrace of factors like intention, purpose, and social context in the judicial process. Briefly, Alphonse Maddin was a truck driver who was stuck for hours in sub-zero January weather with frozen brakes.²²³ Numb and in fear of personal harm or death, Mr. Maddin unhitched the truck cab from the trailer, and drove briefly to a safe warming spot—contrary to his employer’s orders.²²⁴ The employer fired him for taking these precautions.²²⁵ A majority of the Tenth Circuit’s panel ruled that the firing was wrongful because federal law bars an employer from firing an employee who “refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury.”²²⁶ Then-Judge Gorsuch dissented because the statute protects only “refus[ing] to operate” a vehicle rather than “operating” it.²²⁷ The statute’s unmistakable purpose is to protect the health and safety of truckers—and as the facts show, this purpose can be just as

only transitorily in the territory of the state, is not generally acceptable under international law.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 cmt. e (AM. LAW INST. 1987).

220. Clermont, *Jurisdictional Salvation*, *supra* note 22, at 96, 111. For further discussion of the Hague Judgment project, see Justyna Regan, *Recognition and Enforcement of Foreign Judgments—A Second Attempt in The Hague?*, 14 RICH. J. GLOBAL L. & BUS. 63, 64, 82–86 (2015); *Consultation Paper on the 2016 Preliminary Draft Convention on the Recognition and Enforcement of Foreign Judgments*, INT’L LAW DIV. HONG KONG DEP’T OF JUSTICE 1, 5–11 (Oct. 2016), http://www.doj.gov.hk/eng/public/pdf/2016/consultation_ild.pdf.

221. In addition to the replacement of Scalia by Gorsuch, the other eight *Burnham* Justices have also been replaced.

222. *TransAm Trucking, Inc. v. Admin. Review Bd.*, 833 F.3d 1206, 1215–17 (10th Cir. 2016) (Gorsuch, J., dissenting).

223. *Id.* at 1208 (Murphy, J.).

224. *Id.* at 1208–09.

225. *Id.* at 1209.

226. 49 U.S.C. § 31105(a)(1)(B)(ii) (2012) (emphasis omitted).

227. *TransAm*, 833 F.3d at 1215–16 (Gorsuch, J., dissenting).

strongly implicated by operating as by not operating—but Judge Gorsuch refused to take account of the legislative purpose.²²⁸

Our other convenient example is Justice Gorsuch’s first opinion as a Supreme Court Justice, *Henson v. Santander Consumer USA Inc.*²²⁹ At issue was the federal Fair Debt Collection Practices Act (FDCPA),²³⁰ which protects consumers from threats, family harassment, abusive midnight phone calls, etc. on the part of a debt collector.²³¹ But the statutory definition of “debt collector”²³² is interesting. It clearly includes an independent company hired by an auto dealer to collect what the consumer owes the auto dealer; and conversely, the term clearly excludes the auto dealer itself, collecting what the consumer owes to it.²³³ The statutory distinction is whether the debt is “owed or due . . . another,”²³⁴ and the congressionally declared purpose behind this distinction is that the auto dealer itself is usually “restrained by the desire to protect [its] good will when collecting past due accounts,” while independent companies are likely to have “no future contact with the consumer and often are unconcerned with the consumer’s opinion of them.”²³⁵ *Santander* involved a middle ground: the consumer sought protection from a professional debt buyer that had acquired the debt from the auto dealer (instead of being hired by the auto dealer) trying to collect for itself (not for the auto dealer).²³⁶

228. “Even supposing all this is true, though, when the statute is plain it simply isn’t our business to appeal to legislative intentions.” *Id.* at 1217. For an incredulous and devastating mockery of then-Judge Gorsuch’s reasoning by then-Senator Al Franken during the confirmation hearings, see Paul Callan, *Judge Gorsuch and the frozen truck driver*, CNN (March 21, 2017, 5:27 AM), <http://www.cnn.com/2017/03/21/opinions/judge-gorsuch-the-frozen-truck-driver-opinion-callan>. For more on the case’s role in the confirmation hearings, see Jed Handelsman Shugerman, *Neil Gorsuch and the “Frozen Trucker,”* SLATE (March 21, 2017, 10:38 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/neil_gorsuch_s_arrogant_frozen_trucker_opinion_shows_he_wants_to_be_like.html.

