

4-1-1991

Burnham v. Superior Court: The Supreme Court Agrees on Transient Jurisdiction in Practice But Not in Theory

Douglas A. Mays

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Douglas A. Mays, *Burnham v. Superior Court: The Supreme Court Agrees on Transient Jurisdiction in Practice But Not in Theory*, 69 N.C. L. REV. 1271 (1991).

Available at: <http://scholarship.law.unc.edu/nclr/vol69/iss4/6>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

NOTES

Burnham v. Superior Court: The Supreme Court Agrees on Transient Jurisdiction in Practice, But Not in Theory

As any survivor of a law school course in civil procedure can attest, *Pennoyer v. Neff*¹ dominates the subject of personal jurisdiction. Not only did that decision render a state's assertion of jurisdiction a constitutional matter, but it also created jurisdictional standards that remained unchallenged for a century. Not until 1977, in *Shaffer v. Heitner*,² did the United States Supreme Court hold that one of the *Pennoyer* bases, presence of property in the forum state, is alone insufficient to confer personal jurisdiction. The *Shaffer* Court held that the minimum-contacts test, first enunciated in *International Shoe Company v. Washington*³ as a new formulation of jurisdictional due process, also must be satisfied.⁴ Following *Shaffer*, many commentators hypothesized that minimum-contacts analysis also might have superseded *Pennoyer*'s other basis for jurisdiction—presence of the defendant in the forum state—rendering the latter of little more than historical interest.⁵ Some lower courts agreed and refused to find jurisdiction based on presence in the forum state solely.⁶

After twelve years of uncertainty, the Court finally addressed the status of “transient” or “tag” jurisdiction in the post-*Shaffer* era in *Burnham v. Superior Court*.⁷ All nine Justices voted to affirm jurisdiction on the *Burnham* facts, but eight of them split into two widely divergent camps. One camp maintained that

1. 95 U.S. 714 (1877).

2. 433 U.S. 186 (1977).

3. 326 U.S. 310 (1945).

4. *Shaffer*, 433 U.S. at 212. The minimum-contacts test consists of a two-part inquiry: A court first must establish that a sufficient level of defendant-initiated contact with the forum seeking jurisdiction exists; then, if the contacts exist, the court must consider whether allowing jurisdiction would comport with “traditional notions of fair play and substantial justice.” *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). See *infra* notes 74-92 and accompanying text for a more detailed discussion of the minimum-contacts test.

5. Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38, 52-60 (1979); Brilmayer, Haverkamp, Logan, Lynch, Neuwirth & O'Brien, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 748-55 (1988); Casad, *Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory?*, 26 U. KAN. L. REV. 61, 77 (1977); Fyr, *Shaffer v. Heitner: The Supreme Court's Latest Last Words on State Court Jurisdiction*, 26 EMORY L.J. 739, 770-73 (1977); Posnak, *A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729, 742-43 (1981); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 75-76 (1978); Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of Shaffer v. Heitner*, 1978 WASH. U.L.Q. 273, 302-03 (1978); Werner, *Dropping the Other Shoe: Shaffer v. Heitner and the Demise of Presence Oriented Jurisdiction*, 45 BROOKLYN L. REV. 565, 588-90 (1979). See *infra* notes 103-06 and accompanying text for further discussion of the scholarly reaction to *Shaffer*.

6. See, e.g., *Nehemiah v. Athletics Congress of the U.S.A.*, 765 F.2d 42, 45-48 (3d Cir. 1985); *Harold M. Pitman Co. v. Typecraft Software, Ltd.*, 626 F. Supp. 305, 312 (N.D. Ill. 1986); *Schreiber v. Allis-Chalmers Corp.*, 448 F. Supp. 1079, 1089 (D. Kan. 1978) (alternative holding), *rev'd on other grounds*, 611 F.2d 790 (10th Cir. 1979); *Duehring v. Vasquez*, 490 So. 2d 667, 671 (La. App. 1986); *Bershaw v. Sarbacher*, 40 Wash. App. 653, 655, 700 P.2d 347, 349 (1985). See *infra* notes 107-17 and accompanying text for further discussion of the *Harold M. Pitman* and *Schreiber* cases.

7. 110 S. Ct. 2105 (1990). “Transient jurisdiction” refers to a state's assertion of jurisdiction

Shaffer had no effect on the doctrine of transient jurisdiction and that the *Pennoyer* formulation remains viable;⁸ the other camp reasoned that *Shaffer* requires applying the minimum-contacts test, but found that presence itself satisfied the test and conferred jurisdiction.⁹ Neither of these two factions formed a majority; therefore, the theory of transient jurisdiction remains unclear. While the legal rationales for jurisdiction based on in-forum service remain in dispute, however, service of process, during even a fleeting presence in a forum, probably still will allow a state to assert jurisdiction.

This Note examines the reasoning of the opposing positions adopted by the *Burnham* Justices, describes the Court's past treatment of personal jurisdiction, and analyzes the former in light of the latter. It concludes that, although *Shaffer* did not explicitly compel the application of minimum-contacts analysis to jurisdiction based on presence of the defendant in the forum state, the holding does provide a justification for doing so. Furthermore, the Note contends that the Court's emphasis on fairness as a determinant of due process during the past forty-five years and the unfairness that can result from transient jurisdiction suggest that the Court should abolish the practice. The Note also finds that the Justices who favored replacing transient jurisdiction with the minimum-contacts test applied that test in a faulty manner, giving far too much weight to presence in the forum state as a contact. Although presence is a contact worthy of analysis, courts should not give it such balance-tipping consideration.

Dennis Burnham and Francie Burnham were married in 1976 and lived together in New Jersey from 1977 until July 1987, when the couple separated and Francie moved to California with their two children.¹⁰ The couple entered into a separation agreement before Francie left, but the following October Dennis filed for divorce in New Jersey state court.¹¹ He did not serve process on Francie, however, and in January, 1988, she filed her own action in California,¹² seeking not only a divorce, but also a determination of marital property rights, spousal support, and custody of the children.¹³ Dennis traveled to California shortly after Francie filed suit, both to conduct business and to visit his children.¹⁴ While at his wife's home, he received a summons and a copy of

over an individual on the grounds that she received service of process while within that state's borders.

8. *Id.* at 2109-17.

9. *Id.* at 2120-26 (Brennan, J., concurring in judgment). Justice Stevens joined neither faction, apparently basing his vote to affirm jurisdiction on the rationales of both sides. See *infra* note 68.

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

11. *Id.*

12. *Id.*

13. Petitioner's Brief on the Merits at 3, *Burnham* (No. 89-44). A state may acquire jurisdiction to determine marital status if it is the domicile of one of the spouses. *Williams v. North Carolina*, 317 U.S. 287, 298-99 (1942). To determine property rights incident to the marriage, however, a state must acquire in personam jurisdiction over the defendant or quasi in rem jurisdiction over the property affected. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418-19 (1957). Similarly, a court must have in personam jurisdiction over the defendant to determine alimony or child custody. *Baldwin v. Baldwin*, 28 Cal. 2d 406, 415-16, 170 P.2d 670, 676 (1946) (alimony); *May v. Anderson*, 345 U.S. 528, 533-34 (1953) (child custody).

