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INTERNATIONAL SHOE GETS THE BOOT: *BURNHAM V. SUPERIOR COURT* RESURRECTS THE PHYSICAL POWER THEORY

I. INTRODUCTION

A court's assertion of jurisdiction must not deprive a defendant of life, liberty or property without due process of law.¹ This idea has dominated the area of personal jurisdiction since the United States Supreme Court decided *Pennoyer v. Neff*.² What constitutes due process of law, however, is far less settled. The recent personal jurisdiction case of *Burnham v. Superior Court*³ weaves a new strand in the evolving fabric of due process jurisprudence. The *Burnham* decision reverses the thirteen-year trend away from presence-based jurisdiction⁴ by unanimously affirming a state's assertion of jurisdiction based solely on service of process on the defendant within that state's borders.⁵

The evolution of the law in the area of personal jurisdiction has, over many years, seen various theories develop and be discarded.⁶ Assertions of personal jurisdiction have generally been based on either a physical power⁷ or fairness theory⁸ and categorized as *in personam*, *quasi in rem* or *in rem*.⁹ The physical power theory of *in personam* jurisdiction has much historical appeal, but United States Supreme Court cases, such

1. See *Pennoyer v. Neff*, 95 U.S. 714, 733-34 (1877); U.S. CONST. amend. XIV, § 1.

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

3. 110 S. Ct. 2105 (1990).

4. Presence-based jurisdiction refers to the obtaining of personal jurisdiction over a party due to mere physical presence of that individual in the forum at the time process is served. See *infra* notes 31-39 and accompanying text.

5. See *Burnham*, 110 S. Ct. at 2115; *id.* at 2120 (White, J., concurring); *id.* at 2126 (Brennan, J., concurring); *id.* at 2126 (Stevens, J., concurring).

6. See *infra* notes 27-123 and accompanying text.

7. The "physical power" theory is based upon actual control over something or someone physically present within the territorial boundaries of the state. See *Pennoyer*, 95 U.S. at 720; Johnston, *The Fallacy of Physical Power*, 1 J. MARSHALL J. PRAC. & PROC. 37, 47 (1967).

8. The "fairness theory" is based upon the concept that, in order to comport with due process, procedures must not "offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

9. The term *in personam* jurisdiction refers to a court's power over a defendant's person, in contrast to a court's power over the defendant's interest in property (*quasi in rem*), or power over the property itself (*in rem*). BLACK'S LAW DICTIONARY 711 (5th ed. 1979).

as *International Shoe Co. v. Washington*¹⁰ and *Shaffer v. Heitner*,¹¹ have explicitly abolished aspects of that theory, supplanting it in certain areas with a fairness analysis.¹²

The Supreme Court's decision in *Shaffer*¹³ was heralded by some as signalling the end of the physical power theory in its purest form; that of transient jurisdiction.¹⁴ Other commentators, however, believed that the impact of *Shaffer* would be minimal.¹⁵ Still others cautiously declined to predict the exact direction or scope of the *Shaffer* decision.¹⁶ Lower courts were split on the issue as well.¹⁷

10. 326 U.S. 310 (1945) (asserted jurisdiction over corporate defendant based on its contacts with forum state).

11. 433 U.S. 186 (1977) (invalidated assertion of jurisdiction based solely on *quasi in rem* attachment of defendant's property in forum state).

12. See *Shaffer*, 433 U.S. at 212; *International Shoe*, 326 U.S. at 316. See *infra* notes 60-123 and accompanying text.

13. *Shaffer* was not an *in personam* case, but its due process analysis could easily be applied to *in personam* cases due to the Court's broad language stating that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe Co.* and its progeny." *Shaffer*, 433 U.S. at 212.

14. Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38, 61 (1979); Werner, *Dropping the Other Shoe: Shaffer v. Heitner and the Demise of Presence-Oriented Jurisdiction*, 45 BROOKLYN L. REV. 565, 567, 589 (1979).

The term "transient" jurisdiction refers to jurisdiction based solely on the defendant's fleeting presence in a state where he or she is served with process for litigation unrelated to his or her activities in the forum. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 289 (1956). This form of jurisdiction has also been referred to as the "tagged," "gotcha," or "catch as catch can" theory of jurisdiction. Posnak, *A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729, 729 (1981); Werner, *supra*, at 589.

15. Smit, *The Importance of Shaffer v. Heitner: Seminal or Minimal*, 45 BROOKLYN L. REV. 519, 531 (1979); Note, *Jurisdiction—A Methodological Analysis: Implications for Presence and Domicile as Jurisdictional Bases—Shaffer v. Heitner*, 433 U.S. 186 (1977), 53 WASH. L. REV. 537, 546-47 (1978); see also Glen, *An Analysis of "Mere Presence" and Other Traditional Bases of Jurisdiction*, 45 BROOKLYN L. REV. 607, 611 (1979) (contending transient jurisdiction appropriate if individual entered forum purposefully).

16. Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 18-19 (1982); Note, *Shaffer v. Heitner: New Constitutional Questions Concerning Seider v. Roth*, 6 HOFSTRA L. REV. 393, 410 (1978); Comment, *The Reasonableness Standard In State-Court Jurisdiction: Shaffer v. Heitner and the Uniform Minimum Contacts Theory*, 14 WAKE FOREST L. REV. 51, 53 n.18 (1978).

17. See, e.g., *Rittenhouse v. Mabry*, 832 F.2d 1380, 1388-89 (5th Cir. 1987) (upheld jurisdiction based solely upon service within forum); *Amusement Equip. v. Mordelt*, 779 F.2d 264, 270 (5th Cir. 1985) (reaffirmed exercise of transient jurisdiction after *Shaffer*); *Nehemiah v. Athletics Congress of the U.S.A.*, 765 F.2d 42, 47-48 (3d Cir. 1985) (service of unincorporated association's agent within forum insufficient basis for jurisdiction; minimum contacts required); *Harold M. Pitman Co. v. Typecraft Software*, 626 F. Supp. 305, 310-13 (N.D. Ill. 1986) (interpreted *Shaffer* as destroying transient jurisdiction rule and requiring minimum contacts analysis for all *in personam* actions); *Cariaga v. Eighth Judicial Dist. Court*, 762 P.2d 886, 887-88 (Nev. 1988) (minimum contacts analysis not needed when defendant personally

From this debate evolved a great need for a resolution of the issue presented by a state's assertion of jurisdiction over a non-resident based solely on service of process within the territorial boundaries of the state.¹⁸ Would *International Shoe* and its progeny apply to this situation in the wake of *Shaffer*? While the United States Supreme Court's decision in *Burnham* appears to resolve this issue, in reality, it further confuses the area of personal jurisdiction.

In *Burnham*, the Supreme Court granted a writ of certiorari to determine the validity of California's exercise of personal jurisdiction over a non-resident father visiting his children in California while on a business trip.¹⁹ In affirming California's exercise of jurisdiction over the father, a plurality of the Court resurrected the physical power theory and, at the same time, validated transient jurisdiction.²⁰ The Court, however, could not agree upon the appropriate due process analysis.²¹

The *Burnham* Court's failure to establish a definitive interpretation of *Shaffer* leaves lower courts with little guidance as to what type of due process analysis should apply to *in personam* actions. At its broadest, this decision has the potential to impact the existing minimum contacts analysis.²² In light of its focus on presence-based jurisdiction, however, it is more likely to only affect other single-factor bases²³ of jurisdiction,

served within forum); *Bershaw v. Sarbacher*, 40 Wash. App. 653, 657, 700 P.2d 347, 349 (1985) (service during defendant's transient presence in forum held insufficient basis for jurisdiction); *Nutri-West v. Gibson*, 764 P.2d 693, 695-96 (Wyo. 1988) (transient jurisdiction held to survive *Shaffer* and comport with due process).

18. See, e.g., *Bernstine*, *supra* note 14, at 54; Comment, *supra* note 16, at 79.

19. *Burnham*, 110 S. Ct. at 2109.

20. See *id.* at 2107. Justices Kennedy and White and Chief Justice Rehnquist joined Justice Scalia's plurality opinion concluding that due process did not prohibit the exercise of jurisdiction based on in-state service of process. *Id.* at 2119. Justices Marshall, Blackmun and O'Connor joined Justice Brennan's concurring opinion, reasoning that transient jurisdiction is valid, as long as the individual is voluntarily and knowingly in the state when served. *Id.* at 2120, 2126 (Brennan, J., concurring). Justice Stevens concurred separately. *Id.* at 2126 (Stevens, J., concurring):

21. The plurality opinion, written by Justice Scalia, set forth a traditional due process analysis. See *id.* at 2115-17. Justices Brennan and White, however, each set out a different due process analysis. See *id.* at 2119-20 (White, J., concurring); *id.* at 2120-22 (Brennan, J., concurring). Additionally, Justice Stevens concurred without explaining how the requirements of due process were met. See *id.* at 2126 (Stevens, J., concurring).

22. See *infra* notes 367-90 and accompanying text.

23. A single-factor basis of jurisdiction is based on the concept that the existence of a single factor automatically confers jurisdiction. See *Vernon, Single-Factor Bases of Jurisdiction—A Speculation on the Impact of Shaffer v. Heitner*, 1978 WASH. U.L.Q. 273, 276-77.

such as domicile²⁴ and consent.²⁵

This Note examines the history of the physical power and the transient jurisdiction rules, and discusses the distinctions between these two rules. This Note also discusses the various due process models employed by the *Burnham* Court in its analysis of the physical power theory of jurisdiction. Finally, this Note explores the implications of the *Burnham* decision and suggests an alternative approach to the Court's analyses.

II. HISTORICAL FRAMEWORK

A thorough understanding of the background of the physical power rule is crucial to an appreciation of *Burnham v. Superior Court*²⁶ because of the disagreement among members of the Court over the use of history and tradition in the due process analysis. Also necessary is an understanding of the evolution of due process, which was pushed to new limits in *Burnham*.

A. *The Physical Power Theory*

In the nineteenth century, a young United States of America could not look to any one country's laws for guidance in the evolving area of personal jurisdiction.²⁷ The United States had a distinctive jurisdictional

24. Domicile is "that place where a man has his true, fixed and permanent home and principle establishment, and to which whenever he is absent he has the intention of returning." BLACK'S LAW DICTIONARY 435 (5th ed. 1979).

25. Consent is "[a] concurrence of wills. Voluntarily yielding the will to the proposition of another; acquiescence or compliance therewith." BLACK'S LAW DICTIONARY 276 (5th ed. 1979).

26. 110 S. Ct. 2105 (1990).

27. Civil law countries traditionally emphasized the defendant's domicile as the primary basis for jurisdiction both at the international level and within a single country. See Smit, *Common and Civil Law Rules of In Personam Adjudicatory Authority: An Analysis of Underlying Policies*, 21 INT'L & COMP. L.Q. 335, 335-36 (1972); Comment, *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 913 (1960).

Conversely, "in common law countries, the technical development of the writ system stressed the service of the *capias ad respondendum* as the crucial event." Smit, *supra*, at 341. *Capias ad respondendum*, a judicial writ, was the medieval equivalent of a summons to appear in court; it commanded the sheriff to take the defendant and keep him safely so he may appear before the court on a certain day. BLACK'S LAW DICTIONARY 188 (5th ed. 1979). Originally all English actions were "local" in the sense that they had to be held wherever the operative facts underlying the litigation occurred. Werner, *supra* note 14, at 568-70. "[A] purely territorial notion of jurisdiction grew up in medieval England where a strong central court exercised judicial power over a fairly vast, self-sufficient territory . . ." Schlesinger, *Methods of Progress in Conflict of Laws Some Comments on Ehrenzweig's Treatment of "Transient" Jurisdiction*, 9 J. PUB. L. 313, 317 (1960).

The advent of the "transitory" cause of action and the evolution of service of process led to the rule of presence-oriented jurisdiction. Werner, *supra* note 14, at 568-70. Even the defendant's presence, however, was not a settled basis for jurisdiction in England in the nine-

problem because, "while the country [was] socially and economically essentially a unitary state, legally and politically it [was] in many respects a federation of distinct polities."²⁸ Additionally, United States citizens always have had a legal right to move from state to state and to project themselves commercially into all parts of the nation.²⁹ This creates a dichotomy in that our national unity is conducive to nationally applied laws, while our political plurality requires a choice of law and jurisdictional rules among the several states.³⁰

The Supreme Court faced this dichotomy when it decided the landmark case of *Pennoyer v. Neff*.³¹ Prior to *Pennoyer*, some states had already adopted the concept of presence-oriented jurisdiction.³² The rule of law in the states, however, was unsettled, and precedent was scarce.³³ Thus, in *Pennoyer*, the Court supplemented its use of United States precedent with continental sources as related by Justice Joseph Story,³⁴ thereby creating what has come to be known as the physical power theory.³⁵

Pennoyer dominated the jurisprudence of jurisdiction from the moment of its rendition.³⁶ The "two well established principles of public law"³⁷ which Justice Field used as the basis of the *Pennoyer* decision were: (1) "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory;" and (2) "no State can

teenth century. Ehrenzweig, *supra* note 14, at 297-98; Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 255. "The defendant's presence in England seems to have been less a reason for asserting jurisdiction than an obviation of a reason why it should not be asserted; it could hardly be said that personal presence was the basis for jurisdiction." *Id.*

28. Hazard, *supra* note 27, at 246.

29. See *Shapiro v. Thompson*, 394 U.S. 618, 630 n.8 (1969); *Crandall v. Nevada*, 73 U.S. 35, 49 (1867). The privileges and immunities clause implies this right by stating that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

30. Hazard, *supra* note 27, at 247.

31. 95 U.S. 714 (1877).

32. See, e.g., *Murphy v. John S. Winter & Co.*, 18 Ga. 690, 690-92 (1855); *Weil v. Lowenthal*, 10 Iowa 575, 578 (1860); *Peabody v. Hamilton*, 106 Mass. 217, 220 (1870).

33. See Hazard, *supra* note 27, at 253-58, for a discussion of British precedent in this area.

34. See J. STORY, CONFLICT OF LAWS § 543, 554 (1846).

35. *Pennoyer*, 95 U.S. at 722; see Hazard, *supra* note 27, at 258-61. Professor Hazard notes that Justice Story greatly influenced *Pennoyer*. Hazard, *supra* note 27, at 262. According to Hazard, Justice Story elaborated on propositions of the Dutch jurist Huber which in turn became the basis of Justice Field's opinion in *Pennoyer*, 95 U.S. at 722. Hazard, *supra* note 27, at 259-62. Cases prior to *Pennoyer* also cited Justice Story. See *Murphy*, 18 Ga. at 691-92; *Weil*, 10 Iowa at 578; *Peabody*, 106 Mass. at 220.

36. Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600, 602 (1977).

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

exercise direct jurisdiction and authority over persons or property without its territory."³⁸ These concepts cemented the physical power doctrine in this country.³⁹ Without physical presence, a state was powerless over a civil defendant.⁴⁰

Pennoyer gave United States courts the first definitive statement of what constituted due process in the area of judicial proceedings.⁴¹ The Court stated that proceedings in a court lacking jurisdiction over the parties did not constitute due process of law.⁴² The *Pennoyer* Court defined due process as "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."⁴³ The Court thus applied the due process clause as a limitation on the jurisdiction of state courts to enter judgments affecting the rights or interests of non-resident defendants.⁴⁴

B. *The Expansion of Physical Power and the Rise of Fairness*

Courts and commentators recognized the force and vitality of the physical power theory;⁴⁵ however, some criticized its dangers and shortcomings as well.⁴⁶ The physical power theory was later recognized as being extremely narrow in scope,⁴⁷ and fell prey to exceptions⁴⁸ based on

38. *Id.*

39. See Johnston, *supra* note 7, at 46-47; Smit, *supra* note 36, at 601.

40. See *Pennoyer*, 95 U.S. at 722; Johnston, *supra* note 7, at 47.

41. See *Pennoyer*, 95 U.S. at 733-34.

42. *Id.* The right to due process is embodied in the fourteenth amendment. U.S. CONST. amend. XIV, § 1.

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

44. Since *Pennoyer*, the due process clause has been used as an instrument of interstate federalism that can act to divest a state of its power to render a valid judgment. Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 85.

45. See, e.g., *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power"); Johnston, *supra* note 7, at 49; Comment, *supra* note 27, at 936.

46. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); Ehrenzweig, *supra* note 14, at 289-90.

47. Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 227 (1967); Ehrenzweig, *supra* note 14, at 309; Hazard, *supra* note 27, at 272; Johnston, *supra* note 7, at 49; Werner, *supra* note 14, at 575; Comment, *supra* note 16, at 58.