229. 137 S. Ct. 1718 (2017).

230. Pub. L. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692–1692p (2012)).

231. *Henson*, 137 S. Ct. at 1720.

232. See § 15 U.S.C. § 1692a(6) (“any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts . . . owed or due or asserted to be owed or due *another*” (emphasis added)).

233. *Id.*

234. *Id.*

235. *F.T.C. v. Check Inv’rs, Inc.*, 502 F.3d 159, 173 (3d Cir. 2007) (quoting S. Rep. No. 95-382, at 2 (1977), *reprinted in* 1997 U.S.C.C.A.N. 1695, 1696–97).

236. *Henson*, 137 S. Ct. at 1720–21.

From the point of view of the consumer, the debt buyer is just like an independent company hired by an auto dealer: no prior relationship, no likelihood of a future relationship, and thus “unconcerned with the consumer’s opinion of them.”²³⁷ But Justice Gorsuch, writing for a unanimous Court, relied almost solely on grammatical reasoning (notably, is the debt, originated by the auto dealer but now owned by the debt buyer, “owed or due . . . another”?), to find that the statute did not protect the consumer against the debt buyer.²³⁸ Thus, he ignored not only congressional purpose, but also the changing social landscape. The FDCPA was enacted in 1977, at a time when there was not much of a professional debt buying industry.²³⁹ In the forty intervening years, the professional debt buying industry has exploded, accompanied by abuses that Congress—like the pre-*Pennoyer* judges—lacked the experience or vocabulary to articulate.

The unpromising nature of the current Supreme Court’s outlook in no way diminishes the importance of this Article’s critique. On the contrary, the prospect of a continuing conservative bench should make lawyers and others scrutinize the Court’s reasoning all the more carefully. Plain meaning, strict construction, and the unreflective perpetuation of zombie metonymies are all forms of a judicial hands-off-ism that, as has been explained in this Section III.B, fails to do real justice.

C. *Others Manage, So What Was Justice Scalia’s Excuse?*

The phenomenon of a metonymy being invented in one era and then ceasing to be appropriate with the passage of time is not unique to tag jurisdiction, personal jurisdiction, civil procedure, or law. But in the other contexts, language users have adapted by moving past the metonymy or by at least marginalizing the metonymy. This fact makes the Scalia opinion in *Burnham* even more regrettable.

In law, one very instructive example of flexibility in other bodies of law is the statute of frauds. Already regarded as an “anachronism” decades ago,²⁴⁰ the statute of frauds has, for centuries, sought to ensure that only genuine contracts are sued on, by requiring plaintiffs to demonstrate the contract to be in writing and signed by the

237. *Check Inv’rs*, 502 F.3d at 173.

238. *Henson*, 137 S. Ct. at 1722–24.

239. *Id.* at 1724.

240. See Hugh Evander Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427, 429 (1928).

defendant.²⁴¹ But as the electronic age arrived, difficulties arose in applying this writing-plus-signature rule.²⁴² Courts struggled to define “writing” and “signing” without a physical paper contract. In theory, our legal system could have continued applying the seventeenth-century statute of frauds unchanged, but lawmakers have responded to the practical demands of changing social circumstances by enacting the Uniform Electronic Transactions Act (UETA),²⁴³ which gives legal effect to acts that are deemed the electronic equivalents of writings and signatures.²⁴⁴ In retrospect, this modern development has clarified that the initial impulse behind the statute of frauds was not to value writings and signatures for their own sake; rather, the initial impulse was to value writings and signatures as indications of “intent to sign” the contract.²⁴⁵ When new means of authenticating the contract became available, the law adjusted to move beyond its initial, physicalist, formulation. The writing requirement stands revealed as never having been more than an initial, awkward metonymy (like “doggie”) for a more abstract concept.

Of course, electronic records and electronic signatures are broader categories than writings and pen-on-paper signatures, but in retrospect, our modern experience with electronic signatures reveals that the old pre-UETA statute of frauds, not the new UETA, was over-inclusive. Consider the case of a celebrity who is asked to autograph a piece of paper, and who does so, but the piece of paper unbeknownst to the celebrity turns out to be a contract. Counter-intuitively, if the celebrity’s duplicitous fan sues the celebrity on the contract, the

241. See RESTATEMENT (SECOND) OF CONTRACTS § 117 (AM. LAW INST. 1981); E. ALLAN FARNSWORTH, CONTRACTS 353, 353–405 (4th ed. 2004).