14. Petitioner's Brief on the Merits at 4, *Burnham* (No. 89-44).

Francie's divorce petition.¹⁵

Dennis made a special appearance in California Superior Court, where he moved to quash the service of process on the grounds that the court lacked personal jurisdiction over him.¹⁶ The court initially granted his request.¹⁷ On reconsideration, however, it denied the motion to quash in its entirety.¹⁸ The California Court of Appeal denied Dennis's request for mandamus relief on the grounds that personal presence in the forum state continues to be a "valid jurisdictional predicate for *in personam* jurisdiction."¹⁹ The United States Supreme Court granted certiorari,²⁰ and on May 29, 1990, unanimously affirmed jurisdiction.²¹

Although the Justices voted unanimously in favor of jurisdiction, they adopted two radically different rationales for their holding. Justice Scalia wrote the opinion of the Court,²² while Justice Brennan wrote an opinion concurring in the judgment.²³ Neither of the two primary factions restricted its holding to the facts at hand; instead, both sides took expansive positions on the issue.²⁴

Justice Scalia began his opinion for the Court by noting that transient jurisdiction is "[a]mong the most firmly established principles of personal jurisdiction in American tradition."²⁵ He traced the historical development of the doctrine from Roman origins through English common law.²⁶ While conceding that scholars have questioned the degree to which English tradition in fact embraced transient jurisdiction,²⁷ he asserted that when the fourteenth amendment

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

16. *Id.* Dennis argued that due process was not satisfied, as he had insufficient contacts with the state for its assertion of jurisdiction. *Id.*

17. Petitioner's Brief on the Merits at 5, *Burnham* (No. 89-44). The order nominally denied Dennis Burnham's motion to quash, but in effect granted his request because it stated that the court had "no personal jurisdiction . . . over any other issue except marital status." *Id.*

18. *Id.* at 6. The court reversed itself after a hearing at which Francie Burnham argued both that in-forum service was a proper basis for jurisdiction and that her husband had sufficient contacts with the state to satisfy the minimum-contacts test. *Id.*

19. *Burnham*, 110 S. Ct. at 2109 (citation omitted).

20. 110 S. Ct. 47 (1989).

21. *Burnham*, 110 S. Ct. at 2105.

22. *Id.* at 2109-19. Chief Justice Rehnquist and Justice Kennedy joined Justice Scalia. Justice White filed an opinion concurring in part with the opinion of the Court and concurring in the judgment. *Id.* at 2119-20 (White, J., concurring in part and in judgment).

23. *Id.* at 2120-26 (Brennan, J., concurring in judgment). Justices Marshall, Blackmun, and O'Connor joined Justice Brennan. Justice Stevens wrote a brief opinion concurring in the judgment. *Id.* at 2126 (Stevens, J., concurring in judgment).

24. Both plaintiff and defendant suggested at oral arguments that the Court could take a narrow approach. For a description of these arguments, see *Arguments Before the Court*, 58 U.S.L.W. 3585, 3585-86 (1990). Dennis's attorney reasoned that "if the court were to determine that *Pennoyer* should not be abolished, then it should not apply in a situation such as this, where a father is visiting his children." *Id.* at 3586. Francie's attorney suggested that while transient jurisdiction may not always lead to fair results, it would be appropriate in this instance. *Id.*

25. *Burnham*, 110 S. Ct. at 2110.

26. *Id.* at 2110-11.

27. *Id.*; see, e.g., Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 297 (1956) ("English legal history furnishes little support for the power doctrine."); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 253 ("[I]t would appear that, until 1830, there was no developed English common law on what we now call interstate or international jurisdiction.").

was adopted,²⁸ American courts accepted without question the concept of jurisdiction based on presence.²⁹ Furthermore, that acceptance has continued until the present, with the exception of a few decisions after *Shaffer* that, Justice Scalia claimed, "erroneously" held that transient jurisdiction violates due process.³⁰ Justice Scalia said he did "not know of a single State or federal statute, or a single judicial decision resting upon State law, that has abandoned in-State service as a basis of jurisdiction."³¹ He argued that transient jurisdiction has become so well established that it now automatically satisfies due process, stating "[that which], in substance, has been immemorially the actual law of the land . . . therefor[e] is due process of law."³²

Turning to the minimum-contacts theory of personal jurisdiction—but leaving aside *Shaffer* for the moment—Justice Scalia refuted the suggestion that this relatively new theory should displace the traditional *Pennoyer* "power" formulation in the context of transient jurisdiction.³³ He emphasized that the Court developed the minimum-contacts analysis as a way of addressing weaknesses in the *Pennoyer* rule which courts previously had resolved within the *Pennoyer* framework through the fictions of "consent" and "presence."³⁴ He noted that "[o]ur opinion in *International Shoe* cast those fictions aside, and made explicit the underlying basis of these decisions: due process does not necessarily require the States to adhere to the unbending territorial limits on jurisdiction set forth in *Pennoyer*."³⁵ The minimum-contacts test serves only to supplement *Pennoyer*, according to Justice Scalia; it provides no basis for the proposition that presence in a forum not only is no longer necessary to confer jurisdiction, but also is no longer sufficient on its own to do so.³⁶ Thus, Justice Scalia concluded, both the status of transient jurisdiction as a tradition and the nature of minimum-contacts analysis as a mere adjunct to the *Pennoyer* rules militate against overturning the practice:

The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of "traditional notions of fair play and substantial justice." That standard was developed by analogy to "physical presence," and it would be perverse to say it could now be turned against that touchstone of jurisdiction.³⁷

Justice Scalia next discussed the argument that *Shaffer* requires minimum-

28. *Burnham*, 110 S. Ct. at 2111. Justice Scalia called the moment of adoption "the crucial time for present purposes," *id.*, presumably because acceptance of the doctrine in the past confers legitimacy upon it now. See *infra* notes 135-38 and accompanying text.

29. *Burnham*, 110 S. Ct. at 2111.

30. *Id.* at 2113; see *infra* notes 107-17 and accompanying text.

31. *Burnham*, 110 S. Ct. at 2113.

32. *Id.* at 2115 (quoting *Hurtado v. California*, 110 U.S. 516, 528 (1884)).

33. *Id.* at 2114-15.

34. *Id.* at 2114. See *infra* note 73 for a discussion of the use of fictions in personal jurisdiction.

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

36. *Id.* at 2115.