48. See *National Equip. Rental v. Szukhent*, 375 U.S. 311, 315-16 (1964) (consent to jurisdiction given by contractual agreement held valid); *Milliken v. Meyer*, 311 U.S. 457, 463-64 (1940) (domicile in forum state sufficient basis for personal jurisdiction); *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938) (party filing claim in forum court submits to forum court's jurisdiction); *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (use of highways by non-resident motorist deemed equivalent to appointment by him of agent in state to receive process related to any action arising out of driving in forum); *Commercial Mut. Accident Co. v. Davis*, 213 U.S. 245, 254-

legal fictions expanding the doctrine of physical power beyond its constrained "territorial" limitation.⁴⁹ The Supreme Court created three main exceptions to address the physical power theory limitations: (1) actual consent given by agreement,⁵⁰ filing a claim⁵¹ or designating an agent;⁵² (2) implied consent, by having property in the forum,⁵³ being domiciled in the forum⁵⁴ or engaging in certain activities in the forum;⁵⁵ and (3) corporate presence implied by engaging in business in the forum.⁵⁶ Courts used these legal fictions to relax the rigid physical power rules, thereby making them "more adaptable to the increased mobility of population and business interests" which characterized the growing United States in the twentieth century.⁵⁷

The proliferation of these exceptions and their complexity, especially regarding jurisdiction over corporations,⁵⁸ eventually led to the implementation of a fairness theory.⁵⁹ The Supreme Court, in *International Shoe Co. v. Washington*,⁶⁰ rejected such legal fictions in favor of a more flexible fairness and reasonableness approach.⁶¹ The Court no longer considered presence within the territorial jurisdiction of a court a prereq-

55 (1909) (state may require foreign corporation's agent to receive process when such agent is transacting business in forum); *Freeman v. Alderson*, 119 U.S. 185, 188-89 (1886) (presence of property in state gives court jurisdiction over disposition of property); *St. Clair v. Cox*, 106 U.S. 350, 356 (1882) (state may condition transaction of business by foreign corporations within its borders on acceptance of service by such corporation's designated agent).

49. See *National Equip. Rental*, 375 U.S. at 315-16; *Milliken*, 311 U.S. at 463-64; *Adam*, 303 U.S. at 67-68; *Hess*, 274 U.S. at 356; *Commercial Mut. Accident Co.*, 213 U.S. at 245; *Freeman*, 119 U.S. at 188; *St. Clair*, 106 U.S. at 356; Cowen, *Transient Jurisdiction: A British View*, 9 J. PUB. LAW. 303, 310 (1960); Ehrenzweig, *supra* note 14, at 309-11; Johnston, *supra* note 7, at 49-51; Werner, *supra* note 14, at 575; Note, *supra* note 16, at 395.

50. See *National Equip. Rental*, 375 U.S. at 315-16.

51. See *Adam*, 303 U.S. at 67-68.

52. See *Commercial Mut. Accident Co.*, 213 U.S. at 254-55.

53. See *Freeman*, 119 U.S. at 188-89.

54. See *Milliken*, 311 U.S. at 463-64.

55. See *Hess*, 274 U.S. at 356.

56. See *St. Clair*, 106 U.S. at 356.

57. Johnston, *supra* note 7, at 49.

58. See *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213 (1921) (service on appointed agent of foreign corporation held void where corporation had ceased operations and withdrawn property before suit was filed); *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139 (2d Cir. 1930) (foreign corporation which visited forum sporadically to deal with forum corporation in whose shares it owned controlling interest held not doing business within state and therefore not subject to forum court's jurisdiction).

59. The fairness theory was first articulated by the Court in *Milliken v. Meyer*, 311 U.S. 457, 463 (1940), but was pushed to the forefront of personal jurisdiction in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

60. 326 U.S. 310 (1945).

61. *Id.* at 316-17.

quisite to the exercise of *in personam* jurisdiction.⁶² The Court held, instead, that in order to subject an absent defendant to a judgment *in personam*, due process requires only that the defendant "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁶³

The Court recognized this formulation of due process as a needed response to changing times.⁶⁴ Yet the Court realized that, even in the mobile society of the 1940s, such a rule must have limits.⁶⁵ The Court articulated those limits by requiring a minimal nexus between the defendant and the forum.⁶⁶

International Shoe thus abolished one of the two basic holdings of *Pennoyer*: that a state was prohibited from exercising direct jurisdiction and authority over persons or property outside its territory.⁶⁷ It did nothing, however, to disturb the remaining *Pennoyer* rule that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."⁶⁸

C. *Testing the Limits of Fairness After International Shoe Co. v. Washington*

United States Supreme Court cases in the wake of *International Shoe Co. v. Washington*⁶⁹ struggled to define the amorphous standard of "fairness and substantial justice."⁷⁰ The cases focused on the "quality and nature of the activity [in the forum] in relation to the fair and orderly

62. *Id.*

63. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

64. *Id.* The Court reasoned that "now that the *capias ad respondendum* has given way to personal service of summons" the due process analysis must change as well. *Id.*

65. *Id.* at 319.

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 laws . . . [the due process] clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.

Id.

66. *Id.*

67. See *Pennoyer*, 95 U.S. at 722.

68. *Id.*

69. 326 U.S. 310 (1945).

70. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Hanson v. Denckla*, 357 U.S. 235 (1958); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

administration of the laws,"⁷¹ in their attempts to refine the doctrine.⁷² As a result, the analysis under the fairness theory evolved into a series of questions concerning the defendant's relationship to the forum and convenience to the parties.⁷³ According to the "minimum contacts analysis" of *International Shoe* and its progeny, a plaintiff must satisfy two related inquiries before a court can exercise jurisdiction.⁷⁴ The first examines the quality and nature of the defendant's contacts,⁷⁵ and the second examines the fairness and reasonableness of jurisdiction under the circumstances.⁷⁶

1. Quality and nature of contacts

Under *International Shoe* and its progeny, the significance of a defendant's contacts both in quantity and in relatedness to the cause of action determines whether the court can exercise "general jurisdiction"⁷⁷ or "specific jurisdiction."⁷⁸ The fewer contacts an individual has with a forum, the more intimately those contacts must be tied to the plaintiff's claim to justify an assertion of personal jurisdiction.⁷⁹

Under the Supreme Court's test, a court should scrutinize the quality and nature of the defendant's contacts with the forum state to determine whether it is reasonable and fair to require him or her to conduct his or her defense in that state.⁸⁰ The Supreme Court, in *Hanson v. Denckla*,⁸¹ held that the assertion of jurisdiction is not justified by the unilateral activity of those who claim some relationship with the defendant.⁸² Thus, the Court qualified the types of contacts necessary to meet the fairness analysis, stating that "it is essential in each case that there be

71. *International Shoe*, 326 U.S. at 319.

72. See, e.g., *Kulko*, 436 U.S. at 92; *Hanson*, 357 U.S. at 253-54.

73. See *Asahi Metal Indus.*, 480 U.S. at 113; *World-Wide Volkswagen*, 444 U.S. at 292.

74. *Burger King*, 471 U.S. at 476-77.

75. *International Shoe*, 326 U.S. at 319.

76. *Asahi Metal Indus.*, 480 U.S. at 113; *Burger King*, 471 U.S. at 476-77.

77. *Helicopteros Nacionales de Colombia*, 466 U.S. at 414 n.9. "When a state exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the state is exercising general jurisdiction . . ." *Id.*

78. *Id.* at 414 n.8. When a state exercises personal jurisdiction over a defendant in a suit arising out of that defendant's contacts with the forum, the state is exercising "specific jurisdiction." *Id.*

79. See *McGee v. International Life Ins.*, 355 U.S. 220, 223 (1957). "[J]urisdiction, grounded upon a single act, must be limited to causes of action arising out of that act." Sobeloff, *Jurisdiction of State Courts over Non-Residents in Our Federal System*, 43 CORNELL L.Q. 196, 208 (1957).

80. *Perkins*, 342 U.S. at 445-46; *International Shoe*, 326 U.S. at 314-16.

81. 357 U.S. 235 (1958).

82. *Id.* at 253 (unilateral activity of individual establishing bank account in one state then moving to forum state not sufficient to require bank to defend against action in forum state).

some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."⁸³

For example, in *Burger King Corp. v. Rudzewicz*,⁸⁴ the Court found that a defendant's franchisee relationship with the forum-resident franchisor constituted purposeful availment.⁸⁵ Conversely, in *Kulko v. Superior Court*,⁸⁶ the Court held that a father who allowed his children to spend more time in the forum state than was required under a separation agreement had not purposefully availed himself of the benefits and protections of the forum state.⁸⁷ The rationale for the purposeful availment limitation, articulated by the Court in *Burger King*, is that it "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous' or 'attenuated' contacts or of the 'unilateral activity of another party or a third person.'"⁸⁸ Rather, purposeful availment limits assertions of jurisdiction to activities in the state that are such that defendants have clear notice they are subject to suit there.⁸⁹

The Court further developed the minimum contacts analysis to include foreseeability in *World-Wide Volkswagen Corp. v. Woodson*.⁹⁰ The aspect of foreseeability that the Court found critical to due process was that the defendant's conduct and connection with the forum state be such that he or she should reasonably anticipate being haled into court there.⁹¹ For example, mere foreseeability that a product may enter the forum will not be enough, by itself, to establish jurisdiction.⁹² Conversely, the design of a product in anticipation of sales in the forum, or advertising in the forum, may suffice.⁹³

2. Balancing interests to determine fairness and reasonableness

In addition to looking at the quantity and quality of the defendant's activities in the forum, the Court performs a balancing test to assess the fairness and reasonableness of exercising jurisdiction.⁹⁴ The Court con-

83. *Id.*; accord *Keeton v. Hustler Magazine*, 465 U.S. 770, 774 (1984).

84. 471 U.S. 462 (1985).

85. *Id.* at 482.

86. 436 U.S. 84 (1978).

87. *Id.* at 94.

88. *Burger King*, 471 U.S. at 475 (citations omitted).

89. *World-Wide Volkswagen*, 444 U.S. at 297.

90. 444 U.S. 286, 297 (1980) (non-resident car dealership which sold car involved in accident in forum state held not subject to forum state's jurisdiction).

91. *Id.*

92. *Asahi Metal Indus.*, 480 U.S. at 111-12.

93. *Id.* at 112.

94. *Id.* at 113; *World-Wide Volkswagen*, 444 U.S. at 292.

siders the following factors in making its assessment: (1) the plaintiff's interest in obtaining convenient and effective relief;⁹⁵ (2) the burden on the defendant;⁹⁶ (3) the forum state's interest in adjudicating the dispute;⁹⁷ and (4) interstate interests in efficient resolution of controversies and furtherance of substantive social policies.⁹⁸ Consideration of such a variety of interests indicates the Court's growing commitment to the fairness analysis.

As the minimum contacts analysis developed, the question which came increasingly into focus was whether traditional bases of jurisdiction which existed before *International Shoe* would include this same fairness analysis or would stand on their own as per se methods of asserting jurisdiction.⁹⁹ The constant factor in *International Shoe* and its progeny was the assertion of jurisdiction over an *absent* defendant.¹⁰⁰ None of the minimum contact cases subsequent to *International Shoe* dealt with a defendant that was properly served in the forum state.¹⁰¹ Cases dealing with an individual served within the forum state's territory were decided on a physical power theory basis without a due process analysis.¹⁰² Similarly, those cases basing jurisdiction on an absent defendant's property within the state were decided on the basis of *quasi in rem*¹⁰³ rules of jurisdiction.¹⁰⁴ The fairness of the physical power theory and *quasi in rem* jurisdiction were not questioned until the case of *Shaffer v. Heitner*.¹⁰⁵

95. *McGee*, 355 U.S. at 223.

96. *Kulko*, 436 U.S. at 97-98.

97. *Id.* at 98-101.

98. *Id.* See *World-Wide Volkswagen*, 444 U.S. at 292, for a discussion of all the factors.

99. See *supra* notes 32-57 and accompanying text for a discussion of pre-*International Shoe* bases of jurisdiction.

100. *International Shoe*, 326 U.S. at 316.

101. See, e.g., *Asahi Metal Indus.*, 480 U.S. at 106 (defendant Japanese corporation brought in on cross-complaint in California); *Helicopteros Nacionales de Colombia*, 466 U.S. at 409 (defendant Colombian corporation sued in Texas); *World-Wide Volkswagen*, 444 U.S. at 288-89 (defendant New York corporation sued in Oklahoma); *Kulko*, 436 U.S. at 87-88 (defendant New York resident sued in California); *Hanson*, 357 U.S. at 238 (defendant Delaware corporation sued in Florida and served by mail).

102. See, e.g., *New York v. O'Neill*, 359 U.S. 1, 8-9 (1959) (forum had immediate personal jurisdiction over individual by virtue of his presence within state); *Grace v. MacArthur*, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (service of defendant flying over forum held sufficient basis for jurisdiction).

103. See *supra* note 9 for a definition of *quasi in rem* jurisdiction.

104. See *Freeman v. Alderson*, 119 U.S. 185 (1886), *overruled in Shaffer v. Heitner*, 433 U.S. 186, 212 (1977); *Pennoy v. Neff*, 95 U.S. 714, 723 (1877).

105. 433 U.S. 186 (1977).

D. *Shaffer v. Heitner: Open Season on Settled Rules of Jurisdiction*

In *Shaffer v. Heitner*,¹⁰⁶ the Supreme Court faced an assertion of jurisdiction over an absent defendant based on *quasi in rem* attachment of the defendant's property located within the forum.¹⁰⁷ Finding the foundation in *Pennoyer v. Neff*¹⁰⁸ unstable, the Court addressed, for the first time, whether the standard of fairness and substantial justice should govern actions *in rem* as well as *in personam*.¹⁰⁹ In its analysis, the *Shaffer* Court found history relevant, but not decisive.¹¹⁰

The *Shaffer* Court found that, in terms of its effect on a defendant, an assertion of jurisdiction over property was the same as an assertion of jurisdiction over the owner of that property.¹¹¹ Both *in rem* and *in personam* assertions of jurisdiction affected the defendant's interest in property.¹¹² According to the *Shaffer* Court, such interests in property may be impinged upon only if the minimum contacts standard is satisfied.¹¹³ The Court held that *quasi in rem* jurisdiction was an ancient form of jurisdiction not supported by modern justification and that its continuance would be fundamentally unfair to the defendant.¹¹⁴ The Court concluded, in sweeping language, "that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe Co. v. Washington* and its progeny."¹¹⁵ To the extent that prior decisions were inconsistent, they were overruled.¹¹⁶

Shaffer, thus, cast a shadow of doubt over the remaining holding of *Pennoyer*, that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."¹¹⁷ Clearly, after *Shaffer*, physical power over property was no longer a sufficient basis for exercising jurisdiction.¹¹⁸ Nonetheless, *Shaffer* left open the question of whether a forum state possesses jurisdiction over persons by virtue of

106. 433 U.S. 186 (1977).

107. *Id.* at 190-91.

108. 95 U.S. 714 (1877).

109. *Shaffer*, 433 U.S. at 206.

110. *Id.* at 211-12 ("History must be considered as supporting the proposition that jurisdiction based solely on the presence of property satisfies the demands of due process . . . but it is not decisive.").

111. *Id.* at 212.

112. *Id.* at 207.

113. *Id.*

114. *Id.* at 212.

115. *Id.*

116. *Id.* at 212 n.39.

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

118. *See Shaffer*, 433 U.S. at 212.

their mere presence within its territory.¹¹⁹ Following *Shaffer*, lower federal courts and commentators were split on this issue.¹²⁰ Until *Burnham v. Superior Court*,¹²¹ the Supreme Court had not addressed the issue. As a result, the area of personal jurisdiction was uncertain.¹²² By potentially subjecting all assertions of jurisdiction to a minimum contacts analysis, the *Shaffer* decision put a spotlight on those procedures which had yet to be subjected to such an analysis.¹²³

E. Transient Jurisdiction

Courts and commentators often use the physical power theory and transient jurisdiction rule synonymously.¹²⁴ Yet, the physical power theory, even after *Shaffer v. Heitner*,¹²⁵ is much broader than the rule of transient jurisdiction.¹²⁶ The transient rule applies to an assertion of jurisdiction over an individual who, while fleetingly in the state, is served with process in a cause of action unrelated to his or her presence in the forum.¹²⁷ True transient jurisdiction comes into play only when a dis-

119. The *Shaffer* Court formulated the issue as whether the due process analysis of *International Shoe* should be applied to *in rem* proceedings. *Id.* at 206. The Court then made a broad statement that it should apply to all assertions of state-court jurisdiction. *Id.* at 212.

120. *See supra* notes 14-17 and accompanying text.

121. 110 S. Ct. 2105 (1990).

122. This uncertainty is evidenced by conflicting sections in the *Restatement (Second) of Conflict of Laws*. Compare RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24 (1986) ("A state has power to exercise judicial jurisdiction over a person if the person's relationship to the state is such as to make the exercise of such jurisdiction reasonable.") with *id.* § 28 ("A state has power to exercise judicial jurisdiction over an individual who is present within its territory, whether permanently or temporarily.") and *id.* § 28 comment a ("It can also be contended that [this] rule is inconsistent with the basic principle of reasonableness which underlies the field of judicial jurisdiction.").

123. *See, e.g., Amusement Equip. v. Mordelt*, 779 F.2d 264, 270 (5th Cir. 1985) (jurisdiction based on service in state does not offend traditional notions of fair play and substantial justice); *Nehemiah v. Athletics Congress of the U.S.A.*, 765 F.2d 42, 46-47 (3d Cir. 1985) (due process precludes asserting jurisdiction over unincorporated association by in-state service on its agent).

124. *See, e.g., Amusement Equip. v. Mordelt*, 779 F.2d 264, 267-68 (5th Cir. 1985); *Nehemiah v. Athletics Congress of the U.S.A.*, 765 F.2d 42, 46-47 (3d Cir. 1985); *Bernstine, supra* note 14, at 38; Comment, *The "Transient Rule" of Personal Jurisdiction: A Well-Intentioned Concept That Has Overstayed Its Welcome*, 73 MARQ. L. REV. 181, 181 (1989).

125. 433 U.S. 186 (1977).

126. The physical power theory was originally stated as follows: "[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877). The Court in *Shaffer* modified this concept by holding that physical power over property is no longer a sufficient basis for exercising jurisdiction, but requires a fairness analysis as well. 433 U.S. at 212. *See supra* notes 106-16 and accompanying text.