242. See Alison S. Brehm & Cathy D. Lee, *From the Chair: “Click Here to Accept the Terms of Service,”* 31 COMM’N. LAW. (Jan. 2015), https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/january2015/CL_Win15_v31n1.pdf (detailing the controversial nature of click-wrap agreements).

243. UNIF. ELEC. TRANSACTIONS ACT (UETA) (UNIF. LAW COMM’N 1999).

244. The statute’s terminology is “electronic record” and “electronic signature,” with the latter defined as “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.” See UETA § 2(8) (1999). As of this writing, the UETA has been adopted by forty-seven states, plus the District of Columbia and the U.S. Virgin Islands. See *Legislative Fact Sheet—Electronic Transactions Act*, UNIF. LAW COMM’N, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Electronic%20Transactions%20Act> (last visited Oct. 17, 2018).

245. *Electronic Transactions Act Summary*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/ActSummary.aspx?title=Electronic%20Transactions%20Act> (last visited Oct. 17, 2018).

celebrity will not have a statute of frauds defense, because traditional statutes of frauds, unlike UETA, have no “intent to sign” element.²⁴⁶ Thus the traditional statutes of frauds were over-inclusive. This is exactly the same characteristic of the service-while-present rule that regrettably validates tag jurisdiction.

UETA prevents electronic signatures from being over-inclusive,²⁴⁷ but it does not fix the longstanding over-inclusivity of the statute of frauds itself because it does not affect the validity of pen-and-paper signatures. Thus even post-UETA the celebrity in the above example would still be bound by the contract that he or she unwittingly signed. This aspect of UETA, too, illuminates a weakness of Justice Scalia’s *Burnham* opinion. Rather than invalidating tag jurisdiction using the Fourteenth Amendment, Justice Scalia airily invites the states to achieve a similar effect by narrowing their own long-arm statutes.²⁴⁸ Justice Brennan’s opinion calls this reliance on possible state-level action “misplaced,” because “[s]tates have little incentive to limit rules such as transient jurisdiction that make it easier for their own citizens to sue out-of-state defendants Out-of-staters do not vote in state elections or have a voice in state government.”²⁴⁹ The UETA experience shows how well taken Brennan’s point is. With UETA as opposed to the long-arm statutes, a thoughtful and effective uniform statutory drafting process was in place,²⁵⁰ and in addition, any of UETA’s forty-nine adopting legislatures had the opportunity to tweak and improve the uniform bill during the state-specific enactment

246. *E.g.*, CAL. CIV. CODE § 1624(a) (2015) (requiring only that the agreement be “subscribed” by the party to be charged, without an intent element). Nonetheless the contract would not be binding, at least in principle, because of general contract law’s requirement of intent to be bound. But removing the statute of frauds defense means that no summary judgment will be available to the defendant and could even lead to a wrong result on the merits, depending on the parties’ credibility and on who can prove what. *Cf.* FARNSWORTH, *supra* note 241, at 390 (noting that the modern test is whether the other party reasonably believes that the asserted signer had the intent to adopt the writing).

247. *See supra* note 243 (requiring “intent to sign”).

248. “We have conducted no independent inquiry into the desirability or fairness of the prevailing in-state service rule, leaving that judgment to the legislatures that are free to amend it” *Burnham v. Superior Court*, 495 U.S. 604, 621 (1990) (plurality opinion). “Nothing we say today prevents individual States from limiting or entirely abandoning the in-state-service basis of jurisdiction.” *Id.* at 627.

249. *Id.* at 639–40 n.14 (Brennan, J., concurring).