37. *Id.*

contacts analysis even in situations when service occurs within the forum.³⁸ *Shaffer's* application of the minimum-contacts test to in rem and quasi in rem jurisdiction³⁹—jurisdiction sanctioned by *Pennoyer*—and its statement that “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,”⁴⁰ do not, Justice Scalia argued, invalidate transient jurisdiction. *Shaffer*, like all cases the Court has heard since *International Shoe*, concerned a state’s effort to obtain jurisdiction over an absent defendant.⁴¹ Its holding simply “places all suits against absent nonresidents on the same constitutional footing, regardless of whether a separate Latin label is attached to one particular basis of contact [and] does not compel the conclusion that physically present defendants must be treated identically to absent ones.”⁴² Thus, Justice Scalia argued, *Shaffer's* significance is not that it overruled one of *Pennoyer's* fundamental bases of personal jurisdiction; rather, it simply conferred the same jurisdictional treatment on out-of-state defendants who own property in the forum state as that given to out-of-state defendants who do not own property in the forum state.

Justice Scalia acknowledged *Shaffer's* statement that “‘traditional notions of fair play and substantial justice’ can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage.”⁴³ He insisted, however, that it would be impossible for a practice which is “both firmly approved by tradition and still favored”⁴⁴—transient jurisdiction—to be “no longer justified.”⁴⁵

Finally, Justice Scalia criticized the minimum-contacts approach advocated in Justice Brennan’s concurring opinion.⁴⁶ Abandoning the *Pennoyer* rule and

38. *Id.* at 2115-16. Justice White did not join in this section of the Court’s opinion.

39. In rem jurisdiction refers to a court’s authority to determine rights to property within the forum as to the entire world; for example, to hear a condemnation suit. Quasi in rem jurisdiction describes two distinct judicial capacities. One is a court’s power to resolve competing claims on property in the forum held by the litigating parties; for example, a suit to compel specific performance of a contract to convey real estate. The other is a court’s ability, in the absence of in personam jurisdiction over a defendant, to attach the defendant’s property in the forum and render a judgment up to the property’s value. J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 3.8, at 114-16 (1985).

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

41. *Burnham*, 110 S. Ct. at 2110 (“Since *International Shoe*, we have only been called upon to decide whether these ‘traditional notions’ [of fair play and substantial justice] permit States to exercise jurisdiction over absent defendants in a manner that deviates from the rules of jurisdiction applied in the 19th century.”).

42. *Id.* at 2116.

43. *Id.* (quoting *Shaffer*, 433 U.S. at 212).

44. *Id.*

45. *Id.*

46. *Id.* at 2117-19. Justice Brennan argued first that the *Shaffer* holding compels the conclusion that minimum-contacts analysis should apply to all assertions of jurisdiction. *Id.* at 2120-22 (Brennan, J., concurring in judgment); see *infra* notes 53-57 and accompanying text. He then applied a minimum-contacts analysis to presence in the forum state. *Burnham*, 110 S. Ct. at 2122-26 (Brennan, J., concurring in judgment); see *infra* notes 58-68 and accompanying text. He concluded that presence in the forum state is a sufficiently weighty contact to allow jurisdiction because by visiting a state a defendant avails herself of its benefits and services and because the defendant has access to the state’s courts as a plaintiff. *Burnham*, 110 S. Ct. at 2124-25 (Brennan, J., concurring in judgment). Furthermore, Justice Brennan found that considerations of fairness to the defendant

requiring minimum contacts of even those served while in the forum state, Justice Scalia argued, would establish not "a rule of law at all, but only a 'totality of the circumstances' test, guaranteeing what traditional territorial rules of jurisdiction were designed specifically to avoid: uncertainty and litigation over the preliminary issue of the forum's competence."⁴⁷ Moreover, he continued, applying the minimum-contacts test in as liberal a manner as Justice Brennan advocated would lead to anomalous results. The benefits obtained in a three-day trip such as that in *Burnham* "strike us as powerfully inadequate to establish, as an abstract matter, that it is 'fair' for California to decree the ownership of all Mr. Burnham's worldly goods acquired during the ten years of his marriage, and the custody over his children."⁴⁸ The arguments that a transient defendant has access to the forum's courts as a plaintiff and that defending a foreign suit would not be burdensome "justify the exercise of jurisdiction over *everyone, whether or not* he ever comes to California."⁴⁹ Thus, Justice Scalia argued,

[t]he only "fairness" elements setting Mr. Burnham apart from the rest of the world are the three-days' "benefits" . . . and even those, do not set him apart from many other people who have enjoyed three days in the Golden State . . . but who were fortunate enough not to be served with process while they were there and thus are not (simply by reason of that savoring) subject to the general jurisdiction of California's courts.⁵⁰

Under Justice Brennan's formulation, according to Justice Scalia, allowing jurisdiction would be inconsistent with the accepted minimum-contacts test. To find that Burnham's presence in the forum state by itself was a sufficient contact for the assertion of general jurisdiction⁵¹ under minimum-contacts analysis would require the conclusion that the state could have asserted general jurisdiction over him even if he had not received service of process while there, but had obtained notice of the suit in some other manner—a proposition "which we *know* does not conform with 'contemporary notions of due process.'"⁵²

In contrast to the opinion of the Court, Justice Brennan's concurring opinion⁵³ accepted the proposition that *Shaffer* requires application of the minimum-contacts test even when service occurs within the forum state. Justice Brennan

support jurisdiction for the following reasons: Presence-based jurisdiction comports with reasonable expectations, travel today is easy and inexpensive, and procedural devices exist to lighten the burden of defending in a foreign forum. *Id.* at 2125 (Brennan, J., concurring in judgment).

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

48. *Id.* at 2117.

49. *Id.*

50. *Id.* (citation omitted).

51. "General jurisdiction" is a court's ability to assert personal jurisdiction regardless of the relationship between the cause of action and the defendant's activities in, or affecting, the forum state. In contrast, "specific jurisdiction" is the power to assert jurisdiction in claims arising out of activities that occur in the forum state or that have a direct effect there. The Court has acknowledged that a defendant's contacts with the forum state must be more systematic when a court is seeking to exercise general jurisdiction rather than specific. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8-9 (1984); see also *infra* notes 81-84 and accompanying text (further discussion of the distinction between general and specific jurisdiction).

52. *Burnham*, 110 S. Ct. at 2118.

53. *Id.* (Brennan, J., concurring in judgment).

interpreted this requirement as arising both from *Shaffer's* explicit language—"all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny"⁵⁴—and from the nature of the *Shaffer* decision itself. In throwing out quasi in rem jurisdiction, a doctrine "dutifully accepted by American courts for at least a century,"⁵⁵ the *Shaffer* Court established that a practice's "pedigree" should not determine its present-day status, Justice Brennan argued.⁵⁶ Thus, he continued, "[i]f we could discard an 'ancient form without substantial modern justification' in *Shaffer*, we can do so again."⁵⁷

Justice Brennan proceeded to analyze the application of the minimum-contacts test to instances in which a defendant is present in the forum state.⁵⁸ He identified two factors relating to a defendant's contacts with the forum—availment of state services and the ability to sue in state courts—and three factors relating to the general fairness of jurisdiction based on the "contact" of presence—reasonable expectations, the ease of travel and communication, and the availability of cost-cutting procedural devices.⁵⁹ From these factors, Justice Brennan concluded that "as a rule the exercise of personal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process."⁶⁰

On the issue of contacts, Justice Brennan argued that in most instances a defendant's presence within a forum state is itself a sufficient availment of benefits to satisfy the minimum-contacts test.⁶¹ Availment occurs in that the defendant's "health and safety are guaranteed by the State's police, fire and emergency medical services; he is free to travel on the State's roads and waterways; he likely enjoys the fruits of the State's economy as well."⁶² Contact also occurs in that a defendant constitutionally is guaranteed the right of access to the forum's courts: "[w]ithout 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."⁶³

On the issue of the general fairness of presence-based jurisdiction, Justice Brennan argued that three elements reduce the possibility of unfair and burdensome results for a defendant. First, the practice has a long history of acceptance in the courts. Although this tradition does not mean that transient jurisdiction therefore must comport with due process, it raises "a strong presumption" that

54. *Id.* (Brennan, J., concurring in judgment) (citing *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (emphasis added by *Burnham* Court)).