127. *Brilmayer, Haverkamp, Logan, Lynch, Neuwirth, O'Brien, A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 748, 752 (1988); *Ehrenzweig, supra* note 14, at 289.

pute is not related to the individual's presence in the forum, such as in the classic case of *Grace v. MacArthur*.¹²⁸ In *Grace*, the defendant was served while in an airplane flying over forum.¹²⁹ Thus, the transient rule represents the most extreme aspect of the physical power rule, yet it is merely one piece of the physical power pie. The physical power rule is much broader, covering the whole spectrum of "presence" from fleeting presence to permanent domicile. Additionally, the physical power rule covers all disputes, whether related to the individual's presence in the forum or not.¹³⁰ Although ignored by the *Burnham* Court, these differences are crucial to understanding the transient jurisdiction controversy.

The evolution of the differences between the physical power rule and transient jurisdiction rule is due in part to the increased mobility of society. At the time of *Pennoyer v. Neff*,¹³¹ the two rules were closely aligned. The frequency of non-residents' visits to other states was low, and the duration of their visits long.¹³² Thus, at the time of *Pennoyer*, a transient defendant did not create a truly "fleeting" presence. Rather, "transient" jurisdiction existed only in the sense that actions were "transitory" and followed the defendant wherever he or she went.¹³³ Due to the lack of rapid transportation, non-resident visitors to a forum state had no choice but to build up contacts in the state by "residing as they pass."¹³⁴ Therefore, an assertion of jurisdiction was almost always based on substantial contacts with the state,¹³⁵ making a minimum contacts analysis unnecessary.¹³⁶ The idea of a "transient" individual simply did not embrace the degree of mobility it does today.¹³⁷ Accordingly, the states' classic concern—that an individual would cause injury to a forum

128. 170 F. Supp. 442 (E.D. Ark. 1959).

129. *Id.* at 443.

130. The physical power theory is "dispute blind"—it does not take litigation-relatedness of activity into account. Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 619 (1988).

131. 95 U.S. 714 (1877).

132. Although railroads were rapidly developing in the nineteenth century, they were mostly built to meet specific requirements in isolated local areas and were concentrated in the Atlantic and Seaboard states. R. CRAIB, *A PICTURE HISTORY OF U.S. TRANSPORTATION* 7 (1958). Where rail transportation was not available, horses, wagons and stages provided slow, uncomfortable and unreliable transportation. *Id.* at 2, 9. Thus, for the most part, a "transient" individual during the time of *Pennoyer* could move only as fast as his or her horse. This necessitated a longer stay in any state through which he or she traveled.

133. See Werner, *supra* note 14, at 569.

134. *Burnham v. Superior Court*, 110 S. Ct. 2105, 2111 (1990).

135. See R. CRAIB, *supra* note 132, at 2-3.

136. See Note, *supra* note 15, at 548.

137. Johnston, *supra* note 7, at 44-45.

plaintiff and then leave the state before he or she could be served with process—was a rare occurrence.

Changes in transportation and technology transformed this concern into a real threat to a state's ability to protect its citizens.¹³⁸ The duration and frequency of non-resident visits to other states changed tremendously, giving rise to criticism of the transient rule.¹³⁹ For example, non-resident visits to other states became shorter and more frequent. The diminishing length of a defendant's stay was one factor that caused the Court to modify the physical power theory in *International Shoe Co. v. Washington*.¹⁴⁰

After *International Shoe*, no matter how fleeting an actual physical presence in a state was, if the defendant had minimum contacts with the forum, the state could follow that defendant beyond its own territorial borders to exercise personal jurisdiction.¹⁴¹ In ceasing to rely exclusively on the concept of "physical presence,"¹⁴² the Court enabled states to solve the problems caused by the more fleeting visits to forum states made possible by rapid forms of transportation.¹⁴³

The *International Shoe* decision did not, however, resolve the corresponding problem presented by the increased frequency of non-residents' visits to other states. The *Pennoyer* premise that a state had power over persons physically present within its territory¹⁴⁴ remained intact after *International Shoe*.¹⁴⁵ Yet, just as the brevity of visits to a forum potentially exposed citizens of that forum to a risk of irreparable harm, the increased frequency of visits to forum states exposed non-resident individuals to the risk of being forced to litigate in a distant forum.¹⁴⁶ Thus, the transient rule became a real threat to traveling non-residents.

The United States Supreme Court has indicated that "all citizens

138. The first two decades of the twentieth century saw the beginning of mass production of automobiles. R. CRAIB, *supra* note 132, at 92. Airlines and busses became major contenders in the passenger market in the 1930s. *Id.* at 114. These forms of mass transportation increased non-residents' visits to other states. *Id.* at 103-06.

139. See Ehrenzweig, *supra* note 14, at 308-09.

140. 326 U.S. 310, 316 (1945). The *International Shoe* Court had to deal with non-resident corporations which were doing an increasing amount of business in other states. Rather than rely on the fictional presence extension of the physical power theory, the Court replaced it with the minimum contacts analysis. See *id.* at 316-17. See *supra* notes 45-66 and accompanying text.

141. See *International Shoe*, 326 U.S. at 320.

142. *Id.* at 316.

143. See *supra* notes 45-66 and accompanying text.

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

145. See, e.g., *New York v. O'Neill*, 359 U.S. 1, 8-9 (1959).

146. See, e.g., *Grace*, 170 F. Supp. at 443 (defendant was Illinois resident, sued in Arkansas and served while flying over forum).

[should] be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."¹⁴⁷ The threat of litigation in a distant forum with which the defendant has no contacts other than a fortuitous passing constitutes a burden on that right.¹⁴⁸ The transient jurisdiction rule creates this threat, thereby burdening the right to travel.¹⁴⁹ Thus, as society becomes more mobile, the transient rule creates greater risk of liability in distant forums. Consequently, the burden on the right to travel increases.¹⁵⁰ This makes the rule of transient jurisdiction inherently unfair—each application of the rule further chills the exercise of a fundamental right.

In sum, presence has come to have little meaning in terms of obligation. Individuals frequently travel through places simply because those locations lie between where that individual is and his or her destination.¹⁵¹ Clearly, a fleeting presence is weaker evidence of a jurisdictional basis over an individual than an individual's ownership of property in a forum.¹⁵² Property ownership indicates purposeful availment of the forum state's property laws and the obligation to pay taxes.¹⁵³ Yet such a property interest alone has been held to be an insufficient basis for jurisdiction.¹⁵⁴

Before *Burnham v. Superior Court*,¹⁵⁵ the Court had never addressed transient jurisdiction in light of the fairness analysis established by *International Shoe* and its progeny.¹⁵⁶ The *Burnham* Court appears to address the difficulties presented by transient jurisdiction. In reality, however, the Court ignores the core issue of unfairness inherent in the transient jurisdiction rule by failing to acknowledge the different types of presence embraced by the "physical power theory."¹⁵⁷ The Court's deci-

147. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

148. Comment, *supra* note 124, at 198.

149. *Id.*

150. *Id.*

151. Werner, *supra* note 14, at 588.

152. *Id.*

153. See *Shaffer*, 433 U.S. at 207-08.

154. *Id.* at 212.

155. 110 S. Ct. 2105 (1990).

156. In 1905, the Court dealt with the issue in *Harris v. Balk*, wherein it held a temporary presence in the state alone was sufficient to establish jurisdiction. 198 U.S. 215, 222 (1905), *overruled in* *Shaffer v. Heitner*, 433 U.S. 186, 212 & n.39 (1977). However, that decision was handed down long before transportation developed to the point where the Court felt obligated to erode the holding of *Pennoyer* and allow states to follow non-residents out of their territorial boundaries in order to assert jurisdiction over them. See *supra* notes 45-66 and accompanying text.

157. Justice Scalia focused on in-state service without reference to the "physical power the-

sion ignores the spectrum of physical presence created by the evolution in transportation.

III. STATEMENT OF THE CASE: *BURNHAM V. SUPERIOR COURT*

A. Facts

Dennis and Francie Burnham were married in West Virginia in 1976.¹⁵⁸ In 1977, they moved to New Jersey where they had two children.¹⁵⁹ In 1987, the Burnhams separated¹⁶⁰ and executed a marital settlement agreement to be governed by New Jersey law.¹⁶¹ Shortly before Francie departed for California, she and Dennis agreed that she would take custody of the children and file for divorce based on irreconcilable differences.¹⁶²

Dennis remained in New Jersey where he subsequently filed for divorce on grounds of desertion.¹⁶³ Francie, after unsuccessfully demanding that Dennis adhere to their prior agreement, brought suit for divorce in a California Superior Court in early January 1988.¹⁶⁴ Dennis had taken periodic business trips to California in the past,¹⁶⁵ and in January, 1988, he arrived in Southern California on such a business trip.¹⁶⁶ After finishing business on January 21, he flew up to the San Francisco Bay area to visit his children, and took his older child to San Francisco for the weekend.¹⁶⁷ Upon returning the child to Francie's home on January 24, 1988, Dennis was served with a California court summons and a copy of the divorce petition.¹⁶⁸

ory" or "transient jurisdiction" rule. See *Burnham*, 110 S. Ct. at 2110-15. Justice Brennan labeled jurisdiction based on service within the state as "transient jurisdiction." *Id.* at 2120 n.1 (Brennan, J., concurring).

158. *Burnham v. Superior Court*, 110 S. Ct. 2105, 2109 (1990).

159. *Id.*

160. *Id.*

161. Petitioner's Brief on the Merits at 2-3, *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990) (No. 89-44).

162. *Burnham*, 110 S. Ct. at 2109.

163. *Id.* The petitioner, Dennis, filed two separate divorce actions in New Jersey, both of which were dismissed by a New Jersey superior court and both orders of dismissal were upheld on appeal. Respondent's Brief on the Merits at app. 2, *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990) (No. 89-44).

164. *Burnham*, 110 S. Ct. at 2109.

165. Respondent's Brief on the Merits at 19. Dennis had made at least one business trip to California during each year of their marriage, except in 1984, and acknowledged receiving tax advantages resulting from his activities in California. Brief for Respondent in Opposition to Petitioner's Petition for Writ of Certiorari at 3, *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990) (No. 89-44).

166. Respondent's Brief on the Merits at 5.

167. *Burnham*, 110 S. Ct. at 2109.

168. *Id.*

B. Procedural Background

Dennis made a special appearance¹⁶⁹ in the California Superior Court to quash the service of process on the ground that the court lacked personal jurisdiction because he had insufficient contacts with the forum.¹⁷⁰ His wife argued that she did not need to prove her husband's contacts with the forum because his service within the state sufficed as a basis for personal jurisdiction.¹⁷¹

The trial court asserted both *in rem* and *in personam* jurisdiction over Dennis,¹⁷² and the California Court of Appeal denied mandamus relief, holding service within the forum state to be "a valid jurisdictional predicate for *in personam* jurisdiction."¹⁷³ The California Supreme Court denied Dennis's petition for review.¹⁷⁴ The United States Supreme Court granted a writ of certiorari to consider the question posed by California's exercise of jurisdiction in this situation.¹⁷⁵

C. The Reasoning of the Court

1. Justice Scalia's plurality opinion

Justice Scalia announced the judgment of the Court in an opinion joined by Chief Justice Rehnquist and Justices White and Kennedy.¹⁷⁶ Justice Scalia described the criteria of due process analysis as resting upon "well established principles" and "traditional notions."¹⁷⁷ He then employed these criteria to establish a new approach to due process.¹⁷⁸

Justice Scalia first examined the tradition behind the physical power

169. "A special appearance is for the purpose of testing the sufficiency of service or the jurisdiction of the court . . ." BLACK'S LAW DICTIONARY 89 (5th ed. 1979).

170. *Burnham v. Superior Court*, 110 S. Ct. 2105, 2109 (1990).

171. Brief for Petitioner's Petition for Writ of Certiorari at 4-5, *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990) (No. 89-44). Respondent relied on section 28 of the *Restatement (Second) of Conflict of Laws* for the principle that "a state has power to exercise judicial jurisdiction over an individual who is present within its territory, whether permanently or temporarily." *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (1986)).

172. Brief for Petitioner's Petition for Writ of Certiorari at app. 3. The trial court originally asserted jurisdiction solely over the marital status but not over Dennis as an individual, but then granted Francie's request for reconsideration and asserted personal jurisdiction over Dennis. Brief for Petitioner's Petition for Writ of Certiorari at app. 1.

173. *Burnham*, 110 S. Ct. at 2109 (quoting Brief for Petitioner's Petition for Certiorari at app. 5, *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990) (No. 89-44)).

174. Brief for Petitioner's Petition for Writ of Certiorari at app. 7.

175. *Burnham v. Superior Court*, 110 S. Ct. 47 (1989).

176. *Burnham v. Superior Court*, 110 S. Ct. 2105, 2108 (1990). Justice White joined the opinion in Sections I, II-A, B and C, but did not agree with Justice Scalia's traditional due process approach. *Id.* at 2119-20 (White, J., concurring).

177. *Id.* at 2110.

178. *See id.* at 2116-17.

rule.¹⁷⁹ He downplayed the fact that others had found the history of presence-based jurisdiction unclear.¹⁸⁰ He pointed out, rather, that when the fourteenth amendment¹⁸¹ was adopted, and through the early twentieth century, many state courts “held that personal service upon a physically present defendant sufficed to confer jurisdiction.”¹⁸² Additionally, he stated, most states had statutes or common-law rules negating personal jurisdiction over individuals who were brought into the forum by force or fraud.¹⁸³ According to Justice Scalia, all the cases since 1978 which invalidated jurisdiction based on presence alone had erroneously interpreted *Shaffer v. Heitner*.¹⁸⁴

Justice Scalia then traced the expansion of the territorial limit rule articulated in *Pennoyer v. Neff*¹⁸⁵ through the fictional “consent” and “presence” theories.¹⁸⁶ He noted that *International Shoe Co. v. Washington*¹⁸⁷ replaced those theories with the concept that “the defendant’s litigation-related ‘minimum contacts’ may take the place of physical presence as the basis for jurisdiction.”¹⁸⁸ Justice Scalia asserted, however, that nothing in *International Shoe* or subsequent cases supported the proposition that physical presence alone was no longer sufficient to establish jurisdiction.¹⁸⁹

In his approach to due process, Justice Scalia posited that there was a distinct difference between the due process analysis applied to support novel procedures and to sustain traditional ones.¹⁹⁰ Justice Scalia found that “jurisdiction based on physical presence alone constitute[d] due process because it [was] one of the continuing traditions of our legal system that define[d] the due process standard of ‘traditional notions of fair play

179. *Id.* at 2110-13.

180. *Id.* at 2111. Justice Brennan took issue with Justice Scalia on this point, pointing out that British cases “‘evidence a judicial intent to limit the rules to those instances where their application is consonant with the demands of ‘fair play’ and ‘substantial justice.’” *Id.* at 2122 n.8 (Brennan, J., concurring) (quoting Note, *British Precedents for Due Process Limitations on In Personam Jurisdiction*, 48 COLUM. L. REV. 605, 610-11 (1948)).

181. See U.S. CONST. amend. XIV (1868).

182. *Burnham*, 110 S. Ct. at 2111. Justice Scalia stated that 1868 was the “crucial time” for purposes of this case. *Id.*

183. *Id.* at 2112.

184. *Id.* at 2113 (citing *Shaffer v. Heitner*, 433 U.S. 186 (1977)).

185. 95 U.S. 714 (1877). The *Pennoyer* Court held that “[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.” *Id.* at 720.

186. *Burnham*, 110 S. Ct. at 2114. The fictional consent theory was previously articulated in *Hess v. Pawloski*, 274 U.S. 352, 356 (1927). The fictional presence theory was previously articulated in *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 265 (1917).

187. 326 U.S. 310 (1945).

188. *Burnham*, 110 S. Ct. at 2114.

189. *Id.* at 2115.

190. *Id.*

and substantial justice.’ ”¹⁹¹

Justice Scalia continued¹⁹² by stressing the fact that “*Shaffer*, like *International Shoe*, involved jurisdiction over an *absent defendant*,” not a non-resident served within the state.¹⁹³ Justice Scalia concluded that the language in *Shaffer*, stating that “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,”¹⁹⁴ meant only that *quasi in rem* and *in personam* jurisdiction are the same thing.¹⁹⁵ He found that *Shaffer* stood for nothing more than the proposition that when the “minimum contact” that is a substitute for physical presence consists of property ownership, it must, like other contacts, be related to the litigation.¹⁹⁶ Thus, Justice Scalia concluded that the logic of *Shaffer*’s holding did not compel the conclusion that physically present defendants must be treated identically to absent ones.¹⁹⁷

Justice Scalia then established a new approach to the due process question, conceding it would diverge from that taken in *Shaffer*.¹⁹⁸ Unlike the *Shaffer* majority, Justice Scalia did not conduct an independent inquiry into the desirability or fairness of the prevailing in-state service rule.¹⁹⁹ He pointed out that language in *Shaffer* suggested that due process could be as readily offended by old rules as by new rules.²⁰⁰ Justice Scalia, however, distinguished *Shaffer*’s due process analysis as only applying when such old rules are utilized by a minority of states, such as the situs of stock rule in *Shaffer*.²⁰¹

On this basis, Justice Scalia concluded that the due process clause

191. *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Justice Scalia first established the “tradition” of the physical power rule and then defined due process as being met by traditional rules. See *id.* at 2110-15. Thus, he held the pedigree of the rule was its validation.

192. At this point, Justice White no longer joined in the opinion. He disagreed with Justice Scalia’s traditional due process approach. *Id.* at 2119-20 (White, J., concurring).