250. *See About the ULC*, UNIF. LAW COMM’N, <http://uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Oct. 17, 2018) (describing the “deliberative and uniquely open drafting process” that underlies UETA and other Uniform Law Commission statutes).

process.²⁵¹ Yet no state-level action directed against the statute of frauds' longstanding over-inclusivity took place.²⁵² As is so often true, but as Justice Scalia declined to consider, a decision about "forum" becomes in practice a decision about substance.²⁵³

There are many other examples in law. In old English property law, land was formerly transferred only by livery of seisin—literally the hand-to-hand passing of soil from the ground in question²⁵⁴—but in modern times this insistence on physicalism has been abandoned. In criminal procedure, the remedy of habeas corpus was formerly available only when a prisoner was in custody of the courts,²⁵⁵ but in modern times, the law has moved away from this physicalist focus so that the remedy is also available to persons who are free on probation, parole, or the like.²⁵⁶ In commercial law, property rights of owners and secured parties with respect to assets like securities were historically determined principally by physical possession,²⁵⁷ but over the past twenty-five years or so this concept has been generalized to permit the property rights to be determined based on "control," which while generally analogous to possession may also be narrower²⁵⁸ or broader.²⁵⁹ Other examples will doubtless occur to readers in their own fields of legal expertise.

251. See Patricia Brumfield Fry, *A Preliminary Analysis of Federal and State Electronic Commerce Laws*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/Narrative.aspx?title=UETA%20and%20Preemption%20Article> (last visited Oct. 17, 2018) (discussing some of the changes made when states enacted the UETA).

252. Cf. Kenneth Chase, *The Statute of Frauds in the Digital Age*, LAW 360 (June 27, 2014) (discussing the evolution of the statute of frauds over the past twenty years).

253. No pun intended.

254. See *Livery of Seisin*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "livery of seisin" as "[t]he ceremony by which a grantor conveyed land to a grantee" and noting that it involved "either (1) going on the land and having the grantor symbolically deliver possession of the land to the grantee by handing over a twig, a clod of dirt, or a piece of turf (called *livery in deed*) or (2) going within sight of the land and having the grantor tell the grantee that possession was being given, followed by the grantee's entering the land (called *livery in law*)").

255. See Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 754 (1986). The term habeas corpus literally means "that you have the body." *Habeas Corpus*, BLACK'S LAW DICTIONARY (10th ed. 2014).

256. Chemerinsky, *supra* note 255, at 754–55.

257. See James Steven Rogers, *Negotiability as a System of Title Recognition*, 38 OHIO ST. L.J. 197, 202–04 (1987).

258. See, e.g., U.C.C. § 8-106(b) (AM. LAW INST. 2017) (imposing conditions in addition to possession for control of certificated securities in registered form).

259. See generally James Steven Rogers, *Policy Perspectives on Revised U.C.C. Article 8*, 43 UCLA L. REV. 1431, 1481 (1996) ("Though the control concept may, at first

Quite apart from law, metonymies in daily life often become outdated, and people take this in stride without letting the metonymy constrain them. Computer files used to be saved on “floppy discs,” and as a result even today, the “save” button on all of our Word toolbars is labeled with an icon of a floppy disc, even though that medium has been completely obsolete for the past several years.²⁶⁰ Similarly, automobile engines used to make a “vroom” sound when moving down the road, and when hybrid engines like that of a Toyota Prius became silent this became dangerous to pedestrians who were no longer warned by the noise. Accordingly, the option arose for Prius owners to buy a special, artificial vrooming sound.²⁶¹ Similar examples could again be easily multiplied—for example, election campaign billboards that show a check-mark next to a candidate’s name. The floppy disc icon, the vrooming Prius, and the check-mark on the election campaign billboard are all metonymies, and probably even dead metonymies, but crucially, they do not have zombie effects. This is because these metonymies are not woodenly adhered to, whether in the law or in any other coercive medium. For example, no laptop user is confused or limited by today’s floppy disc icon; on the contrary, if we think about it at all, we see that the icon is a quaint throwback provided for convenience of reference only. If only Justice Scalia had had the same insight about presence.²⁶²

Metonymy is everywhere, and certainly not just in the law of personal jurisdiction. Among the myriad metonymies in law and elsewhere, many

examination, seem novel, it is, in fact, fully consistent with basic principles of the law of secured transactions; indeed, the control concept can usefully be regarded as merely a generalization from several specific rules that have long been part of the law of securities and secured transactions”); WILLIAM D. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES: REVISED ARTICLE 8 INVESTMENT SECURITIES § 8-106:4 (2018) (control by agreement “is, in essence, the indirect holding system analog of a transaction in which a debtor pledges bearer securities to a lender”). *See also* U.C.C. § 9-207(c) (AM. LAW INST. 2017) (rights such as repledge of secured party having “possession or control”). In terms of its breadth, control, unlike possession, is available for property that is completely intangible. *E.g., id.* §§ 8-106(c)–(d), (f) (uncertificated and indirectly held securities); § 9-104 (bank accounts and commodity accounts).