55. *Id.* at 2121 (Brennan, J., concurring in judgment).

56. *Id.* (Brennan, J., concurring in judgment).

57. *Id.* at 2122 (Brennan, J., concurring in judgment).

58. *Id.* at 2122-26 (Brennan, J., concurring in judgment).

59. *Id.* at 2124-25 (Brennan, J., concurring in judgment). For a description of the minimum-contacts test and its two stages, see *supra* note 4 and *infra* notes 74-92 and accompanying text.

60. *Burnham*, 110 S. Ct. at 2125 (Brennan, J., concurring in judgment).

61. *Id.* at 2124-25 (Brennan, J., concurring in judgment).

62. *Id.* at 2125 (Brennan, J., concurring in judgment).

63. *Id.* (Brennan, J., concurring in judgment).

it does.⁶⁴ Second, modern communication and transportation lessen the costs of defending a suit in a foreign forum.⁶⁵ Moreover, "[t]hat the defendant has already journeyed at least once before to the forum . . . is an indication that suit in the forum likely would not be prohibitively inconvenient."⁶⁶ Finally, procedural devices exist that can lessen the burden of defending the foreign action, such as discovery by mail or telephone, motions to dismiss, and the doctrine of forum non conveniens.⁶⁷ Thus, Justice Brennan concluded, although *Shaffer* requires that all assertions of jurisdiction satisfy the minimum-contacts test, the contacts arising out of a defendant's presence in the forum state almost always will satisfy the test.⁶⁸

Personal jurisdiction in contemporary times has been contoured by a series of decisions, beginning in 1878 with *Pennoyer v. Neff*.⁶⁹ That case had two great consequences, both of which arose out of dictum.⁷⁰ One was to require that state assertions of jurisdiction satisfy the due process clause of the fourteenth amendment.⁷¹ The other consequence was to enunciate a theory of jurisdiction that, although later decisions have supplemented it and cast doubt on its vitality, remains today an important and influential decision—as *Burnham* itself illustrates.

64. *Id.* at 2124 (Brennan, J., concurring in judgment).

65. *Id.* at 2125 (Brennan, J., concurring in judgment).

66. *Id.* (Brennan, J., concurring in judgment).

67. *Id.* (Brennan, J., concurring in judgment).

68. Justice Brennan acknowledged that "there may be cases in which a defendant's involuntary or unknowing presence in a State does not support the exercise of personal jurisdiction over him." *Id.* at 2124 n.11 (Brennan, J., concurring in judgment). He did not discuss specific circumstances under which a defendant would not have sufficient contacts to meet the minimum-contacts test, however, because "[t]he facts of the instant case do not require us to determine the outer limits of the transient jurisdiction rule." *Id.* (Brennan, J., concurring in judgment).

In his concurring opinion, Justice White reaffirmed his conviction that the long history and wide acceptance of transient jurisdiction forestall a finding that the practice violates due process "either on its face or as applied in this case." *Id.* at 2119 (White, J., concurring in part and in judgment). Unlike Justice Scalia, he conceded that the Court "has the authority . . . to examine even traditionally accepted procedures and declare them invalid." *Id.* (White, J., concurring in part and in judgment). Justice White argued, however, that only a general showing that the transient jurisdiction rule is sufficiently unfair would justify a finding that the doctrine violates due process. *Id.* at 2119-20 (White, J., concurring in part and in judgment). In the meantime, he added, "claims in individual cases that the rule would operate unfairly as applied to the particular non-resident involved need not be entertained." *Id.* at 2120 (White, J., concurring in part and in judgment).

Justice Stevens concurred in the judgment in a short and somewhat enigmatic opinion, stating that "the historical evidence and consensus identified by Justice Scalia, the considerations of fairness identified by Justice Brennan, and the common sense displayed by Justice White, all combine to demonstrate that this is, indeed, a very easy case." *Id.* at 2126 (Stevens, J., concurring in judgment). He declined to join either of the two primary opinions out of concern for their "unnecessarily broad reach." *Id.* (Stevens, J., concurring in judgment).

69. 95 U.S. 714 (1878).

70. At issue in *Pennoyer* was the validity of what appears to have been a quasi in rem judgment obtained against an absent defendant. The Court ruled for the defendant on the grounds that the property serving as the basis for jurisdiction was not attached when the litigation began. *Id.* at 728. Discussion of in personam jurisdiction and due process requirements was unnecessary to the decision; in fact, the fourteenth amendment had not yet taken effect. See *Perdue, Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 496-500 (1987).

71. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty or property, without due process of law . . ."). See *Pennoyer*, 95 U.S. at 733.

Pennoyer's "power" theory of jurisdiction was geared around the notion of states as separate sovereign entities. Justice Field, author of the Court's opinion, identified two fundamental principles that defined the limits of state jurisdiction: "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and "no State can exercise direct jurisdiction and authority over persons or property without its territory."⁷² These statements embedded the concept of transient jurisdiction in the American legal system; whatever the practice's prior degree of acceptance, *Pennoyer* made it clear that presence in the forum state was the sole means of securing in personam jurisdiction over a nonconsenting, nonresident defendant.⁷³

This standard persisted until 1945, when the Court in *International Shoe Company v. Washington*⁷⁴ tacitly acknowledged that the "power" theory of jurisdiction, despite its accompanying fictions,⁷⁵ no longer sufficed in an age of dramatically increased interstate contacts.⁷⁶ The Court ruled that a state could acquire jurisdiction over a mail-order corporation that solicited shoe sales within the forum through in-state agents, but whose activities may have failed to reach the level at which a corporation was deemed to be "doing business" in the forum.⁷⁷ By allowing the assertion of jurisdiction, the Court cleared the way for

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

73. See, e.g., *McDonald v. Mabey*, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power.").

The *Pennoyer* court explicitly recognized two situations beyond the power formulation in which a state could assert jurisdiction: When the issue is the status of a nonresident toward a citizen of the forum and when a business organization consents to being subject to the state's jurisdiction. *Pennoyer*, 95 U.S. at 734-36.