193. *Id.* at 2115.

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

195. *Burnham*, 110 S. Ct. at 2116.

196. *Id.* at 2115.

197. *Id.* at 2116.

198. *Id.*

199. Compare *id.* with *Shaffer*, 433 U.S. at 212.

200. *Burnham*, 110 S. Ct. at 2116 (“Traditional notions of fair play and substantial justice can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage.”).

201. Justice Scalia’s reference to “old rules” focused on the unique situs of the stock rule of Delaware in *Shaffer*, rather than the much followed rule of *quasi in rem* jurisdiction upon which the *Shaffer* Court actually focused. *Id.*

required a dual jurisdictional analysis.²⁰² For new procedures the Court must “determine whether ‘traditional notions of fair play and substantial justice’ have been offended.”²⁰³ He reasoned, however, that “a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.”²⁰⁴ In other words, if a rule is “traditional” it automatically meets due process; if not, a reasonableness inquiry may be required.²⁰⁵

2. Justice Brennan’s concurrence

Justice Brennan, in an opinion joined by Justices O’Connor, Marshall and Blackmun, agreed with Justice Scalia’s holding that due process generally permits the exercise of jurisdiction based upon service within the forum state.²⁰⁶ Justice Brennan, however, “d[id] not perceive the need . . . to decide that a jurisdictional rule . . . automatically comports with due process simply by virtue of its ‘pedigree.’”²⁰⁷

In his opinion, Justice Brennan found Justice Scalia’s approach was foreclosed by the Court’s decisions in *International Shoe* and *Shaffer*.²⁰⁸ According to Justice Brennan, “[t]he critical insight of *Shaffer* is that all rules of jurisdiction, even ancient ones, must satisfy contemporaneous notions of due process,” as defined by *International Shoe* and its progeny.²⁰⁹ Justice Brennan noted that the history of a given rule must be considered, but cannot be decisive.²¹⁰

Justice Brennan then examined the so-called “pedigree” of the transient jurisdiction rule and found it historically debatable rather than well

202. *Id.* at 2116-17. Justice Scalia found a fundamental distinction between what is needed to support novel procedures and what is needed to sustain traditional ones. *Id.* at 2115.

203. *Id.* at 2116 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

204. *Id.* at 2116-17. Justice Scalia cited the following cases to support this approach: *Ownbey v. Morgan*, 256 U.S. 94 (1921); *Hurtado v. California*, 110 U.S. 516 (1884); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

205. *Burnham*, 110 S. Ct. at 2119.

206. *Id.* at 2120 (Brennan, J., concurring).

207. *Id.* (Brennan, J., concurring).

208. *Id.* (Brennan, J., concurring). He noted that “[i]n *International Shoe*, [the Court] held that a state court’s assertion of personal jurisdiction does not violate the Due Process Clause if it is consistent with ‘traditional notions of fair play and substantial justice.’” *Id.* (Brennan, J., concurring) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Justice Brennan further observed that “[i]n *Shaffer*, [the Court] stated that ‘all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.’” *Id.* (Brennan, J., concurring) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (emphasis added by Justice Brennan)).

209. *Id.* at 2120-21 (Brennan, J., concurring).

210. *Id.* (Brennan, J., concurring). “If we could discard an ‘ancient form without substantial modern justification’ in *Shaffer*, we can do so again.” *Id.* at 2121 (Brennan, J., concurring) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977)).

settled as Justice Scalia had suggested.²¹¹ The rule was a stranger to the common law and only weakly implanted in American jurisprudence when the fourteenth amendment was adopted.²¹² Furthermore, Justice Brennan explained that the rule did not receive wide recognition until *after* the Court's decision in *Pennoyer*.²¹³

Justice Brennan found that the historical background was relevant because "the fact that American courts have announced the rule for perhaps a century . . . provides a defendant voluntarily present in a particular state *today* 'clear notice that [he or she] is subject to suit' in the forum."²¹⁴ Justice Brennan reasoned that a defendant visiting another state assumes the risk that the state will exercise its power over his or her property or person.²¹⁵

Justice Brennan recognized that there was a limit to risk assumption by the pure transient when " 'the individual's relationship to the state [was] so attenuated as to make the exercise of such jurisdiction unreasonable.' "²¹⁶ He pointed out that the facts of *Burnham* did not require the Court to determine the outer limits of the transient jurisdiction rule,²¹⁷ yet, Justice Brennan analyzed those outer limits. According to Justice Brennan, by simply visiting the forum, a defendant avails himself or herself of significant benefits provided by the state, such as police, fire and emergency medical services.²¹⁸

Finally, Justice Brennan noted, "Without transient jurisdiction, an asymmetry would arise: a transient would have the full benefit of the power of the forum State's courts as a plaintiff while retaining immunity from their authority as a defendant."²¹⁹ In addition, the potential burdens on a transient defendant are slight due to modern transportation and communications.²²⁰ He concluded, "as a rule the exercise of per-

211. *Id.* at 2122 (Brennan, J., concurring).

212. *Id.* at 2122-23 (Brennan, J., concurring).

213. *Id.* at 2123-24 (Brennan, J., concurring).

214. *Id.* at 2124 (Brennan, J., concurring) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

215. *Id.* (Brennan, J., concurring); see *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring).

216. *Burnham*, 110 S. Ct. at 2124 (Brennan, J., concurring) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (1986)). According to Justice Brennan, such a circumstance would only occur when a defendant's presence was involuntary or unknowing. *Id.* at 2126 (Brennan, J., concurring).

217. *Id.* at 2124 n.11 (Brennan, J., concurring).

218. *Id.* at 2124 (Brennan, J., concurring). Additionally, the privileges and immunities clause prevents a state from discriminating against a transient defendant by denying him such protections or the right of access to its courts. *Id.* at 2125 (Brennan, J., concurring); see U.S. CONST. art. IV, § 2, cl. 1; *supra* note 29 and accompanying text.

219. *Burnham*, 110 S. Ct. at 2125 (Brennan, J., concurring).

220. *Id.* (Brennan, J., concurring). Any burdens arising could be ameliorated by a variety

sonal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process."²²¹ As to the petitioner, Dennis, Justice Brennan concluded that he was served while voluntarily and knowingly in the forum, and therefore, was subject to the forum court's jurisdiction.²²²

3. Justice Scalia's response to Justice Brennan's concurrence

Justice Scalia, in responding to Justice Brennan's concurrence, asserted that "contemporary notions of due process" applicable to personal jurisdiction are the "'*traditional* notions of fair play and substantial justice'" established in *International Shoe*.²²³ The key word to him was "traditional."²²⁴ Justice Scalia stated that Brennan's proposed standard of due process would measure jurisdictional rules against each Justice's subjective assessment of what is fair, rather than as they should be measured—against traditional doctrines.²²⁵

Justice Scalia then examined the fairness of California's assertion of jurisdiction in the *Burnham* case. He found the three days of benefits Dennis received before being served "inadequate to establish . . . that it is 'fair' for California to decree the ownership of all Dennis's worldly goods."²²⁶ Justice Scalia noted, rather, that it would have been unfair to assert jurisdiction over Dennis if he had returned to New Jersey without being served.²²⁷ He explained, however, that asserting jurisdiction in this case was not unfair.²²⁸ The continuing tradition of presence-based jurisdiction, which anyone entering California should have known about, rendered it fair for Dennis to be sued there because he was served while present in the state.²²⁹ Justice Scalia concluded that when the Court is dealing with "the very *baseline* of reasonableness, physical presence," there is no need for a free standing reasonableness inquiry.²³⁰

of procedural devices. *Id.* (Brennan, J., concurring). Justice Brennan referred to venue, forum non conveniens and inexpensive discovery methods as devices to aid the transient defendant. *Id.* at 2125 n.13. (Brennan, J., concurring).

221. *Id.* at 2125 (Brennan, J., concurring).

222. *Id.* at 2126 (Brennan, J., concurring).

223. *Id.* at 2117 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (emphasis added by Justice Scalia)).

224. *Id.* at 2118.

225. *Id.* at 2117.

226. *Id.* The benefits listed by Justice Brennan and referred to by Justice Scalia included guarantees of health and safety by the state's police, fire and emergency services, travel on state's roads and waterways and enjoyment of the fruits of the state's economy. *Id.*

227. *Id.* at 2117-18.

228. *Id.* at 2118.

229. *Id.*

230. *Id.* at 2119.

4. Justice White's and Justice Stevens' concurring opinions

Justice White concurred separately to emphasize his disagreement with Justice Scalia's due process analysis.²³¹ He stated that jurisdiction based on service within the forum "has been and is so widely accepted throughout this country that [he] could not possibly strike it down."²³² He stressed, however, that "the Court has the authority under the [Fourteenth] Amendment to examine even traditionally accepted procedures and declare them invalid."²³³ In such an examination, a rule must be found "so arbitrary and lacking in common sense in so many instances that it should be held violative of Due Process in every case."²³⁴ Until such a showing is made, and as long as presence in the forum state is intentional, individual cases claiming that the rule operated unfairly as applied to the particular non-resident need not be entertained.²³⁵

Justice Stevens concurred separately, affirming the assertion of jurisdiction over Dennis.²³⁶ He stated that he would not join the other opinions in this case for the same reason he did not join the majority in *Shaffer*—he found them all too broad.²³⁷ Justice Stevens thought the combination of historical evidence, fairness and common sense identified by the other Justices made this a very easy case.²³⁸

V. ANALYSIS

The narrow holding of *Burnham v. Superior Court*²³⁹ is quite clear and is supported by a majority of the Court. In all but the most extreme circumstances,²⁴⁰ a state may assert jurisdiction over a non-resident who is within its borders, even if the individual is there only temporarily and for reasons unrelated to the litigation.²⁴¹ This holding validates both the

231. *Id.* at 2119-20 (White, J., concurring).

232. *Id.* at 2119 (White, J., concurring).

233. *Id.* (White, J., concurring) (citing *Shaffer v. Heitner*, 433 U.S. 186 (1977)).

234. *Id.* at 2120 (White, J., concurring).

235. *Id.* (White, J., concurring).

236. *Id.* at 2126 (Stevens, J., concurring).

237. *Id.* (Stevens, J., concurring).

238. *Id.* (Stevens, J., concurring).

239. 110 S. Ct. 2105 (1990).

240. According to Justice Brennan and Justice White, an extreme circumstance in which a state may not assert jurisdiction over a non-resident individual occurs when the individual's presence is involuntary or unknowing. *Id.* at 2120 (White, J., concurring); *id.* at 2124 n.11, 2126 (Brennan, J., concurring).

Justice Scalia did not specify any exceptions, but noted that some state statutes exempt individuals from service when brought into the forum by force, fraud or as a witness in unrelated proceedings. *Id.* at 2112.

241. *Id.* at 2115; *id.* at 2120 (White, J., concurring); *id.* at 2125 (Brennan, J., concurring).

physical power theory and the transient jurisdiction rule simultaneously. The problem is that the physical power theory and transient jurisdiction rule are not the same.²⁴² The Court's failure to recognize the difference between the two rules resulted in its ignoring the controversy which underlies the transient jurisdiction rule.²⁴³

In resurrecting the physical power theory after *Shaffer v. Heitner*,²⁴⁴ the *Burnham* decision creates a broader due process holding as well. Unfortunately, the Court's approach to due process is splintered and unclear, with no analysis supported by a majority of the Court. The question left open by *Shaffer* as to whether minimum contacts applied across the board to all assertions of jurisdiction was actually aggravated by *Burnham*. The question now is which of the many due process analyses established by the Court applies and when.

A. The Court's Treatment of Transient Jurisdiction

Rather than address the transient jurisdiction rule as a separate problem, the Court in *Burnham v. Superior Court*²⁴⁵ combined it with its discussion of the physical power theory.²⁴⁶ The result was broad due process analyses covering both physical power and the transient rule. The Court labeled the assertion of jurisdiction in this case an exercise of the transient rule, without addressing what facts made Dennis, the petitioner, a transient defendant.²⁴⁷ The specific facts suggested that Dennis's activities in the forum were more substantial than the brief, isolated visit that the transient rule covered.²⁴⁸ Furthermore, a visit to the residence of his wife and children could be considered an activity related to the divorce litigation, which would also put him outside the transient jurisdiction rule.²⁴⁹ The Court never analyzed these facts.²⁵⁰

242. See *supra* notes 124-30 and accompanying text.

243. Pure transient jurisdiction was not the issue before the Court, as Dennis, the petitioner, had more contacts with the forum than the classic transient defendant, thereby establishing more than a mere transient presence. The Court addressed it nevertheless. See *infra* notes 427-49 for a discussion of petitioner's contacts with California.

244. 433 U.S. 186 (1977).

245. 110 S. Ct. 2105 (1990).

246. See *id.* at 2110-15; *id.* at 2120 n.1 (Brennan, J., concurring).

247. See *id.* at 2110-15; *id.* at 2119-20 (White, J., concurring); *id.* at 2124-26 (Brennan, J., concurring).

248. The petitioner, Dennis, visited California regularly on business. See *infra* notes 427-49 and accompanying text for a discussion of petitioner's contacts with California.

249. Petitioner was dropping his daughter off at his wife's house when served. See *supra* notes 167-68 and accompanying text. The transient jurisdiction rule concerns service when activities in the forum are unrelated to the litigation. See *supra* note 14.

250. See *Burnham*, 110 S. Ct. at 2110-19; *id.* at 2119-20 (White, J., concurring); *id.* at 2120-26 (Brennan, J., concurring).

In sum, the Court kept a blind focus on mere presence and decided the case solely on that basis.²⁵¹ By equating physical power and transient jurisdiction, the Court avoided the necessity of confronting the unfairness posed by true cases of transient jurisdiction.²⁵² The Court's analysis was contrary to the suggestion of courts and commentators that the transient rule was really an aspect of the minimum contacts doctrine and should be abolished due to its inherent unfairness.²⁵³ Resurrection of the physical power theory comes at the cost of unfairness to a large and growing group of non-resident interstate travelers embraced by the transient jurisdiction rule.²⁵⁴

B. *The Burnham Court's Due Process Smorgasbord*

The decision in *Burnham v. Superior Court*²⁵⁵ provided a variety of due process analyses from which lower courts may choose when evaluating other bases of jurisdiction. In his traditional due process analysis, Justice Scalia refused to perform any independent fairness inquiry.²⁵⁶ Although Justice Brennan claimed to apply an independent inquiry into the fairness of transient jurisdiction, his analysis seemed hollow.²⁵⁷ Likewise, Justice White paid lip service to the fairness inquiry, but refused to reach the issue until a rule is shown to be arbitrary and lacking in common sense in a large number of cases.²⁵⁸ Yet, even with their opposing viewpoints, the opinions all came to the same result. Due process gener-

251. *See id.* at 2110-15. The California Court of Appeal upheld the assertion of jurisdiction based solely on the physical presence of Dennis in the forum when served. *Id.* at 2109. Both parties argued the minimum contacts issue before the United States Supreme Court. Transcript of Oral Argument at 18-19, 31-33, *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990) (No. 89-44).

252. *See supra* notes 124-57 and accompanying text.

253. *See, e.g.,* *Nehemiah v. Athletics Congress of the U.S.A.*, 765 F.2d 42, 47-48 (3d Cir. 1985) (service of unincorporated association's agent within forum insufficient basis for jurisdiction, minimum contacts analysis required); *Harold M. Pitman Co. v. Typecraft Software*, 626 F. Supp. 305, 310-13 (N.D. Ill. 1986) (interpreted *Shaffer* as destroying transient jurisdiction rule and requiring minimum contacts analysis for all *in personam* actions); *Bershaw v. Sarbacher*, 40 Wash. App. 653, 657, 700 P.2d 347, 349 (1985) (service during defendant's transient presence in forum held insufficient basis for jurisdiction); *Bernstine*, *supra* note 14, at 61; *Ehrenzweig*, *supra* note 14, at 311-12.

254. *See supra* notes 131-50 and accompanying text.

255. 110 S. Ct. 2105 (1990).

256. *Id.* at 2116.

257. *See id.* at 2124-26 (Brennan, J., concurring). Justice Brennan did not properly address purposeful availment and totally ignored the lack of litigation-related activities of a transient, which are both key to the minimum contacts analysis. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984); *Keeton v. Hustler Magazine*, 465 U.S. 770, 775 (1984); *Rush v. Savchuk*, 444 U.S. 320, 329 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

258. *Burnham*, 110 S. Ct. at 2119-20 (White, J., concurring).

ally allows an assertion of jurisdiction based solely on service within the state, no matter how fleeting or unrelated to the litigation the visit is.²⁵⁹

1. Tradition as a measure of due process

Justice Scalia's due process approach rests on the premise that *International Shoe Co. v. Washington*²⁶⁰ was meant to establish an additional basis of jurisdiction, supplementing the existing physical power rule.²⁶¹ This makes sense in light of the Court's emphasis on physical presence prior to and within the *International Shoe* opinion. It does not, however, necessarily follow that the due process analysis established in *International Shoe* was a new form of due process.²⁶² The minimum contacts analysis was meant merely to define the notions of "fair play and substantial justice" the Court found crucial to due process.²⁶³

International Shoe expanded the states' ability to assert jurisdiction beyond the physical power theory. At the same time, it cast doubt upon the justification for that theory by abolishing one of the two principles established in *Pennoyer v. Neff*,²⁶⁴ that no state can exercise jurisdiction over persons outside its territory.²⁶⁵ *Shaffer v. Heitner*²⁶⁶ expressly rejected another portion of the physical power theory by holding that the presence of property alone was an insufficient basis for jurisdiction.²⁶⁷ The Court in both *International Shoe* and *Shaffer* thus concluded that portions of the physical power theory no longer comported with due process notions of fairness.²⁶⁸

Nevertheless, in *Burnham*, Justice Scalia distinguished the physical power theory from the fairness theory by focusing exclusively on its basis in tradition.²⁶⁹ A traditional rule, such as the physical power theory,

259. *Id.* at 2119; *id.* at 2120 (White, J., concurring); *id.* at 2125 (Brennan, J., concurring).