260. *E.g., Obsolescence: Hardware and Media*, DIG. PRES. MGMT., <http://www.dpworkshop.org/dpm-eng/oldmedia/obsolescence2.html> (last visited Oct. 17, 2018) (discussing how the hardware evolution, including USB keys and CD drives, forces floppy disc based peripherals into obsolescence).

261. Jim Motavalli, *Hybrid Cars May Include Fake Vroom for Safety*, N.Y. TIMES (Oct. 13, 2009) <http://www.nytimes.com/2009/10/14/automobiles/14hybrid.html>.

262. Recalling children’s use of metonymy in the absence of adult vocabularies and experience, we can note that Justice Scalia did not have these children’s excuses. *See supra* notes 187–189 and accompanying text.

become dead, as just discussed. So one can imagine law and indeed all of civilization being assailed by relentless armies of zombie metonymies—but collectively we have managed to keep them at bay. Except in *Burnham*.

CONCLUSION: PRESENCE AS ANOTHER MERE “ANCIENT FORM”

Judges of any era (including our own) are limited by an entirely natural and human inability to see the future. Accordingly, the cases of the past must be seen as having been written for their own day, and should apply to their facts while being potentially subject to change when new facts arise. The modern common-law method is well adapted to this reality. But Justice Scalia’s *Burnham* opinion behaves in a wooden way that ignores these basic aspects of judging. The argument here is that Justice Scalia made a cognitive error, by accepting at face value the once-legitimate metonymy of an earlier era and by doggedly clinging to it despite enormous changes in the circumstances that animated the metonymy in the first place. Part II.A showed that metonymy is largely about cognitive convenience and, on the jurisprudential level, Justice Scalia’s emphasis on a defendant’s simple physical presence when served is certainly convenient for judges. It saves them all of the analytical work that would be required in assessing the factual fabric of the situation, if *International Shoe*’s standard-like approach were to be required.²⁶³ In this way, the *Burnham* opinion is consistent with many of the other opinions that Justice Scalia has left us.²⁶⁴

By calling into question what the pre-*Pennoyer* judges really would have meant by presence, if the judges had had the experience and vocabulary of our later age, this Article hoists Justice Scalia on his own originalist petard. Originalists look at the law at an earlier point in time and accept it as having a fixed meaning that should control today, as Justice Scalia does in *Burnham*, with his asserted understanding of personal

263. See *supra* notes 61–64 and accompanying text.

264. See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 15–28 (2012) (discussing the contrast between textualism and opposing schools of judicial thought); Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 HAW. L. REV. 385, 385 (2000) (criticizing Scalia’s understanding of the Constitution as having a single, ascertainable meaning); Megan McDermott, *Justice Scalia’s Bankruptcy Jurisprudence: The Right Judicial Philosophy for the Modern Bankruptcy Code?*, 2017 UTAH L. REV. 939, 939 (2017) (explaining that Scalia’s bankruptcy decisions reflect a uniform judicial philosophy); William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1133 (1992) (noting that Scalia consistently applied a “text-and-rule-based approach” to statutory interpretation rather than “traditional case by case common law judging”).

jurisdiction at the time of the Fourteenth Amendment. But this Article probes even further into the past, seeking to excavate beneath the originalists' temporal stopping points, in order to reveal how those points, themselves, came to be. One could puckishly call this technique "original intent." The goal here is far from accepting any prior understanding as being authoritative; rather the goal is to expose the thinking processes that shaped those prior understandings, the better to evaluate whether we wish to accept that prior, subconscious, thinking today. There is no reason to think that the pre-*Pennoyer* judges were more self-conscious or free from subconscious imaginative forms of reasoning than all of us are today; and if those early judges' focus on presence was really just a metonymy of PRESENCE FOR CONTACTS, then today's judges' perpetuation of that metonymy despite the changed social circumstances is nothing more or less than zombie jurisprudence. Today's judges can and often do reject longstanding precedents; they can and often do rule longstanding statutes to be unenforceable; and similarly, they can, and should, be open to changing our acceptance of metaphors or metonymies from long ago.²⁶⁵