In time, the Court developed both of these exceptions to allow jurisdiction over absent individuals under certain circumstances. In *Milliken v. Meyer*, it held that a state may render in personam judgments against its domiciliaries regardless of whether they are present in the forum. 311 U.S. 457, 462-63 (1940). A more troublesome situation arose when a nonresident defendant's in-forum activities gave rise to a claim, but the defendant left the forum before being served. The Court sought to address this problem by allowing states to condition permission to conduct potentially harmful activities in the forum on obtaining consent—first express, then implied—to jurisdiction over claims arising from those activities. See *Kane v. New Jersey*, 242 U.S. 160, 167-69 (1916) (state could require operators of automobiles in the state to consent to jurisdiction for claims arising out of that activity); *Hess v. Pawloski*, 274 U.S. 352, 356-57 (1927) (state could infer consent to jurisdiction by operators of motor vehicles within the state for claims arising from such operation).

Initially, the Court tried to limit the application of this rationale for jurisdiction. See, e.g., *Flexner v. Farson*, 248 U.S. 289, 293 (1919) (It would be a "mere fiction" for a state to infer that a foreign unincorporated association consented to jurisdiction by doing business in the forum.). However, it later granted greater latitude in the use of "consent." See, e.g., *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623, 627-28 (1935) (state could infer consent to jurisdiction over nonresident securities seller, partially because of the state's interest in protecting its citizens).

74. 326 U.S. 310 (1945).

75. See *supra* note 73.

76. *International Shoe*, 326 U.S. at 316. For the Court's characterization of the effect of increased interstate contacts, see, e.g., *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958) (citations omitted):

As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* to the flexible standard of *International Shoe Co. v. Washington*.

77. It appears that the defendant intentionally structured its operations in Washington to avoid

the state to pursue a claim for payments to an unemployment compensation fund due of all in-state employers.⁷⁸ The Court recharacterized *Pennoyer's* due process limitations on personal jurisdiction,⁷⁹ holding that for a court to acquire in personam jurisdiction over a defendant, "if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁸⁰

The *International Shoe* Court linked the level of contacts necessary for jurisdiction to the relationship between the activities and the cause of action. If the suit arises out of in-forum activity, as was the case in *International Shoe*,⁸¹ isolated acts of contact or even a single act might be sufficient.⁸² If the suit is unrelated to the defendant's contacts with the forum, however, the contacts must constitute "continuous and systematic" activity for the state to assert jurisdiction.⁸³ The Court later acknowledged the terms "specific jurisdiction" and "general jurisdiction" to describe these two situations.⁸⁴

Presence in the forum remained an unchallenged basis for jurisdiction following *International Shoe*. Indeed, the most notorious assertion of transient jurisdiction took place in 1959 when a federal district court upheld jurisdiction based on service of a defendant while on an airplane flying over the forum state.⁸⁵ Some scholars, however, saw *International Shoe* as potentially superseding *Pennoyer*, and questioned the continued vitality of the transient jurisdiction

reaching the level of activity at which "doing business" occurred. It had no office in the state, supplied its salesmen with only one shoe of a pair offered, and shipped its orders free on board from the state of Illinois. See *International Shoe*, 326 U.S. at 313-14. Defendant argued that the Court had held those activities to be insufficient to constitute presence within the state. *Id.* at 315-16.

78. *Id.* at 311-12.

79. See *supra* notes 69-73 and accompanying text.

80. *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

81. The state claimed that the company was an in-state employer and thus was obliged to contribute to the state's unemployment compensation fund. *Id.* at 311; see *supra* text accompanying note 78.

82. *International Shoe*, 326 U.S. at 318; see, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (state could assert jurisdiction, even though defendant's only contact with the forum was the issuance of an insurance policy to a forum resident, because the claim arose out of that policy).

83. *International Shoe*, 326 U.S. at 317; see, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952) (corporation's use of forum to run a portion of its operations amounted to the continuous and systematic activity necessary to enable the state to assert jurisdiction on a claim unrelated to the business conducted in the state).

Courts have held that domicile constitutes contact sufficiently continuous and systematic to confer general jurisdiction since before *International Shoe*. See *Milliken v. Meyer*, 311 U.S. 457, 462 (1940). Thus a state may assert jurisdiction over an absent domiciliary regardless of the source of the claim. *Id.* at 462-63; see *supra* note 73 and accompanying text.

84. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8-9 (1984). Specific jurisdiction allows a court to adjudicate only claims arising out of a defendant's activities within the forum; general jurisdiction permits a court to hear any claim against the defendant, regardless of its source. Commentators had analyzed jurisdiction in these terms long before the Court did. Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (coining the terms nearly 20 years prior to the Court's use of the terms specific and general jurisdiction).

85. *Grace v. MacArthur*, 170 F. Supp. 442, 447 (E.D. Ark. 1959). In *Grace*, the court stated: [I]t makes no practical difference whether [the defendant] is traveling at the time on a plane, or on a bus or train, or in his own car. True, if he is going by plane the duration of

rule.⁸⁶

Subsequent cases refined *International Shoe*'s minimum-contacts test. In *Hanson v. Denckla*⁸⁷ the Court distinguished the situation in which a plaintiff attempts to sue a defendant in the forum in which the claim-generating activities occurred from that where a plaintiff seeks to sue in a forum of her own choosing.⁸⁸ The Court held that the focus of the contacts inquiry should be upon the defendant's conduct; forum ties established by the plaintiff or some other party should not be considered in determining the sufficiency of contacts:

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be 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.⁸⁹

Although the test set out by the *International Shoe* Court consisted of a single consideration of the sufficiency of contacts in light of notions of fair play and substantial justice, over time the minimum-contacts test evolved into a two-step inquiry.⁹⁰ First, the party asserting jurisdiction must establish a certain level of contacts.⁹¹ If the requisite contacts exist, the court must then determine that the assertion of jurisdiction would not violate "traditional notions of fair play and substantial justice." At this point a court may consider factors other than the defendant's contacts with the forum, such as the forum state's interest

his presence in the State will probably be much shorter than if he were availing himself of some other means of transportation, but that is a difference of degree only, not principle.

Id.

86. See, e.g., Ehrenzweig, *supra* note 27, at 311-12 ("It may well be that in the law of jurisdiction over individuals . . . a substantial 'minimum contact' will ultimately be the touchstone of permissible jurisdiction."); Hazard, *supra* note 27, at 281 ("Ever since *International Shoe*, *Pennoyer v. Neff* has been eligible for oblivion. . . . [It is feasible] that all jurisdictional problems [could] be approached as ones of the existence of minimum contacts between the forum and the transaction in litigation.").

87. 357 U.S. 235 (1958).

88. *Id.* at 251-52.

89. *Id.* at 253.

90. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). This case explicitly adopts the two-step inquiry, with the defendant's contacts as the threshold question:

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

Id. at 294.

The Court readdressed its language on federalism in *Insurance Corporation of Ireland, Limited v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) ("It is true we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other States. . . . The restriction on state sovereign power . . . however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.").