260. 326 U.S. 310 (1945).

261. *Burnham*, 110 S. Ct. at 2114. Justice Scalia found that "the defendant's litigation-related 'minimum contacts' may take the place of physical presence as the basis for jurisdiction." *Id.* In coming to this conclusion, Justice Scalia relied on language from *International Shoe*:

[D]ue 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."

Id. at 2114-15 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

262. See *infra* notes 408-12 and accompanying text.

263. See *International Shoe*, 326 U.S. at 316.

264. 95 U.S. 714 (1877).

265. See *International Shoe*, 326 U.S. at 316; *Pennoyer*, 95 U.S. at 722.

266. 433 U.S. 186 (1977).

267. *Id.* at 212.

268. See *id.*; *International Shoe*, 326 U.S. at 316.

269. *Burnham*, 110 S. Ct. at 2115.

automatically comported with due process simply by virtue of its pedigree.²⁷⁰ A novel procedure, because it cannot be justified simply on the basis of tradition, requires an independent analysis in terms of its fair play and substantial justice.²⁷¹ This insulation of traditional bases of jurisdiction from any fairness inquiry is unprecedented in personal jurisdiction cases and ignores the evolutionary nature of law, as well as the holdings of several key personal jurisdiction cases.²⁷²

a. *the evolution of the law*

If the *Shaffer* Court had applied Justice Scalia's traditional due process analysis, the result would have been different because *quasi in rem* attachment was traditionally used to achieve jurisdiction.²⁷³ The *Shaffer* Court explicitly disapproved of such an analysis, rejecting the assertion that history was decisive.²⁷⁴ The Court in *Shaffer* held that old rules of jurisdiction can offend due process as easily as new rules.²⁷⁵

Justice Scalia attempted to distinguish *Shaffer* from *Burnham* by reasoning that the history involved in *Shaffer* was only a minority rule.²⁷⁶ The problem with that suggestion, however, is that Justice Scalia focused on Delaware's unique situs of corporate stock rule in *Shaffer*,²⁷⁷ which was in fact a minority rule.²⁷⁸ The *Shaffer* Court's actual focus was not on the situs rule, but rather the well-established principle of *quasi in rem* jurisdiction.²⁷⁹ In reality, the *Shaffer* decision abolished a basis of jurisdiction with a longer "settled usage" than either the physical power theory or the transient jurisdiction rule.²⁸⁰

270. *Id.*

271. *Id.* at 2119.

272. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Shaffer*, 433 U.S. at 211-12. "The social conditions underlying the [physical power] rule have changed, and the principle that 'due process is ancient process' should not apply in the face of fundamental factual changes." Comment, *supra* note 27, at 938.

273. Justice Scalia distinguished *Shaffer* as resting on Delaware's unique situs of corporate stock rule. *Burnham*, 110 S. Ct. at 2116 n.4. The opinion, however, clearly rested on the insufficiency of property in the forum as a sole basis for jurisdiction. See *Shaffer*, 433 U.S. at 212-13.

274. *Shaffer*, 433 U.S. at 211-12.

275. *Id.* at 212.

276. *Burnham*, 110 S. Ct. at 2116.

277. DEL. CODE ANN. tit. 8, § 169 (1975) makes Delaware the situs of ownership of all stock in Delaware corporations. See *Shaffer*, 433 U.S. at 192.

278. *Burnham*, 110 S. Ct. at 2116 n.4.

279. *Shaffer*, 433 U.S. at 212-13.

280. *Quasi in rem* jurisdiction was recognized by *Pennoyer* itself. See *Pennoyer*, 95 U.S. at 723. For a discussion of the history of the *quasi in rem* rule of jurisdiction, see Ownbey v. Morgan, 256 U.S. 94, 111 (1921); Lacy, *Personal Jurisdiction and Service of Summons After*

The cases cited by Justice Scalia to support the history of transient jurisdiction represent isolated cases where jurisdiction was based solely on service of an individual who was fleetingly present in the forum.²⁸¹ These pre-*Pennoyer* cases²⁸² did not set forth a due process analysis because there was no perceived need for one at the time.²⁸³ Relying on physical presence to the exclusion of fairness may have made sense when limited mobility forced travelers to actually reside as they passed through a state.²⁸⁴ In contrast, travelers now may enter a state without even knowing it.²⁸⁵ It is this type of evolution in society which has historically led to the reevaluation of rules of law to ensure that the requirements of due process are continuously met.²⁸⁶ Justice Scalia's approach, looking at the original use of a rule while ignoring its evolution, would freeze the changing fabric of the law.²⁸⁷

b. misapplied precedent

Furthermore, Justice Scalia's traditional due process analysis in *Burnham* appears unsupported by precedent. The cases cited by Justice Scalia to support the traditional due process analysis, with the exception of *Ownbey v. Morgan*,²⁸⁸ were not personal jurisdiction cases.²⁸⁹ Even

Shaffer v. Heitner, 57 OR. L. REV. 505, 506 (1978). See *supra* notes 31-123 for a discussion of the evolution of the physical power theory. See *supra* notes 124-57 for a discussion of the evolution of the transient jurisdiction rule. Justice Brennan pointed out that the "settled usage" of the transient jurisdiction rule is not at all certain. *Burnham*, 110 S. Ct. at 2122-24 (Brennan, J., concurring).

281. *Burnham*, 110 S. Ct. at 2110-11.

282. Some of the cases cited were decided before ratification of the fourteenth amendment. See, e.g., *Murphy v. J.S. Winter & Co.*, 18 Ga. 690 (1855) (persons found within limits of government, whether residence is permanent or temporary, are subject to that government's jurisdiction); *Barrell v. Benjamin*, 15 Mass. 354 (1819) (contractual obligations follow person of debtor wherever he or she may go). See *supra* notes 131-54 and accompanying text for a discussion of how the transient rule of jurisdiction differed during the rise of the physical power theory.

283. See *Bernstine*, *supra* note 14, at 60.

284. See *supra* notes 131-37 and accompanying text.

285. See, e.g., *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959) (defendant served while flying over forum state). Undoubtedly, not all pilots make an announcement to their passengers every time they cross a state line. Even if they do, it is too late for the unwary passenger to do anything to avoid service.

286. Otherwise, use of jurisdictional doctrine based upon applications of ancient labels will promote mechanistic determinations of adjudicatory authority and obscure realistic principles of reason and fairness. Comment, *supra* note 16, at 78-79.

287. See *Burnham*, 110 S. Ct. at 2111; *Leflar, The Converging Limits of State Jurisdictional Powers*, 9 J. PUB. LAW 282, 291-92 (1960-61); Comment, *supra* note 27, at 938.

288. 256 U.S. 94 (1921) (jurisdiction based on *quasi in rem* attachment of defendant's property held valid).

289. See *Burnham*, 110 S. Ct. at 2116. Justice Scalia relied on *Ownbey*, 256 U.S. 94;

Ownbey, a *quasi in rem* jurisdiction case, was of doubtful validity after *Shaffer*.²⁹⁰ Another case on which Justice Scalia relied, *Hurtado v. California*,²⁹¹ considered whether an indictment by grand jury was required in a state prosecution for murder.²⁹² The *Hurtado* Court's due process discussion suggested that, rather than tradition, progressive growth and adaptation to new circumstances were the more appropriate focus when defining due process.²⁹³ The final case Justice Scalia used to support a traditional due process analysis was *Murray's Lessee v. Hoboken Land & Improvement Co.*;²⁹⁴ however, this case dealt primarily with the constitutionality of an act of Congress relating to the treasury, an issue far from the realm of personal jurisdiction.²⁹⁵ Thus, none of these cases was on point. Furthermore, only one was decided in this century. As such, they can hardly be used as authority to diverge so completely from *Shaffer*, which directly discussed, albeit in dictum, the proper due process analysis to be used for assertions of personal jurisdiction.²⁹⁶

Hurtado v. California, 110 U.S. 516 (1884) (indictment by grand jury not required in state prosecution for murder); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856) (distress warrant issued under Act of Congress did not deprive defendant of liberty or property without due process of law).

290. The jurisdictional basis in *Ownbey* was declared invalid by *Shaffer*, 433 U.S. at 212 n.39. The *Ownbey* Court described the tradition of *quasi in rem* jurisdiction as "customarily employed, long before the Revolution, in the commercial metropolis of England" *Ownbey*, 256 U.S. at 111. The *Shaffer* Court's abolition of reliance on property alone as a basis for jurisdiction undermines Justice Scalia's argument that such traditional procedures automatically comport with due process. See *Burnham*, 110 S. Ct. at 2115.

291. 110 U.S. 516 (1884).

292. *Id.* at 520.

293. See *id.* at 530-31. The *Hurtado* Court acknowledged that the Constitution "was made for an undefined and expanding future." *Id.* The decision suggested that it was better not to go too far back into antiquity to determine what constitutes due process. See *id.* at 530. Rather, the spirit of personal liberty is best preserved and developed by progressive growth and wise adaptation to new circumstances. *Id.* Thus, the *Hurtado* Court did not support the extreme position Justice Scalia advocated in *Burnham*.

294. 59 U.S. (18 How.) 272 (1856).

295. *Id.* at 274.

296. See *Shaffer*, 433 U.S. at 207-12. The explicit rejection of a solely tradition based due process analysis in *Shaffer*, accompanied by the Court's other jurisdictional due process analyses on the basis of fairness and substantial justice, simply present more compelling authority than cases dealing with other issues and which were decided in 1856, 1884 and 1921.

Additionally, the authorities cited by Justice Scalia are no less persuasive than the Court's discussion of due process in *Twining v. New Jersey*, 211 U.S. 78 (1908), *overruled on other grounds* in *Malloy v. Hogan*, 378 U.S. 1 (1964), which specifically examined and discredited the Court's reasoning in *Hurtado* upon which Justice Scalia relied:

It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight-jacket, only to be unloosened by constitutional amendment. That . . .

2. Justice Brennan's gutting of the minimum contacts analysis

If Justice Brennan applied a minimum contacts analysis, he changed it drastically. At first blush, his concurrence appears to be based on the standard set out by *Shaffer* that "all assertions of . . . jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."²⁹⁷ Yet, in application, his analysis broke down. He paid tribute to the fairness doctrine,²⁹⁸ but found almost anything to be fair.²⁹⁹ Furthermore, he completely ignored one crucial factor—the connection between the litigation and the individual's contacts with the forum.³⁰⁰ This connection has been pervasive in the Court's due process analyses since *International Shoe*.³⁰¹

Justice Brennan labeled his preferred analysis as minimum contacts.³⁰² Yet, rather than apply the standards set forth in *International Shoe* and its progeny, he applied a two-step analysis, foreign to personal jurisdiction.³⁰³ First, he looked to the history of the transient rule.³⁰⁴ Second, he examined the fairness of transient jurisdiction in the abstract without addressing the specific facts of the case before the Court.³⁰⁵

Justice Brennan and Justice Scalia had different reasons for the relevance of history to the due process analysis. According to Justice Brennan, the historical background of the transient jurisdiction rule affords a defendant voluntarily present in a particular state clear notice that he or she may be subject to suit there.³⁰⁶ Several reasons make this approach more sensible than the traditional due process analysis employed by Justice Scalia. First, notice and an opportunity to be heard are "elementary

"would be to deny every quality of the law but its age, and to render it incapable of progress or improvement."

Id. at 101 (quoting *Hurtado v. California*, 110 U.S. 516, 529 (1884)); *accord* *Adamson v. California*, 332 U.S. 46, 65-66 (1947) (Frankfurter, J., concurring), *overruled on other grounds in* *Malloy v. Hogan*, 378 U.S. 1 (1964).

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

298. Justice Brennan claimed to undertake an independent inquiry into the fairness of the prevailing in-state service rule. *See Burnham*, 110 S. Ct. at 2120 (Brennan, J., concurring).

299. *See id.* at 2124-25 (Brennan, J., concurring).

300. *See id.* (Brennan, J., concurring).

301. *See, e.g., Helicopteros Nacionales de Colombia*, 466 U.S. at 414-15 (claims against defendant did not arise out of defendant's activities in forum and defendant did not carry on continuous and systematic business contacts, jurisdiction invalid); *Shaffer*, 433 U.S. at 213 (property defendant possessed in forum state not related to litigation, jurisdiction invalid).

302. *Burnham*, 110 S. Ct. at 2121 (Brennan, J., concurring).

303. *See id.* at 2122-25 (Brennan, J., concurring).

304. *Id.* at 2122-24 (Brennan, J., concurring). Justice Brennan defined transient jurisdiction as jurisdiction premised solely on service while in the forum, thereby making it synonymous with the physical power rule; *see id.* at 2120 n.1 (Brennan, J., concurring).

305. *Id.* at 2124-25 (Brennan, J., concurring).

306. *Id.* at 2124 (Brennan, J., concurring).

and fundamental" requirements of due process.³⁰⁷ Second, the progeny of *International Shoe* incorporate this concept into their due process analyses by requiring that the defendant's connection with the forum be such that he or she should reasonably anticipate being haled into court there.³⁰⁸ While history in this context is clearly relevant, it should not be decisive.³⁰⁹

Justice Brennan, however, treated history as nearly decisive. He found a presumption of due process validity based solely on the historical background of the rule.³¹⁰ He described the presumption as "strong," but never discussed how it could be rebutted.³¹¹ Apparently, a sufficient showing of unfairness could rebut the presumption,³¹² however, Justice Brennan did not find such a showing in *Burnham*.³¹³ In fact, he never addressed the issue of whether it was fair to assert jurisdiction over the petitioner, Dennis, based on his contacts with the forum.³¹⁴ Rather, he considered the fairness of asserting jurisdiction over an abstract transient defendant and then summarily affirmed the assertion of jurisdiction over Dennis.³¹⁵

Justice Brennan slid into his fairness analysis in a haphazard manner, addressing some factors of the minimum contacts test while ignoring others.³¹⁶ The most disturbing aspect of his opinion is that he did not analyze the specific facts of the case before the Court.³¹⁷ Such an approach is contrary to the Court's previous minimum contact analyses.³¹⁸ The danger in this approach is tremendous, for it is tantamount to upholding transient jurisdiction in virtually all cases without considering fairness. This, in effect, is the same result reached by Justice Scalia.

Justice Brennan examined the benefits that a visit to a forum state

307. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950).

308. *See, e.g., World-Wide Volkswagen*, 444 U.S. at 297.

309. *Shaffer*, 433 U.S. at 211-12.

310. *Burnham*, 110 S. Ct. at 2124 (Brennan, J., concurring).

311. *Id.* (Brennan, J., concurring).

312. This can be implied from the structure of Justice Brennan's analysis. Justice Brennan established the transient rule's presumption of due process and then proceeded to a fairness analysis, thereby suggesting the fairness factors could change the result. *See id.* at 2124-25 (Brennan, J., concurring). He also pointed out that tradition alone is not dispositive. *Id.* at 2122 (Brennan, J., concurring). It therefore follows that since his presumption was based solely on historical background that presumption, likewise, should not have been dispositive.

313. *Id.* at 2124-25 (Brennan, J., concurring).

314. *See id.* 2124-26 (Brennan, J., concurring).

315. *Id.* (Brennan, J., concurring).

316. *See id.* (Brennan, J., concurring).

317. *See id.* (Brennan, J., concurring).

318. *See, e.g., Asahi Metal Indus.*, 480 U.S. at 113-16; *Burger King*, 471 U.S. at 478-85; *World-Wide Volkswagen*, 444 U.S. at 295-99; *Hanson v. Denckla*, 357 U.S. 235, 251-56 (1958).

confers.³¹⁹ While in the forum, the transient defendants' health and safety are guaranteed and they can enjoy the fruits of the state's economy.³²⁰ Arguably, this conduct is not the type of *purposeful* availment envisioned by the Court in *Hanson v. Denckla*,³²¹ *Kulko v. Superior Court*,³²² *World-Wide Volkswagen Corp. v. Woodson*,³²³ *Burger King Corp. v. Rudzewicz*,³²⁴ and *Asahi Metal Industry Co. v. Superior Court*.³²⁵

These decisions speak of purposefully availing oneself of the "privilege of conducting activities within the forum State,"³²⁶ or creating continuing obligations with residents of the forum.³²⁷ Justice Brennan acknowledged that this was the proper test, but he did not apply it in his analysis.³²⁸ His idea of purposeful availment seemed to be the mere act of a transient defendant entering the state's territory,³²⁹ while the Court's approach in the past had focused on the particular activities of the actual defendant in the forum.³³⁰

Justice Brennan argued that an asymmetry would arise if transient jurisdiction were not allowed.³³¹ The transient defendant would have the benefits of the forum state's courts as a plaintiff, while at the same time retaining immunity as a defendant.³³² The problem with this reasoning, however, is that a plaintiff never needs to enter a forum state to use its courts.³³³ Any plaintiff who uses another state's courts will create this asymmetry, regardless of whether he or she visits that forum.

Finally, Justice Brennan examined the burdens on a transient de-

319. *Burnham*, 110 S. Ct. at 2124-25 (Brennan, J., concurring).

320. *Id.* at 2125 (Brennan, J., concurring).