The *Shaffer* Court brought *International Shoe's* minimum contacts standard to bear on in rem and quasi in rem jurisdiction chiefly by recognizing that distinguishing those bases from in personam jurisdiction was an "ancient

265. To the extent the unpacking of "presence" to reveal a looser conception of contacts is political at all, it tends to be liberal rather than conservative, because it leaves open to today's judges the possibility of protecting relatively weak defendants against "outer limits" of tag jurisdiction that may be even broader than the Brennan opinion suspects. See *supra* notes 109–114 and accompanying text. By the same token (and fitting well with the above notion of "original intent"), original intent itself is no longer just a tool for conservative argumentation. See generally AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012) (suggesting that the Constitution invites recourse beyond its text and the results can support outcomes like the outlawing of racial segregation and the upholding of abortion rights); SCOTT GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 194 (1995) (using John Locke's influence on the Framers to conclude, for example, that "there is a constitutional right to basic education, health care, food, housing, and clothing"); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007) (defending *Roe v. Wade* with an originalist methodology); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 240 (2009) (demonstrating the variety of stances among originalists and suggesting that originalism is more a rhetorical code than a political commitment); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1256 (1997) (propounding a "semantic originalism" that is independent of the framers' concrete and context-dependent expectations).

form without substantial modern justification.”²⁶⁶ By exactly the same token, this Article’s exploration of the PRESENCE FOR CONTACTS metonymy shows that the service-while-present rule is *also* a mere “ancient form without substantial modern justification.”²⁶⁷ The service-while-present rule is “ancient” because adopted by the pre-*Pennoyer* judges. It is a “form” because it is based on a superficial linguistic articulation, that is, a dead metonymy, perpetuated in *Burnham* as a zombie metonymy. And it is “without substantial modern justification” because the enormous changes in social conditions between the mid-nineteenth century and modern times have enabled mere transient presence to be dissociated from substantive contacts.²⁶⁸

Earlier in his compelling essay from which this Article’s epigraph is taken, Nietzsche asks us to question whether linguistic conventions are “really the products of knowledge.”²⁶⁹ He asks pointedly, “Do the designations and the things coincide?”²⁷⁰ The presence for contacts metonymy explored in this Article is a powerful case study that highlights and elaborates on Nietzsche’s doubts. In fact, looking back at the epigraph, with deeper appreciation now, Nietzsche’s contention that “truth” is really just a “mobile army of . . . metonyms” that “after long use seem firm, canonical, and obligatory”²⁷¹ can sometimes apply with devastating force to rules of law. Legal rules are linguistic constructs developed by judges and other human beings; the rules don’t fall from the sky. To be sure, the service-while-present rule has a long and honorable history; unfortunately, this rule, “after long use,” also came to “seem firm, canonical and obligatory” to the late Justice Scalia. His *Burnham* opinion animates the rule with an artificially prolonged half-life as if the rule did, in fact, fall from the sky. The time has long passed for the rule, and Justice Scalia’s zombie reasoning, to be replaced by a later, more mature, linguistic construct. The tide of history—with its changing “sum of human relations”²⁷²—demands it.

266. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

267. *Id.*

268. Justice Scalia had argued that his opinion in *Burnham* was consistent with *Shaffer* because the scope of *Shaffer*’s concluding sentence (that “all assertions” of state-court jurisdiction must be limited by *International Shoe*) was limited to its immediately preceding paragraph (regarding in rem proceedings). See *supra* note 99. But by recognizing that presence in the jurisdiction is itself just an “ancient form,” this Article shows that even if one adopts Scalia’s asserted limitation of *Shaffer*’s conclusion, his opinion is still inconsistent with *Shaffer*.

269. Nietzsche, *supra* note 1, at 45.

270. *Id.*

271. *Id.* at 46–47.

272. *Id.*