91. *World-Wide Volkswagen*, 444 U.S. at 291 (a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts between the defendant and the forum State").

in hearing the case and the plaintiff's and defendant's interests in a convenient forum.⁹²

The three decades following *International Shoe* saw states test the limits of this new basis for jurisdiction by enacting long-arm statutes authorizing jurisdiction based on a variety of acts by an absent defendant.⁹³ The Court allowed this activity almost without comment; only in *Hanson* did it hold an attempted exercise of jurisdiction violated due process.⁹⁴ In the period between 1977 and 1980, however, the Court "broke its silence"⁹⁵ and issued four decisions, all invalidating a state's assertion of jurisdiction.⁹⁶ All of the cases paid a greater degree of attention to the concept of fairness to the defendant—a fairness measured by the degree of nexus between the defendant, the forum, and the litigation.⁹⁷ In its more recent decisions the Court has defined jurisdictional due process in terms of the defendant's constitutional interest in not having to litigate in a forum where she has an insufficient affiliation.⁹⁸

One of the "silence-breaking" decisions, *Shaffer v. Heitner*, carried added significance for the doctrine of transient jurisdiction because the Court for the first time used minimum-contacts analysis to replace, instead of merely to supplement, a means of asserting jurisdiction that had been valid under *Pennoyer*. In *Shaffer*, plaintiff brought a shareholder derivative suit in the Delaware Court of Chancery against a corporation and twenty-eight of its officers and directors. The plaintiff sought to acquire quasi in rem jurisdiction over the individual defendants by sequestering stock owned by them and, under Delaware law, located in that state.⁹⁹

Under the jurisdictional theory of *Pennoyer*, a court could acquire quasi in

92. *Id.* at 292.

93. See Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. REV. 407, 407-08 (1980).

94. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

95. Louis, *supra* note 93, at 408.

96. *Id.* at 408-09. The decisions were *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); and *Shaffer v. Heitner*, 433 U.S. 186 (1977).

97. See, e.g., *Rush*, 444 U.S. at 332 ("The justifications offered in support of . . . jurisdiction . . . shift the focus of the inquiry from the relationship among the defendant, the forum, and the litigation . . . [and make it so that] the plaintiff's contacts with the forum are decisive in determining whether the defendant's due process rights are violated. Such an approach is forbidden by *International Shoe* and its progeny."); *World-Wide Volkswagen*, 444 U.S. at 297 ("The Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."); *Kulko*, 436 U.S. at 92 ("[T]he California Supreme Court's application of the minimum-contacts test in this case represents an unwarranted extension of *International Shoe* and would, if sustained, sanction a result that is neither fair, just, nor reasonable."); *Shaffer*, 433 U.S. at 212 (continued use of jurisdiction founded on presence of property within forum "would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.").

98. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) ("The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'"); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.").

99. *Shaffer*, 433 U.S. at 190-92.

rem jurisdiction over any of the absent defendant's property located in the forum and then render a judgment for an amount up to the property's value.¹⁰⁰ The Court, however, modified *Pennoyer* by declaring that a court must apply the minimum-contacts test even when a defendant owns property in the forum.¹⁰¹ Acknowledging that even an established practice may violate the "traditional notions of fair play and substantial justice," the Court examined in rem and quasi in rem jurisdiction and concluded that the practices violate due process:

The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.

We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.¹⁰²

In the wake of *Shaffer*, commentators speculated on the decision's impact on the other half of *Pennoyer*'s presence-based model—transient jurisdiction.¹⁰³ Some concluded that the great weight the *Shaffer* Court placed upon fairness to defendants at least implicitly required that minimum-contacts analysis apply even when a defendant is served within the forum.¹⁰⁴ Others reserved judgment on *Shaffer*'s effect.¹⁰⁵ Most, however, agreed that if the reasoning of *Shaffer* were to extend to transient jurisdiction, the doctrine would not survive. Professor David Vernon, for example, argued:

The single factor of the defendant's transient presence in the forum contributes nothing more than the presence of the defendant's property in the forum contributes to the existence of a forum interest in the outcome, the convenience of the forum as a place to litigate, or a reason for defendant to anticipate suit there. Because it was unfair to assert jurisdiction in *Shaffer*, it is unfair to assert jurisdiction in the transient defendant case.¹⁰⁶

100. See *Pennoyer v. Neff*, 95 U.S. 714, 723 (1877).

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

102. *Id.*

103. See *supra* note 5.

104. See, e.g., Casad, *supra* note 5, at 77 ("A majority [of the *Shaffer* Court] apparently [is] willing to declare the territorial power theory completely obsolete. Physical presence is no longer either necessary or sufficient for in personam actions or for in rem actions."); Posnak, *supra* note 5, at 743 ("[G]iven the Court's emphasis upon fairness, substantial justice, and reasonableness in deciding whether other types of assertions of jurisdiction are constitutional . . . it would be inconsistent and unlikely for the Court to uphold" the doctrine of transient jurisdiction.); Werner, *supra* note 5, at 589 ("[T]he 'catch as catch can' theory of in personam jurisdiction, based upon the unrelated physical presence of a defendant within the forum state, is, and should be, entombed along with the attachment basis of jurisdiction.").

105. See, e.g., Bernstine, *supra* note 5, at 54 ("[T]he scope of the *Shaffer* decision with respect to the transient rule remains uncertain."); Brilmayer, Haverkamp, Logan, Lynch, Neuwirth & O'Brien, *supra* note 5, at 752 ("The relevance of *Shaffer* to transient jurisdiction . . . is not at all clear . . ."); Vernon, *supra* note 5, at 294 ("We do not know whether . . . the presence of the defendant in the forum, no matter how transient, remains a sufficient basis for asserting 'broad' jurisdiction.").

106. Vernon, *supra* note 5, at 303; see also Bernstine, *supra* note 5, at 54 ("If *Shaffer* is read broadly, the transient rule . . . may already be dead."); Brilmayer, Haverkamp, Logan, Lynch, Neuwirth & O'Brien, *supra* note 5, at 750 ("The key to the current legal status of transient jurisdiction

Some courts agreed that *Shaffer* signalled the end of transient jurisdiction.¹⁰⁷ One of the first to do so was a Kansas district court in *Schreiber v. Allis-Chalmers Corporation*.¹⁰⁸ In *Schreiber*, plaintiff asserted a products liability claim which arose in Kansas against a Delaware-chartered corporation headquartered in Wisconsin.¹⁰⁹ To take advantage of a favorable statute of limitations,¹¹⁰ plaintiff filed suit in a Mississippi district court, claiming jurisdiction because the corporation was registered to do business there and thus was "present" in the state.¹¹¹ Defendant obtained a change of venue to the Kansas district court and there challenged Mississippi's right to assert jurisdiction.¹¹² The Kansas district court held, in language that might apply equally to individuals, that presence alone was no longer sufficient to confer jurisdiction:

After *Shaffer*, plaintiff cannot rely solely on the asserted fact of "presence" to sustain an exercise of jurisdiction in Mississippi, for "physical presence is no longer either necessary or sufficient for in personam actions." Rather, the nature and quality of that "presence" must be evaluated, with an eye toward the interest of Mississippi in assuming jurisdiction and providing a forum for this particular action.¹¹³