321. 357 U.S. 235, 253 (1958) (unilateral activity of individual establishing bank account in one state then moving to forum state insufficient to require bank to defend against action in forum state).

322. 436 U.S. 84, 93 (1978) (unilateral activity of parent choosing to spend time in forum state while having custody of child insufficient to require other parent to defend against action in forum).

323. 444 U.S. 286, 297-98 (1980) (purposeful availment may be met by manufacturer or distributor serving market for its products in other states).

324. 471 U.S. 462, 475-76 (1985) (franchisee relationship with forum state franchisor constituted purposeful availment).

325. 480 U.S. 102, 108-13 (1987) (placement of product into stream of commerce without more is not act of defendant purposefully directed toward forum state).

326. *Hanson*, 357 U.S. at 253; accord *Asahi Metal Indus.*, 480 U.S. at 112-13.

327. *Burger King*, 471 U.S. at 475-76.

328. *Burnham*, 110 S. Ct. at 2125 n.12 (Brennan, J., concurring).

329. *Id.* at 2124-25 (Brennan, J., concurring).

330. See *Asahi Metal Indus.*, 480 U.S. at 112-13; *World-Wide Volkswagen*, 444 U.S. at 297-98; *Kulko*, 436 U.S. at 92; *Hanson*, 357 U.S. at 253.

331. *Burnham*, 110 S. Ct. at 2125 (Brennan, J., concurring).

332. *Id.* (Brennan, J., concurring).

333. The privileges and immunities clause requires that each state afford non-residents the same access to its courts as that afforded to its domiciliaries. U.S. CONST. art. IV, § 2.

fendant.³³⁴ He noted that such burdens generally would be slight due to modern transportation and communication.³³⁵ Moreover, the fact that the defendant had visited the forum indicated that suit in that state would not likely be prohibitively inconvenient.³³⁶ In a minimum contacts analysis, this reasoning is relatively insignificant, as it would make anyone who steps over, or who could have stepped over the state line, subject to jurisdiction. In contrast, the minimum contacts analysis established in *International Shoe* focused on the relationship between the defendant, the forum and the litigation.³³⁷ Never before has a fleeting visit, without more, been held to establish the requisite relationship for minimum contacts.

As part of his due process analysis, Justice Brennan also considered procedural devices which a transient defendant could use, such as venue and forum non conveniens.³³⁸ He found such devices could ameliorate the burdens on a non-resident defendant.³³⁹ The availability of such devices, however, does not answer the threshold question of whether, in the instant case, the burdens on the petitioner, Dennis, made the exercise of jurisdiction violative of due process.³⁴⁰

The due process clause is a constitutional limitation on a court's power to assert jurisdiction over an individual.³⁴¹ Conversely, procedural devices such as venue and forum non conveniens are, respectively, statutorily and judicially conceived limitations, applied subsequent to a determination of constitutionally permissible jurisdiction.³⁴² Although they may be taken into account in determining the reasonableness of an assertion of jurisdiction, because their application is discretionary, it would stretch due process to allow these devices to remedy an otherwise invalid jurisdictional basis.³⁴³

Justice Brennan concluded his analysis without any reference to the relationship between the defendant's activity in the forum and the litiga-

334. *Burnham*, 110 S. Ct. at 2125 (Brennan, J., concurring).

335. *Id.* (Brennan, J., concurring).

336. *Id.* (Brennan, J., concurring).

337. *See Shaffer*, 433 U.S. at 204.

338. *Burnham*, 110 S. Ct. at 2125 & n.13 (Brennan, J., concurring).

339. *Id.* (Brennan, J., concurring).

340. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 3.10, at 128 (1985).

341. *See id.* § 3.10, at 124.

342. *Id.* § 2.1, at 11; *id.* § 2.17, at 88-89. Venue is designed to balance the objectives of optimum convenience to parties and efficient allocation of resources. *Id.* § 2.1, at 11. Forum non conveniens permits a court to refuse to exercise its jurisdiction when the litigation could have been brought more appropriately in another forum. *Id.* § 2.17, at 88-89.

343. *See* Werner, *supra* note 14, at 590-91.

tion. By failing to address specific jurisdiction, Justice Brennan, in effect, validated an exercise of general, dispute-blind³⁴⁴ jurisdiction, previously allowed only where extensive contacts existed.³⁴⁵

Justice Brennan's fairness analysis of the transient rule was likewise unconvincing. His examination lacked consideration of the forum state's interest in the dispute, the plaintiff's interest in relief and the interstate interest in efficient resolution of controversies.³⁴⁶ Thus, his validation of the transient rule was supported solely by his presumption that, based on history, the rule comports with due process.³⁴⁷ This presumption became his conclusion, tempered only by his summation that Dennis was voluntarily and knowingly in the state when served.³⁴⁸ Thus, while Justice Brennan's approach diverged from that of Justice Scalia, his conclusion was nearly identical.

3. Arbitrariness and common sense as measures of due process

Justice White's conclusion was also similar to Justice Scalia's; how-

344. A dispute-blind theory is "based on affiliations between the forum and [an individual] without regard to the nature of the dispute." Twitchell, *supra* note 130, at 610.

345. See *Helicopteros Nacionales de Colombia*, 466 U.S. at 413-14, for a discussion of the minimum contacts emphasis on litigation-related activities. See Twitchell, *supra* note 130, at 619-20, for a discussion of dispute-blind and dispute-specific jurisdiction.

The physical power theory is dispute-blind in that it does not consider the relatedness of the dispute to the defendant's activities in the forum. *Id.* It provides a basis for general jurisdiction over the individual for any claim. *Id.* Conversely, the minimum contacts analysis is almost exclusively dispute specific. *Id.* at 610.

The *International Shoe* Court focused on the relationship between the claim and the defendant's forum contacts. The *International Shoe* decision thereby minimized the role of general jurisdiction and focused on the exercise of specific jurisdiction, where the cause of action arises from the defendant's forum activities. *International Shoe*, 326 U.S. at 319; see also Twitchell, *supra* note 130, at 624-25 (Court in *International Shoe* focused on relationship between claim and defendant corporation's forum contacts).

The dispute at issue has always played a central role in the Court's minimum contacts analysis. See *Burger King*, 471 U.S. at 472; *Helicopteros Nacionales de Colombia*, 466 U.S. at 414-16; *Keeton*, 465 U.S. at 775; *Rush*, 444 U.S. at 329; *Shaffer*, 433 U.S. at 213; *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-46 (1952).

346. See *Burnham*, 110 S. Ct. at 2124-25 (Brennan, J., concurring); cf. *Asahi Metal Indus.*, 480 U.S. at 113 (to determine reasonableness of jurisdiction court must consider burden on defendant, interests of forum state, plaintiff's interest in obtaining relief, interstate interest in obtaining efficient resolution of controversies and state's interest in furthering social policies); *World-Wide Volkswagen*, 444 U.S. at 292 (burden on defendant will be considered in light of forum's interest in adjudicating dispute, plaintiff's interest in obtaining relief, interstate interest in efficient resolution of controversies and state's interest in furthering social policies). The interstate interest is particularly crucial in the *Burnham* case because the petitioner brought two actions in the New Jersey courts and both were dismissed. Respondent's Brief on the Merits at app. 1-3.

347. See *supra* notes 310-13 and accompanying text.

348. See *Burnham*, 110 S. Ct. at 2126 (Brennan, J., concurring).

ever, like Justice Brennan, Justice White disagreed with the traditional due process analysis Justice Scalia employed.³⁴⁹ Justice Brennan's and Justice White's conclusions seemed identical—as long as presence in the forum state is intentional, service within the state's borders is enough to confer jurisdiction.³⁵⁰ Additionally, they both gave tremendous weight to the tradition behind the physical power theory, but refused to go as far as Justice Scalia, who explicitly held that tradition was dispositive.³⁵¹

The key distinction in Justice White's approach, however, is his use of *Shaffer*.³⁵² Justice White cited *Shaffer* to point out the Court's authority "to examine even traditionally accepted procedures and declare them invalid."³⁵³ He did not, however, follow the balance of *Shaffer*'s due process analysis.³⁵⁴ Instead, Justice White refused to reach the issue of fairness as applied to a particular non-resident until the rule was shown to be generally arbitrary and lacking in common sense.³⁵⁵ This seems to be putting the cart before the horse. How can one ascertain the arbitrariness of a rule in general without first examining its application in particular cases?

Additionally, Justice White cited no cases to support this method of due process analysis.³⁵⁶ In essence, his analysis ignored fairness, or the lack thereof, in each specific case. Thus, although Justice White's conclusion mirrors Justice Brennan's in terms of its scope, his view of *Shaffer*'s due process analysis appeared to be closer to that of Justice Scalia—that a minimum contacts analysis does not apply to exercises of jurisdiction under the physical power theory.³⁵⁷

349. *See id.* at 2119-20 (White, J., concurring).

350. *See id.* at 2119 (White, J., concurring); *id.* at 2126 (Brennan, J., concurring). Justice White used the word "intentional" while Justice Brennan used the phrase "voluntarily and knowingly." *Id.* at 2119 (White, J., concurring); *id.* at 2126 (Brennan, J., concurring).

351. *See id.* at 2119-20 (White, J., concurring); *id.* at 2120 (Brennan, J., concurring).

352. *See id.* at 2119 (White, J., concurring).

353. *Id.* (White, J., concurring).

354. *Shaffer* suggested a due process analysis based on fairness, *see Shaffer*, 433 U.S. at 212, and defined by *International Shoe* and its progeny. *See, e.g., Shaffer*, 433 U.S. at 186; *Hanson v. Denckla*, 357 U.S. 235 (1958); *International Shoe*, 326 U.S. at 310.

355. *Id.* at 2120 (White, J., concurring).

356. *See id.* at 2119-20 (White, J., concurring). In fact, such precedent is scarce in the area of jurisdiction. The due process language in *Ownbey*, 256 U.S. at 111, supports the arbitrary standard of due process used by Justice White, but *Ownbey* is of doubtful validity after *Shaffer*. *See supra* note 290 and accompanying text. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) for Justice White's use of this theory in the equal protection area.

357. *See Burnham*, 110 S. Ct. at 2119-20 (White, J., concurring). Justice White acknowledged that *Shaffer* gives the Court power to declare ancient rules invalid, yet never suggested why *Shaffer*'s due process analysis does not apply to the physical power rule. *Id.* (White, J., concurring).

C. State-Court Jurisdiction After *Burnham v. Superior Court*

The practical impact of the decision in *Burnham v. Superior Court*³⁵⁸ is twofold. It provides a solid basis for presence-based jurisdiction cases, but at the same time throws the area of due process analysis into uncertainty.

1. Physical power

The Court's clear message is that the physical power theory comports with due process—regardless of which due process analysis is applied.³⁵⁹ This aspect of the *Burnham* decision reverses the short-lived trend away from presence-based jurisdiction and toward a single standard of fairness.³⁶⁰ More importantly, it provides lower courts with a seemingly bright-line rule,³⁶¹ rare in the modern era of personal jurisdiction.

Unfortunately, this rule has been formulated at the expense of the transient defendant. The *Burnham* Court did not analyze the fairness of the physical power rule as applied to the petitioner, Dennis, but instead performed an abstract analysis of the rule itself.³⁶² As a result, the *Burnham* decision may preclude *any* transient individual from challenging the fairness of the rule's application in his or her particular case.

The only conceivable constitutional flank of the physical power rule vulnerable to attack after *Burnham* involves an individual unintentionally or involuntarily present in the forum state.³⁶³ Prior cases suggest that such assertions of jurisdiction based upon presence in the forum as a result of deception or coercion are invalid for policy reasons.³⁶⁴ In ac-

358. 110 S. Ct. 2105 (1990).

359. See *id.* at 2115-16; *id.* at 2119-20 (White, J., concurring); *id.* at 2126 (Brennan, J., concurring); *id.* at 2126 (Stevens, J., concurring).

360. Physical presence-based jurisdiction had only been challenged since the decision of *Shaffer v. Heitner*, 433 U.S. 186 (1977). Cases since *Shaffer* which invalidated mere presence as a basis for jurisdiction include: *Nehemiah v. Athletics Congress of the U.S.A.*, 765 F.2d 42 (3d Cir. 1985); *Waffenschmidt v. Mackay*, 763 F.2d 711 (5th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986); *Harold M. Pitman Co. v. Typecraft Software*, 626 F. Supp. 305 (N.D. Ill. 1986); *Energy Reserves Group v. Superior Oil Co.*, 460 F. Supp. 483 (D. Kan. 1978); *Mohler v. Dorado Wings, Inc.*, 675 S.W.2d 404 (Ky. Ct. App. 1984); *Duehring v. Vasquez*, 490 So. 2d 667 (La. Ct. App. 1986); *Bershaw v. Sarbacher*, 40 Wash. App. 653, 700 P.2d 347 (1985).

361. Courts citing to this aspect of the *Burnham* decision have used it as a bright line rule, affirming exercises of jurisdiction based on service in the state. See, e.g., *Schall v. Jennings*, 99 N.C. App. 343, 346, 393 S.E.2d 130, 132 (1990) (personal service of process within forum confers jurisdiction).

362. See *Burnham*, 110 S. Ct. at 2110-17; *id.* at 2124-26 (Brennan, J., concurring).

363. See *id.* at 2120 (White, J., concurring); *id.* at 2126 (Brennan, J., concurring).

364. See *Jacobs/Kahan & Co. v. Marsh*, 740 F.2d 587, 592 n.7 (7th Cir. 1984) (jurisdiction may not be premised on physical presence obtained by trickery); *Wyman v. Newhouse*, 93

cordance with Justices Brennan's and White's opinions, the Court might also find such situations offensive to due process.³⁶⁵

Of course, nothing prevents states from limiting or entirely abandoning the in-state-service basis of jurisdiction.³⁶⁶ No state, however, opted to abolish presence-based jurisdiction when its due process validity was questionable. Therefore, it is unlikely any will do so now that the Court has declared transient jurisdiction consistent with due process. The result is a clear and easily applied rule which dispenses with any consideration of fairness to the defendant.

2. Due process analysis

The variety of due process theories utilized in *Burnham* leaves lower courts no real guidance as to what due process analysis applies to *in personam* assertions of jurisdiction.³⁶⁷ Courts may apply Justice Scalia's "traditional approach,"³⁶⁸ Justice Brennan's "hollowed-out" minimum contacts approach³⁶⁹ or Justice White's "valid until arbitrary in a large number of cases" approach.³⁷⁰ The problem is that each of these approaches is novel in the area of personal jurisdiction. The diversity of these views will cause disagreement among courts as to the practical application of *Burnham*.

Predicting the impact of a splintered opinion such as *Burnham* is speculative at best. While it is possible to identify the various approaches the courts may adopt, identifying which of these they will find to be persuasive is impossible.

Justice Scalia's opinion is grounded on the premise that the due process analysis employed in *Shaffer v. Heitner*³⁷¹ does not apply to "all" assertions of state-court jurisdiction, but only to assertions of jurisdiction over absent defendants.³⁷² Lower courts may use Justice Scalia's reliance

F.2d 313, 315 (2d Cir. 1937) (fraud affecting jurisdiction equivalent to lack of jurisdiction), *cert. denied*, 303 U.S. 664 (1938); *Blandin v. Ostrander*, 239 F. 700, 702 (2d Cir. 1917) (defendant enticed into forum by false representations of plaintiff not present for jurisdictional purposes).

365. See *Burnham*, 110 S. Ct. at 2119-20 (White, J., concurring); *id.* at 2126 (Brennan, J., concurring).

366. *Id.* at 2119.

367. See *Smith v. Smith*, 459 N.W.2d 785, 787-88 n.3 (N.D. 1990). The *Smith* court pointed to the lack of guidance in the *Burnham* decision and concluded "[p]resumably, we will be further enlightened as to the Supreme Court's position in future decisions." *Id.*

368. See *Burnham*, 110 S. Ct. at 2115-17.

369. See *id.* at 2124-26 (Brennan, J., concurring).

370. See *id.* at 2119-20 (White, J., concurring).

371. 433 U.S. 186 (1977).

372. *Burnham*, 110 S. Ct. at 2116.

on tradition to validate not only presence-based assertions of jurisdiction but other procedures as well.³⁷³ The jurisdictional bases of consent and domicile could likewise be held to per se satisfy due process requirements by virtue of their pedigree.³⁷⁴ Such a line of decisions would render the decision in *Shaffer* an aberration.

Widespread application of Justice Scalia's traditional approach would require an explanation of how the *Shaffer* Court could abolish a rule with such a long tradition. Justice Scalia's answer to that question was unsatisfactory and may cause confusion for the lower courts.³⁷⁵ Thus, his traditional due process approach will remain flawed until that question is answered.³⁷⁶

Justice Brennan's approach is grounded upon a premise diametri-

373. Consent and domicile are two bases of jurisdiction which have not been directly subjected to a due process determination since the establishment of the minimum contacts analysis in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See, e.g., *National Equip. Rental v. Szukhent*, 375 U.S. 311 (1964).

374. For cases validating jurisdiction by consent, see *National Equip. Rental*, 375 U.S. at 315-16; *Hess v. Pawloski*, 274 U.S. 352, 356 (1927). For cases validating jurisdiction based on domicile, see *Milliken v. Meyer*, 311 U.S. 457, 462-63 (1940); *Blackmer v. United States*, 284 U.S. 421, 437-38 (1932).