Similarly, an Illinois district court invalidated an assertion of jurisdiction against an individual in *Harold M. Pitman Company v. Typecraft Software, Limited*.¹¹⁴ In that case, plaintiff sued Typecraft together with its director and ninety-percent shareholder in his individual capacity. The individual defendant received service while in the forum state on a three-day business trip.¹¹⁵ This trip, the court found, was "the only affirmative act which arguably connects [defendant] with Illinois."¹¹⁶ The court denied that transient jurisdiction still was a viable doctrine and opted to apply the minimum-contacts test instead.¹¹⁷

A majority of courts, however, refused to throw out the transient jurisdiction rule absent an express holding to that effect from the Supreme Court.¹¹⁸ In

rests with the holdings of [*International Shoe*] and [*Shaffer*]."); Fyr, *supra* note 5, at 770 ("The contacts formula could rarely be satisfied in this case."); Silberman, *supra* note 5, at 75 n.236 ("[I]f the minimum-contacts rule now applies to all types of jurisdiction, the transient presence of an individual would presumably fail to satisfy that standard.").

107. See *supra* note 6.

108. 448 F. Supp. 1079 (D. Kan. 1978) (alternative holding), *rev'd on other grounds*, 611 F.2d 790 (10th Cir. 1979).

109. *Id.* at 1081.

110. *Id.*

111. *Id.* at 1085. The court found that the corporation's Mississippi activities were entirely unrelated to the events out of which the claim arose. *Id.*

112. *Id.* at 1082.

113. *Id.* at 1089 (quoting Casad, *supra* note 5, at 77) (emphasis supplied by the court).

114. 626 F. Supp. 305 (N.D. Ill. 1986).

115. *Id.* at 307.

116. *Id.* at 313.

117. *Id.* at 312 ("[U]nder *Shaffer*, mere service of process upon a defendant transiently present in the jurisdiction does not vest a state with personal jurisdiction over the defendant. Personal service within the jurisdiction is not the litmus test for proper in personam jurisdiction.").

118. See, e.g., *Amusement Equip., Inc. v. Mordelt*, 779 F.2d 264, 270 (5th Cir. 1985); *Opert v. Schmid*, 535 F. Supp. 591, 593-94 (S.D.N.Y. 1982); *Aluminal Indus., Inc. v. Newton Commercial Assocs.*, 89 F.R.D. 326, 329 (S.D.N.Y. 1980); *Humphrey v. Langford*, 246 Ga. 732, 733-34, 273 S.E.2d 22, 23-24 (1980); *Lockert v. Breedlove*, 321 N.C. 66, 68-71, 361 S.E.2d 581, 583-85 (1987);

one of the first post-*Shaffer* cases, *Oxman's Erwin Meat Company v. Blacketer*,¹¹⁹ the Wisconsin Supreme Court upheld jurisdiction over an individual based on service while in the forum. It rejected the argument that *Shaffer* affected transient jurisdiction:

In our view the United States Supreme Court has not imposed a "minimum contacts" requirement on a state's assertion of jurisdiction over a natural person upon whom personal service within the state has been achieved. Neither *International Shoe* nor its progeny, including the recent case of *Shaffer v. Heitner*, addresses the issue of the constitutionality of the state's exercising jurisdiction based solely on the service of process upon an individual physically present within state borders.¹²⁰

The court nevertheless considered the defendant's contacts with the forum and concluded that they were sufficient to assert jurisdiction.¹²¹

In a more recent affirmation of transient jurisdiction, the North Carolina Supreme Court held in *Lockert v. Breedlove*¹²² that a defendant's level of contacts with a forum is irrelevant when in-forum service occurs. The court stated that "a close reading of *International Shoe* and later cases reveals that the Supreme Court has not abolished the transient rule of jurisdiction. . . . [R]ather, it set out an alternative means of establishing personal jurisdiction when the defendant is 'not present within the territory of the forum.'"¹²³

The American Law Institute reacted to *Shaffer* by taking an intermediate position on the question of transient jurisdiction.¹²⁴ It acknowledged that the *Shaffer* Court "rejected the notion that power derived from the mere presence of a thing in a State will always provide that State with a basis to determine interests in the thing."¹²⁵ Instead of abolishing the doctrine altogether, however, the Institute amended the Restatement (Second) of Conflict of Laws to provide that presence normally would make jurisdiction proper, but not always: "A state has power to exercise judicial jurisdiction over an individual who is present within its territory unless the individual's relationship is so attenuated as to make the exercise of jurisdiction unreasonable."¹²⁶

Viewed in light of this history, the rationales offered by both of the *Burnham* camps suffer from inconsistency. Justice Scalia's opinion for the Court fails to recognize the true nature of the jurisdictional due process right as the Court

Oxman's Erwin Meat Co. v. Blacketer, 86 Wis. 2d 683, 687-88, 273 N.W.2d 285, 287 (1979); *Nutri-West v. Gibson*, 764 P.2d 693, 695 (Wyo. 1988).

119. 86 Wis. 2d 683, 693, 273 N.W.2d 285, 289 (1979).

120. *Id.* at 687-88, 273 N.W.2d at 287 (citations omitted).

121. *Id.* at 693-94, 273 N.W.2d at 289-90. The court found that plaintiff's cause of action arose out of an alleged fraudulent misrepresentation claimed to have been made by defendant while in the forum, and that the state's long-arm statute provided for jurisdiction under these circumstances. *Id.*

122. 321 N.C. 66, 361 S.E.2d 581 (1987).

123. *Id.* at 70, 361 S.E.2d at 584. For a discussion of this case, see Note, *Lockert v. Breedlove: The North Carolina Supreme Court Rejects the Minimum-Contacts Analysis Under the "Transient Rule" of Jurisdiction*, 66 N.C.L. REV. 1051 (1988).

124. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (1988).

125. *Id.* comment b.

126. *Id.* § 28.

now defines it and disregards the significance of *Shaffer* as an assault upon *Pennoyer's* power theory.¹²⁷ Justice Brennan's method of applying the minimum-contacts test to the fact of presence in the forum contradicts the Court's prior treatment of that test.¹²⁸

Justice Scalia asserts that a procedure long established and widely adhered to is constitutionally firm; however, this theory ignores altogether the model of jurisdictional due process that the Court has crafted during the past fourteen years. Moreover, his approach fails to meet even the more general test of "fairness" toward the defendant that has supported the Court's approach to personal jurisdiction since *International Shoe*.

The Court has defined jurisdictional due process as some minimum connection between the forum and either the defendant or the litigation.¹²⁹ In its description of the question presented, the *Burnham* Court acknowledged that the suit was unrelated to Dennis Burnham's activities in California.¹³⁰ This lack of nexus between forum and litigation means that, to satisfy the Court's jurisdictional model, there must be a significant level of contact between the forum and the defendant—in the Court's own parlance, a level sufficient to justify the assertion of general jurisdiction.¹³¹

One could simply decree that being present in the forum when service of process occurs *is* a contact sufficient to confer general jurisdiction, and leave it at that. Such an approach is conclusory, however, and lacks the degree of attention to contacts analysis that the Court has paid in the past.¹³² Indeed, presence

127. See *infra* notes 129-43 and accompanying text.

128. See *infra* notes 144-54 and accompanying text.

129. See *Shaffer v. Heitner*, 433 U.S. 186, 205 (1977) ("The relationship among the defendant, the forum and the litigation . . . [is] the central concern of the inquiry into personal jurisdiction").