375. Justice Scalia suggested that the *Shaffer* decision was based on the fact that the Delaware situs of stock rule was used by a minority of states. *Burnham*, 110 S. Ct. at 2116 n.4. However, the *Shaffer* decision was actually based on a finding that *quasi in rem* jurisdiction was unfair. *Shaffer*, 433 U.S. at 212.

376. *Burnham* is one of a series of opinions written by Justice Scalia advocating a traditional approach to Constitutional interpretation. See, e.g., *Rutan v. Republican Party of Ill.*, 110 S. Ct. 2729, 2748-49 (1990) (Scalia, J., dissenting) ("when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down"); *Burnham*, 110 S. Ct. at 2115-17 ("a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets [due process]"); *Michael H. v. Gerald D.*, 491 U.S. 110 127-28 n.6 (1989) (to guide interpretation of due process clause interest denominated as liberty must be fundamental as well as traditionally protected by society). See generally, E. CHEMERINSKI, *INTERPRETING THE CONSTITUTION* (1987) (discussing originalist and non-originalist theories of constitutional interpretation).

In *Michael H.*, Justice Scalia set forth a traditional due process analysis to determine which rights rank as "fundamental" and are therefore entitled to higher constitutional protection. *Michael H.*, 491 U.S. at 127-28 n.6. Justice Brennan attacked that analysis as being indifferent to precedent, and ignorant of the kind of society in which our Constitution exists. *Id.* at 137-39 (Brennan, J., dissenting). In *Burnham*, Justice Brennan again disagreed with Justice Scalia's use of tradition, finding it foreclosed by precedent. *Burnham*, 110 S. Ct. at 2120 (Brennan, J., concurring). In his non-originalist response, Justice Brennan pointed to *Shaffer* as authorizing the Court to invalidate even ancient rules. *Id.* at 2120-21 (Brennan, J., concurring).

After *Burnham*, in *Rutan*, Justice Scalia again advocated tradition to insulate a practice from constitutional scrutiny, citing *Burnham* in the process. *Rutan*, 110 S. Ct. at 2749 n.2 (Scalia, J., dissenting) (citing *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990)). In *Rutan*,

cally opposed to that of Justice Scalia. According to Justice Brennan, *Shaffer's* due process analysis does apply to "all" assertions of state-court jurisdiction.³⁷⁷ He does not limit the application of the minimum contacts analysis to assertions of jurisdiction over absent defendants.³⁷⁸ In the context of his opinion, however, this interpretation of *Shaffer* is deceptively simple. In reality, Justice Brennan's opinion is complex and may be applied by the lower courts in different ways.

Justice Brennan's reliance on *Shaffer* may be used in a definitional sense, thereby leading courts to measure all jurisdictional procedures by an abstract minimum contacts analysis. This would most likely result in validation of other traditional bases of jurisdiction such as consent and domicile. Justice Brennan's conclusion in *Burnham* focused on a knowing and voluntary presence.³⁷⁹ Thus, it would be easy to rationalize the extension to a "knowing and voluntary" consent to jurisdiction.³⁸⁰ Similarly, domicile normally indicates a significant quantum and quality of contacts, as well as a certain level of voluntariness.³⁸¹ Therefore, domicile would also fit easily under the type of definitional analysis Justice Brennan applied.

Justice White's opinion could be interpreted to combine with Justice Brennan's to create a majority of the Court which would invalidate an assertion of jurisdiction based on an involuntary or unknowing presence.³⁸² Both Justice White and Justice Brennan identified voluntariness without really stating how it would affect their determination if physical presence were found to be involuntary.³⁸³ Thus, courts may attach great significance to the elements of knowingness and voluntariness when determining the validity of a court's assertion of jurisdiction.

A real problem will arise, however, if lower courts apply Justice Brennan's minimum contacts analysis on an ad hoc basis to absent defendants. Justice Brennan diverged severely from the minimum contacts

Justice Stevens took issue with Justice Scalia's traditional approach, pointing out that it has never been supported by a majority of the Court. *Id.* at 2741 (Stevens, J., concurring).

This ongoing battle indicates the continued existence of an extreme originalist view, based on tradition, and the vitality of the counter argument against rigid traditional interpretation, supported by a majority in *Burnham*. Justice White's and Justice Brennan's concurrences both refute such an extreme use of tradition. *See Burnham*, 110 S. Ct. at 2119-20 (White, J., concurring); *id.* at 2120-21 (Brennan, J., concurring).

377. *Burnham*, 110 S. Ct. at 2120-21 (Brennan, J., concurring).

378. *See id.* (Brennan, J., concurring)

379. *Id.* at 2126 (Brennan, J., concurring).

380. *See supra* note 25 for a definition of consent.

381. *See supra* note 24 for a definition of domicile.

382. *See Burnham*, 110 S. Ct. at 2120 (White, J., concurring).

383. *Id.* (White, J., concurring); *id.* at 2126 (Brennan, J., concurring).

analysis applied in earlier cases³⁸⁴ by putting tremendous weight on a defendant's fleeting presence in the state, and ignoring the litigation-relatedness aspect of an individual's activities in the state.³⁸⁵ This approach could potentially subject all travelers to jurisdiction in suits unrelated to their presence in the forum. The impact of such an approach would be to destroy the due process clause as an instrument of interstate federalism.³⁸⁶

Lower courts may also interpret Justice Brennan's opinion as not really applying a minimum contacts analysis at all. His opinion may be interpreted to support the position that due process simply means fairness. Rather than interpreting minimum contacts as the definition of what constitutes "fair play and substantial justice," it may be interpreted as merely one method of determining the fairness of jurisdiction.³⁸⁷ This approach is based upon the premise that an assertion of jurisdiction must be fair, regardless of how fairness is determined. The problem with this interpretation is that it gives lower courts no guidelines on how to determine fairness; rather, it seems to say that anything goes.

Justice Scalia acknowledged this possible interpretation and therefore criticized Justice Brennan's approach as allowing the Justices to replace objective legal analysis with their own subjective assessments.³⁸⁸ Such criticism is valid, given the absence of an explanation from Justice Brennan as to why his approach diverged from the previously applied minimum contacts analysis. Nothing in Justice Brennan's opinion gives lower courts any clue as to when or why they should diverge from *International Shoe* and its progeny.³⁸⁹

Thus, the *Burnham* opinions leave the lower courts free to choose what they glean from this case, even though the only holding truly supported by a majority is the resurrection of the physical power theory. The lack of a majority supporting any due process analysis creates the same uncertainty as did the decision in *Shaffer*.³⁹⁰ Lower courts will have to struggle to determine which due process analysis applies in the

384. The standard analysis looks at the quality and nature of the defendant's contacts with the forum and the fairness and reasonableness of asserting jurisdiction under the circumstances. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980); *International Shoe*, 326 U.S. at 319.

385. *Burnham*, 110 S. Ct. at 2124-25 (Brennan, J., concurring).

386. Cf. *World-Wide Volkswagen*, 444 U.S. at 294 (due process clause as instrument of interstate federalism may sometimes divest state of power to render valid judgment).

387. See Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 11-12 (1984).

388. *Burnham*, 110 S. Ct. at 2117.

389. See *id.* at 2120-26 (Brennan, J., concurring).

390. See *Shaffer*, 433 U.S. 186. The language in *Shaffer* declaring that "all assertions of

area of personal jurisdiction. A coherent due process framework is needed—one which addresses the evolution of society and its effect upon jurisdiction jurisprudence.

VI. PROPOSAL: THE PROPER DUE PROCESS ANALYSIS

Due process is not concerned with the abstract application of a rule, but the denial of rights to a specific individual.³⁹¹ Furthermore, tradition and history do not complete a definition of fair play or substantial justice; such a definition can only be in terms of a particular problem.³⁹² One must first determine what the requirements of due process are in order to determine whether a rule meets those requirements. In the area of personal jurisdiction, the proper due process analysis requires: (1) a definitive determination of what type of due process analysis applies to assertions of personal jurisdiction; and (2) the application of that analysis to the specific assertion of jurisdiction in this case.³⁹³

A. *The Proper Due Process Analysis for Assertions of In Personam Jurisdiction*

The due process clause of the fourteenth amendment was meant to change over time, both to include new procedures and exclude those which are no longer valid.³⁹⁴ In the area of personal jurisdiction, due process has evolved in response to changes in society.³⁹⁵ The Court has acknowledged the need for such evolution in *International Shoe Co. v.*

state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny" left courts guessing as to what "all" really meant. *Id.* at 212.

391. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945); U.S. CONST. amend. XIV, § 1.

392. Leflar, *supra* note 287, at 292.

393. This procedure has been used extensively since *International Shoe*. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

394. See *Adamson v. California*, 332 U.S. 46, 65-66 (1947) (Frankfurter, J., concurring), *overruled on other grounds in Malloy v. Hogan*, 378 U.S. 1 (1964); *Twining v. New Jersey*, 211 U.S. 78, 101 (1908), *overruled on other grounds in Malloy v. Hogan*, 378 U.S. 1 (1964).

In *Hurtado v. California*, the Court, in discussing the due process clause of the fourteenth amendment, recognized that due process "does not demand that the laws existing at any point of time shall be irrevocable, or that any forms of remedies shall necessarily continue." 110 U.S. 516, 536 (1884); cf. *Ownbey v. Morgan*, 256 U.S. 94, 110-11 (1921) ("procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law").

395. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The Court in *International Shoe* acknowledged that the *capias ad respondendum* had given way to personal service of summons and reasoned that, as a result, due process requirements had changed as

Washington,³⁹⁶ *Hanson v. Denckla*³⁹⁷ and *Shaffer v. Heitner*.³⁹⁸ Additionally, in *World-Wide Volkswagen Corp. v. Woodson*,³⁹⁹ the Court pointed out that the limits imposed on state-court jurisdiction by the due process clause had been substantially relaxed due to fundamentals transformations in the American economy.⁴⁰⁰ The Court also emphasized, however, that the due process clause remains a limitation on state-court jurisdiction and would divest the states of power to render a valid judgment if a defendant had no contacts, ties or relations with the forum state.⁴⁰¹

Clearly, the evolution of transportation and communication and the resulting nationalization of commerce has had a profound effect upon state-court jurisdiction.⁴⁰² These changes enable individuals to enter and exit a forum state's territory with greater frequency; they also increase the chance that an individual may pass through a state's territory without knowing or intending to do so.⁴⁰³ Along with these changes came an increase in the number of individuals causing injury in states where they were not subject to jurisdiction.⁴⁰⁴ When coupled with the transient jurisdiction rule, these changes necessarily increase an individual's exposure to liability in a forum far from his or her domicile and with which he or she has had no contacts other than a fortuitous passing.⁴⁰⁵

International Shoe dealt directly with the first risk by permitting the states to reach non-residents who cause injury in their territory and then leave.⁴⁰⁶ *Shaffer* began to deal with the second risk by acknowledging the unfairness of imposing jurisdiction based on a trivial contact with the state.⁴⁰⁷ Both cases apply the same due process analysis, demonstrating it to be flexible enough to protect the interests of states and plaintiffs in

well. *Id.*; see *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958); *supra* notes 138-43 and accompanying text.

396. 326 U.S. 310, 316 (1945).

397. 357 U.S. 235, 250-51 (1958).

398. 433 U.S. 186, 202 (1977).

399. 444 U.S. 286 (1980).

400. *Id.* at 292-93.

401. *Id.*

402. See *World-Wide Volkswagen*, 444 U.S. at 286; *Shaffer*, 433 U.S. at 186; *Hanson*, 357 U.S. at 235; *International Shoe*, 326 U.S. at 310.

403. For example, individuals traveling interstate by airplane are not likely to know when they leave one state and enter another. See *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959).

404. *Shaffer*, 433 U.S. at 202.

405. See *Grace*, 170 F. Supp. at 443.

406. See *International Shoe*, 326 U.S. at 316.

407. See *Shaffer*, 433 U.S. at 212.

reaching non-resident defendants while at the same time protecting non-residents' interests in avoiding burdensome litigation in a distant forum.

As Justice Scalia pointed out in *Burnham v. Superior Court*,⁴⁰⁸ the states' newly created power to follow non-residents out of the forum in order to assert jurisdiction over them was an addition to already existing bases of jurisdiction.⁴⁰⁹ Yet, the minimum contacts analysis was not a completely novel creation by the *International Shoe* Court. Rather, it was an interpretation of the fairness and substantial justice concept the Court had earlier found to be implicit in due process in *Milliken v. Meyer*.⁴¹⁰

International Shoe and subsequent decisions by the Court further refined this standard in light of changes in transportation, communication and commercialization.⁴¹¹ This progression culminated in *Shaffer*, wherein the Court stated that the due process standard set forth by the minimum contacts analysis applies to all assertions of jurisdiction.⁴¹² The analytical difficulty created by this statement was that "all" could be interpreted as limited to *in rem* and *quasi in rem* actions, which the Court explicitly dealt with in *Shaffer*, or it could apply to literally "all" assertions of state-court jurisdiction, as Justice Brennan suggested in *Burnham*.⁴¹³ Much of the language in *Shaffer* was broad, suggesting that "all" meant *in rem*, *quasi in rem* and *in personam* actions were to be treated in the same manner.⁴¹⁴ The *Shaffer* Court found that the exercise of jurisdiction over property was really the exercise of jurisdiction over the interests of persons in that property.⁴¹⁵ The Court then held that the standard for determining the due process validity of an exercise of jurisdiction over the interests of a person is the minimum contacts

408. 110 S. Ct. 2105 (1990).

409. *Id.* at 2110-15. Other existing bases for jurisdiction included domicile and consent. See, e.g., *National Equip. Rental v. Szukhent*, 375 U.S. 311 (1964) (parties to contract may agree in advance to submit to court's jurisdiction); *Milliken v. Meyer*, 311 U.S. 457 (1940) (domicile in forum state was sufficient basis for personal jurisdiction even if defendant was absent from state when served).

410. 311 U.S. 457, 463 (1940).

411. See *World-Wide Volkswagen*, 444 U.S. at 286; *Shaffer*, 433 U.S. at 186; *Hanson*, 357 U.S. at 235; *International Shoe*, 326 U.S. at 310.

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

413. *Burnham*, 110 S. Ct. at 2120-21 (Brennan, J., concurring).

414. See *Shaffer*, 433 U.S. at 204, 207; *id.* at 217 (Powell, J., concurring) ("the principles of *International Shoe* . . . should be extended to govern assertions of *in rem* as well as *in personam* jurisdiction"); *id.* at 219 (Brennan, J., concurring and dissenting) ("the minimum-contacts analysis developed in *International Shoe* . . . represents a far more sensible construct for the exercise of state-court jurisdiction than the patchwork of legal and factual fictions that has been generated from the decision in *Pennoyer v. Neff*").

415. *Id.* at 207.

standard.⁴¹⁶ By focusing on the interests of persons, the Court created a basis for assessing assertions of jurisdiction by a single standard.⁴¹⁷

In fact, lower courts⁴¹⁸ and commentators⁴¹⁹ have interpreted *Shaffer* as mandating this result.⁴²⁰ Furthermore, as Justice Brennan pointed out in *Burnham*, the minimum contacts analysis is a far more sensible approach than the "patchwork of legal and factual fictions that has been generated from . . . *Pennoyer*."⁴²¹ Thus, the due process standard by which the assertion of jurisdiction over Dennis Burnham should be evaluated is the minimum contacts analysis formulated by the Court in *International Shoe* and subsequent cases.⁴²²

B. *The Validity of Jurisdiction Asserted over Dennis Burnham*

The due process analysis established by *International Shoe Co. v. Washington*⁴²³ and its progeny answers the question of whether a defendant's contacts with the forum are such that it is fair and reasonable to require him or her to defend against an action brought in that state.⁴²⁴ This analysis requires a fact specific inquiry into the quality and nature of the defendant's contacts with the forum state.⁴²⁵ Additionally, the analysis requires courts to balance the interests of the plaintiff, defendant and forum state and to consider the interstate interests in the efficient resolution of disputes.⁴²⁶

1. Quality and nature of contacts

In *Burnham v. Superior Court*,⁴²⁷ the petitioner, Dennis, made at least one business trip to California each year, except 1984, during the

416. *Id.*

417. *Id.* at 209; see Bernstine, *supra* note 14, at 53-54.

418. See, e.g., Nehemiah v. Athletics Congress of the U.S.A., 765 F.2d 42, 47 (3d Cir. 1985); Harold M. Pitman Co. v. Typecraft Software, 626 F. Supp. 305, 310-13 (N.D. Ill. 1986); Bershaw v. Sarbacher, 40 Wash. App. 653, 657, 700 P.2d 347, 349 (1985).

419. See, e.g., Bernstine, *supra* note 14, at 61; Werner, *supra* note 14, at 567, 589.

420. Justice Scalia found all cases interpreting *Shaffer* in this manner to be erroneous. *Burnham*, 110 S. Ct. at 2112-13.

421. *Id.* at 2121 (Brennan, J., concurring).

422. See *supra* notes 60-123 and accompanying text.

423. 326 U.S. 310 (1945).

424. *Id.* at 316.

425. See *id.* at 319.

426. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); see *supra* notes 94-98 and accompanying text.

427. 110 S. Ct. 2105 (1990).

eleven years the Burnhams were married.⁴²⁸ When the Burnhams separated in 1987, they reached a marital agreement providing that Dennis would pay the expenses of relocating his wife and children in California.⁴²⁹ Dennis then made two trips to California in 1987 and one in early 1988. During the 1988 trip he was served with the Petition and Summons in the divorce action brought by his wife.⁴³⁰ After he was served, Dennis continued regular trips to California to handle personal and business affairs and visit his children.⁴³¹ This quantum of contacts is clearly more substantial than the classic transient defendant had in *Grace v. MacArthur*.⁴³²

Before his wife and children relocated, Dennis's contacts with California consisted of business trips unrelated to the divorce litigation.⁴³³ He conducted a business seminar in San Diego on one occasion and conceded taking advantage of tax benefits resulting from his business trips to California.⁴³⁴ Thus, Dennis had purposely availed himself of the privilege of conducting business in California and had created continuing obligations between himself and residents of the forum.⁴³⁵ After separating from his wife, Dennis's visits to the state arguably became litigation-related when he visited his family.

In *Kulko v. Superior Court*,⁴³⁶ the Court dealt with a similar situation. The *Kulko* plaintiff was the defendant's ex-wife, a California resident.⁴³⁷ She filed suit against her non-resident husband to modify their custody and child support arrangement.⁴³⁸ The parties had been married during a three-day visit to California.⁴³⁹ Other than that, however, the defendant's only contact with California was one twenty-four hour stop-over many years prior, when he returned from military service.⁴⁴⁰ The Court held that the defendant's contacts with California were an insuffi-

428. Respondent's Brief on the Merits at 19, *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990) (No. 89-44).

429. Petitioner's Brief on the Merits at 3, *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990) (No. 89-44).

430. Brief for Respondent in Opposition to Petitioner's Brief for Writ of Certiorari at 2-3, *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990) (No. 89-44).

431. Respondent's Brief on the Merits at 21.

432. 170 F. Supp. 442 (E.D. Ark. 1959) (defendant's only contact was service with process while flying over forum state).

433. See Respondent's Brief on the Merits at 19-20.

434. Brief for Respondent in Opposition to Petition for Writ of Certiorari at 3.

435. See *supra* notes 80-93 for a discussion of the purposeful availment requirement.

436. 436 U.S. 84 (1978).

437. *Id.* at 87.

438. *Id.* at 88.

439. *Id.* at 86.

440. *Id.* at 93.

cient basis for jurisdiction.⁴⁴¹

Although similar, there are many distinctions between *Burnham* and *Kulko*. First, the divorce had already been adjudicated in *Kulko*,⁴⁴² while grounds for the divorce action in *Burnham* were hotly disputed.⁴⁴³ Second, the defendant in *Kulko* had far fewer contacts with the forum than Dennis, the petitioner in *Burnham*.⁴⁴⁴ Dennis maintained systematic business contacts with California over a twelve-year period.⁴⁴⁵ Thus, he purposely availed himself of conducting business in the forum.

Finally, the defendant in *Kulko* was not served in the state, and may not have known about the action until he was served.⁴⁴⁶ Dennis, on the other hand, knew his wife had filed the petition before he traveled to California where he was served.⁴⁴⁷ When he arrived in Southern California on business, he called his wife, Francie, to talk about the action she had initiated.⁴⁴⁸ Arguably, his trip to California was at least partially related to his relationship to his wife, which lies at the heart of the dispute in this case. This combination of factors shows more purposeful availment and litigation-relatedness than *Kulko*,⁴⁴⁹ thus making *Burnham* a more compelling basis for jurisdiction.

2. Balancing interests to determine fairness

It is difficult to predict how burdensome the defense of this case in California would have been for Dennis. He definitely had some contacts with the state because of his periodic business trips, as well as his visits with the children.⁴⁵⁰ Thus, he would have visited California periodically, even without the initiation of this lawsuit. On the other hand, nothing in the facts suggests that the respondent, Francie, would have visited New Jersey in a similarly systematic fashion.

Francie and the children established a domicile in California, giving themselves a substantial connection with the state.⁴⁵¹ Accordingly, California has a definite interest in adjudicating this dispute, in order that its own domiciliary not be forced to sue in a distant forum.

441. *Id.* at 101.

442. *Id.* at 87.

443. *See Burnham*, 110 S. Ct. at 2109.

444. *See Kulko*, 436 U.S. at 93-94.

445. *See supra* notes 427-34 and accompanying text.

446. *See Kulko*, 436 U.S. at 88.

447. Respondent's Brief on the Merits at 20.

448. *Id.* at 5.

449. *See Kulko*, 436 U.S. at 93-94.

450. *See supra* notes 427-34 and accompanying text.

451. *See Milliken v. Meyer*, 311 U.S. 457 (1940) (holding domicile is valid basis of jurisdiction even when domiciliary served while absent from forum).

Perhaps the most compelling facts arise in the context of the plaintiff's interest in having a valid forum and the interstate interest in an effective resolution of the controversy. Upon separating, the Burnhams agreed that Francie would file for divorce based on irreconcilable differences.⁴⁵² Yet, as soon as Francie moved to California, Dennis filed for divorce on the ground of desertion.⁴⁵³ Only after unsuccessfully demanding that Dennis adhere to their prior agreement did Francie file her petition for divorce in California.⁴⁵⁴

If Francie was unable to litigate her claim in California, she may have been without a remedy. Traveling back to New Jersey to sue her husband might have been too burdensome for her.⁴⁵⁵ Dennis filed two complaints for divorce in New Jersey, and both were dismissed.⁴⁵⁶ The New Jersey courts refused to allow Dennis to pursue his claim in their courts because, among other things, they believed he "deliberately and unfairly manipulated [Francie] into moving to California so he could bring his divorce action in New Jersey where it would be most convenient for him and inconvenient for [her]."⁴⁵⁷ The New Jersey courts dismissed the actions with knowledge of the suit commenced by Francie in California, thereby suggesting that they believed California to be the proper forum.⁴⁵⁸

The minimum contacts analysis is a flexible test, rather than a set of rigid rules.⁴⁵⁹ *Burnham* is exactly the type of case for which this flexibility was intended. The facts of *Burnham* indicate that Dennis had some systematic and continuous business contacts with the forum.⁴⁶⁰ Yet they were not nearly as substantial as those found sufficient for general jurisdiction in *Perkins v. Benguet Consolidated Mining Co.*⁴⁶¹ Nevertheless, when combined with Dennis's litigation-related visits to his wife's house and the unfairness of allowing Dennis to manipulate a marital agreement to cause inconvenience to Francie, the exercise of jurisdiction appears to

452. *Burnham*, 110 S. Ct. at 2109.

453. *Id.*

454. *Id.*

455. Arguably, the respondent, Francie, consented to the New Jersey court's jurisdiction by signing the marital agreement; however, the New Jersey courts dismissed Dennis's actions. See Respondent's Brief on the Merits at app. 1-3.

456. *Id.*

457. *Id.*

458. See *id.*

459. See *International Shoe*, 326 U.S. at 319.

460. See Respondent's Brief on the Merits at 19-21. See *supra* notes 427-49 and accompanying text for a discussion of petitioner's contacts with the forum.

461. 342 U.S. 437, 446 (1952) (Phillipine corporation carrying on continuous and systematic business in forum held subject to service in forum in action unrelated to its activities there).

be quite reasonable and fair.⁴⁶² Thus, the exercise of jurisdiction in this case meets the requirements of due process as measured by the minimum contacts analysis.

C. *The Validity of the Transient Rule and Other Bases of Jurisdiction*

In *Burnham v. Superior Court*,⁴⁶³ the Court lumped all forms of physical presence together, thus ignoring the reality that different types of physical presence exist; some of which may be considered a fair basis for jurisdiction under a minimum contacts analysis and others which may not be. The minimum contacts analysis acknowledges this by distinguishing between litigation-related contacts and non-litigation-related contacts.⁴⁶⁴ The flexible nature of the minimum contacts analysis was specifically designed to deal with varying degrees of physical presence.⁴⁶⁵ In fact, decisions employing the analysis have created a continuum of contacts which include varying degrees of presence.⁴⁶⁶ Accordingly, as a single standard, the minimum contacts continuum would cover all situations.

1. Transient jurisdiction

A correct application of the minimum contacts analysis to the transient rule of jurisdiction would highlight the inherent unfairness of the rule and mandate its destruction. Changes in society which caused the evolution of due process, caused the physical power theory to evolve as well.⁴⁶⁷ The group of non-residents historically subject to jurisdiction under the physical power theory now embraces a subset of individuals, transient defendants, over whom the assertion of jurisdiction might be

462. Justice Scalia would not agree; he believed that if Dennis had been served in New Jersey, the assertion of jurisdiction would have been unfair. *Burnham*, 110 S. Ct. at 2117-18.

463. 110 S. Ct. 2105 (1990).

464. See *supra* notes 69-83 and accompanying text.

465. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The decision in *International Shoe* was a reaction to the change in what could be viewed as a "presence" in another state due to improvements in transportation and communication. See *supra* notes 131-43 and accompanying text.

466. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (franchisee's few visits to forum state where franchisor's home office located and franchise contract created, sufficient for jurisdiction); *Kulko v. Superior Court*, 436 U.S. 84 (1978) (few non-litigation related visits to state, ex-wife and children in state insufficient basis for jurisdiction); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (no physical presence in state, commercial transactions with forum resident sufficient for jurisdiction); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (no physical presence in forum but systematic, continuous and substantial business contacts with forum sufficient for jurisdiction).

467. See *supra* notes 45-157 and accompanying text.

unfair and therefore unconstitutional.⁴⁶⁸ The *Burnham* Court had the chance to recognize this distinction and distinguish between the general fairness of the physical power theory and the inherent unfairness of the transient jurisdiction rule.⁴⁶⁹ The Court chose not to do this, thereby ignoring changes in society which have caused corresponding changes in the due process analysis governing personal jurisdiction.⁴⁷⁰

A classic example of a transient defendant is found in *Grace v. MacArthur*,⁴⁷¹ where an individual was served in an airplane within the navigable airspace of the forum state.⁴⁷² Justice Brennan would apparently find an assertion of jurisdiction in such a case valid. After all, Justice Brennan would say, if the plane crashed, the defendant would have the benefit of forum state emergency services.⁴⁷³ Yet, it is precisely this type of situation which demonstrates the inherent unfairness of the transient jurisdiction rule and distinguishes it from other assertions of jurisdiction under the physical power theory.⁴⁷⁴

Clearly, the one or few contacts a transient defendant has with the forum will not be weighty factors in a minimum contacts analysis.⁴⁷⁵ When such contacts are not at all litigation-related, the minimum contacts analysis requires them to be substantial before jurisdiction will be valid.⁴⁷⁶ The fewer the contacts, the more closely the Court will look at litigation-relatedness.⁴⁷⁷ For example, unless the dispute arises out of the individual's flight over the forum, it is unlikely such a contact alone would be a sufficient basis for jurisdiction.

The transient defendant whose only contact with the forum is a flight within its airspace would likewise fail the purposeful availment element of the analysis.⁴⁷⁸ Such a defendant really only avails himself or

468. See *supra* notes 124-57. *Burnham* is the first post-*International Shoe* case wherein the Court addressed transient jurisdiction, suggesting its recognition of the increasing tension between the potential unfairness of existing bases of jurisdiction and the minimum contacts analysis.

469. See Sobeloff, *supra* note 79, at 208 ("To subject the non-resident individual, or corporation, to a general *in personam* jurisdiction because of such limited contact would be unfair and unreasonable, no matter how adequate the notice.").

470. See *supra* notes 45-123 and accompanying text.

471. 170 F. Supp. 442 (E.D. Ark. 1959).

472. *Id.* at 443.

473. See *Burnham*, 110 S. Ct. at 2124-25 (Brennan, J., concurring).

474. See Sobeloff, *supra* note 79, at 208; *supra* notes 144-57 and accompanying text.

475. See *Kulko*, 436 U.S. 84 (marriage and brief visit in state insufficient contacts for jurisdiction); cf. *McGee*, 355 U.S. 220 (insurance contract with forum resident and receipt of premiums by defendant sufficient basis for jurisdiction).

476. See *Perkins*, 342 U.S. at 447.

477. See, e.g., *McGee*, 355 U.S. at 223; Sobeloff, *supra* note 79, at 208.

478. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (car dealership

herself of the fundamental right to travel.⁴⁷⁹ Burdening such a fundamental right with exposure to liability in distant forums with which the defendant has no contact seems unreasonable.⁴⁸⁰ In most cases this type of presence will be fortuitous rather than purposeful.⁴⁸¹

A forum state does have an interest in providing its residents relief; however, it has little interest in adjudicating a dispute with which it has no connection.⁴⁸² Furthermore, the burden of being forced to litigate in a distant forum with which an individual has no contacts would likely outweigh this type of generic forum interest.⁴⁸³ Additionally, contrary to what Justice Brennan suggests,⁴⁸⁴ the doctrine of forum non conveniens does not provide a reliable remedy for the unfairness in this situation, because it is largely discretionary.

Thus, a true minimum contacts analysis demonstrates that transient jurisdiction, in its pure form, fails to meet the requirements of due process.⁴⁸⁵ The analysis also shows that rules with rigid definitions such as physical power and transient jurisdiction have no place in a system of jurisdiction measured by a minimum contacts standard. There is simply no need for definitional rules with a fact specific standard such as minimum contacts. All such rules will fit somewhere along the continuum of due process fairness.

2. Consent

There may be only one contact in a case of consent-based jurisdiction; a factor which would seem to weigh against the assertion of jurisdiction. Yet, consent is the ultimate form of purposeful availment. By contractually consenting or appointing an agent for service in the forum,

which sold car that caused accident in forum state held not subject to jurisdiction in forum); *Shaffer v. Heitner*, 433 U.S. 186 (1977) (owners of stock in company incorporated in forum state held not to meet purposeful availment requirement); *Hanson v. Denckla*, 357 U.S. 235 (1958) (purposeful availment of bank not satisfied by unilateral act of trustee who moved to another state after establishing trust with bank); cf. *Burger King*, 471 U.S. 462 (franchisee's few business visits to forum and relationship with forum state franchisor sufficient for jurisdiction); *McGee*, 355 U.S. 220 (life insurance company's periodic receipt of payments from forum resident sufficient basis for jurisdiction).

479. See *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969); *supra* notes 147-50 and accompanying text.

480. See *Bernstine*, *supra* note 14, at 65; Comment, *supra* note 124, at 197-98.

481. See *Werner*, *supra* note 14, at 611.

482. See *Kulko*, 436 U.S. at 100-01.

483. See *id.*

484. See *Burnham*, 110 S. Ct. at 2125 (Brennan, J., concurring).

485. See *Nehemiah v. Athletics Congress of the U.S.A.*, 765 F.2d 42, 47 (3d Cir. 1985); *Harold M. Pitman Co. v. Typecraft Software*, 626 F. Supp. 305, 310-13 (N.D. Ill. 1986); *Bershaw v. Sarbacher*, 40 Wash. App. 653, 657, 700 P.2d 347, 349 (1985).

an individual purposefully invokes the benefits of that forum's legal system.⁴⁸⁶ In essence, by consenting to a state's jurisdiction an individual chooses his or her own forum. Absent a showing that such consent was involuntarily or unknowingly made, consent is likely to meet the minimum contacts standard of due process.⁴⁸⁷

3. Domicile

Domicile likewise presents a strong case for validation under the minimum contacts analysis. A domiciliary generally has substantial contacts with the state where he or she has established a permanent residence.⁴⁸⁸ Additionally, domiciliaries purposefully avail themselves of privileges and protections of the state.⁴⁸⁹ In the majority of cases, requiring a domiciliary to defend against a suit brought in his or her home state will be found reasonable. The only situation in which it could be questioned under a minimum contacts analysis is if the domiciliary has left the forum permanently, but has yet to establish a new domicile.⁴⁹⁰ If the litigation arose out of the domiciliary's prior contacts in the forum, jurisdiction would likely be valid. In the case where the litigation arose elsewhere, however, the burden on the domiciliary might result in a finding that jurisdiction was invalid.

This could cause a dilemma where denial of jurisdiction would deprive a plaintiff of any possible relief. The potential for such a result would impact the fairness analysis, as the plaintiff's interest in relief would become a weighty factor due to the necessity of the plaintiff having at least one forum in which to seek relief. In the case of an absent domiciliary whom the plaintiff is having difficulty tracking, the necessity element would favor requiring the domiciliary to return to the forum. Such a necessity element could arise in potentially any situation and would change the minimum contacts analysis accordingly. This exemplifies the flexibility which gives the minimum contacts analysis the ability to deal with even the hardest cases.

VII. CONCLUSION

The decision in *Burnham v. Superior Court*⁴⁹¹ will do more to hin-

486. See *National Equip. Rental v. Szukhent*, 375 U.S. 311, 315-16 (1964).

487. See *id.* at 317-18.

488. See *Milliken v. Meyer*, 311 U.S. 457, 463-64 (1940).

489. See *id.*

490. See *id.* at 463 (domicile held to suffice as basis for jurisdiction so long as service is reasonably calculated to give actual notice of proceedings).

491. 110 S. Ct. 2105 (1990).

der than help lower courts in their interpretation of *Shaffer v. Heitner*.⁴⁹² Rather than answer the post-*Shaffer* question of which due process analysis applies to assertions of *in personam* jurisdiction, the Court focused on resurrecting the physical power rule. The result was an incoherent variety of due process theories, none of which was supported by a majority of the Court.⁴⁹³ The by-product of these analyses was the resurrection of the antiquated theory of physical power without considering the inherent unfairness of its modern day counterpart—the transient rule of jurisdiction. This decision will lead to an increase in unfair assertions of jurisdiction. Ultimately, it will require the Court to reexamine and specify when the courts should apply the “fairness and substantial justice standard” elucidated in the minimum contacts line of cases.⁴⁹⁴

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492. 433 U.S. 186 (1977).

493. See *supra* notes 176-238 and accompanying text.

494. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

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