130. *Burnham*, 110 S. Ct. at 2109. Dennis Burnham's contacts with the forum, transacting business and visiting his children, were unrelated to the cause of action. *Id.* He did agree to and assist his wife and children's move to the forum, and may have contributed less to his family because of the move; however, the Supreme Court has established that this kind of conduct does not amount to a purposeful availment of the forum state's benefits and protections. *Kulko v. Superior Court*, 436 U.S. 84, 93-95 (1978). Since there was no relation between the contacts with the forum and the suit, the Court affirmed general jurisdiction over Dennis Burnham.

131. See *supra* notes 83-84 and accompanying text.

The Court's only detailed examinations of the requirements for general jurisdiction since *International Shoe* have occurred in *Helicopteros Nacionales de Colombia, S.A., v. Hall*, 466 U.S. 408, 414 (1984), and *Perkins v. Benguet Consolidated Mining Company*, 342 U.S. 437, 444-49 (1952).

Helicopteros concerned a suit brought in Texas against a Colombian company to recover for deaths caused by the crash in Peru of a helicopter operated by the defendant. *Helicopteros*, 466 U.S. at 409-10. Plaintiff claimed that Texas could assert jurisdiction based on a number of contacts: defendant had negotiated the contract it was performing at the time of the accident in Texas, it had purchased the helicopter there, and it had sent its pilots to the state for training. *Id.* at 410-11. Both sides conceded that the claim did not arise out of these contacts, so the Court restricted its analysis to the question of whether the contacts amounted to the continuous and systematic activity necessary to confer general jurisdiction. *Id.* at 415-16. It concluded they did not. *Id.* at 416.

In *Perkins*, the defendant corporation, chartered in the Philippines, ran part of its operations from Ohio during World War II. *Perkins*, 342 U.S. at 447-48. The Court held that this amounted to the continuous and systematic activity necessary to enable Ohio to assert jurisdiction over the company on a claim unrelated to the business conducted in the state. *Id.* at 448.

132. See, e.g., *Helicopteros*, 466 U.S. at 416-18 (considering in turn each contact between the defendant corporation and the forum, including numerous trips to the forum by officers and employees).

in the forum state at the time of service means little as a contact. Further examination of the facts may reveal that the defendant does have a substantial affiliation with the forum state. Mere presence, however, without regard to the circumstances surrounding it, logically cannot carry much significance.¹³³ Thus, Justice Scalia's approach is irreconcilable with a due process model that relies on contacts between the forum state and either the defendant or the litigation.

Apparently, Justice Scalia is willing to forego the Court's current characterization of jurisdictional due process in instances where the defendant is served within the forum. Even if a special rule should apply in transient jurisdiction cases, the underlying emphasis on general fairness and reasonableness that the Court has placed on assertions of jurisdiction¹³⁴ demands a finding that transient jurisdiction in contemporary society meets some standard of "fairness," however nebulous. According to Justice Scalia, however, there is no need to make an "independent inquiry into the desirability or fairness of the prevailing in-state service rule . . . [because] for our purposes, its validation is its pedigree."¹³⁵

Transient jurisdiction may have been considered a fair practice in the past, but by concluding that it is fair now, Justice Scalia refused to recognize the possibility of change. The speed and ease with which one can travel between states have increased dramatically since the Court first officially sanctioned transient jurisdiction in *Pennoyer*; Justice Scalia refused to consider whether this might have affected the rule's fairness.¹³⁶ States now have a basis on which to assert jurisdiction, minimum-contacts, that they did not have at the time of *Pennoyer*; however, Justice Scalia refused to examine whether this significant extension of state authority has affected the fairness of transient jurisdiction, or the need to accept the unfairnesses it can produce. In short, as Justice Brennan put it, "Justice Scalia's opinion assumes that there is no further progress to be made and that the evolution of our legal system, and the society in which it operates, ended 100 years ago."¹³⁷

Indeed, many scholars agree that transient jurisdiction is generally an unfair doctrine, given its potential for fortuitous and burdensome consequences upon defendants, and therefore should not persist:

There is virtual unanimity among commentators that jurisdiction should not necessarily flow from service on the defendant in the forum. These commentators reached this conclusion primarily because of the unfairness to the defendant that such assertions of jurisdiction might entail. These commentators all agreed that grave injustice and gross

133. See Vernon, *supra* note 5, at 302-03.

134. See *supra* notes 97-98 and accompanying text.

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

136. Such changes may make it less burdensome for a defendant to litigate in a foreign forum than in the past; they also carry the potential, however, for a greater number of fortuitous assertions of jurisdiction. See, e.g., *Grace v. MacArthur*, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (state could assert jurisdiction over defendant in airplane flying over forum).

137. *Burnham*, 110 S. Ct. at 2121 n.3 (Brennan, J., concurring in judgment).

unfairness could result from the application of the "Gotcha" theory of jurisdiction. The forum in which the defendant is served may be so inconvenient and it may be so costly for him to defend there that in some cases . . . it may be prudent for him to default despite a meritorious defense. . . . In addition, miscarriages of justice are more likely in a forum that has no relation to the parties, the law to be applied, and the underlying claims.¹³⁸

Justice Scalia's "established tradition" approach also is susceptible to attack in light of the precedent *Shaffer* established. The *Shaffer* Court took a practice just as venerable and accepted as transient jurisdiction, examined its fairness, and held that it no longer satisfied due process.¹³⁹ *Shaffer* might not hold explicitly that jurisdiction based on a defendant's presence be abolished;¹⁴⁰ nonetheless, its premise that "[t]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures,"¹⁴¹ forces the conclusion that transient jurisdiction should face the same examination in the light of contemporary circumstances and perceptions of due process that in rem and quasi in rem jurisdiction faced. Justice Scalia argues that a long history and wide acceptance mean a practice still must be justified. Yet, this theory would have made *Shaffer* impossible, since in rem and quasi in rem jurisdiction had those qualities to the same degree as transient jurisdiction.¹⁴²

Certainly a distinction between presence-based jurisdiction and property-based jurisdiction exists, in that the *Shaffer* Court labeled the property-based jurisdiction to be merely a fiction for jurisdiction over the property's absent

138. Posnak, *supra* note 5, at 744-45 (footnotes omitted); see also Bernstine, *supra* note 5, at 62 ("[I]t is reasonable to argue that the transient rule is unfair to defendants in light of the holdings of *International Shoe* and *Shaffer*."); Brilmayer, Haverkamp, Logan, Lynch, Neuwirth, & O'Brien, *supra* note 5, at 749 ("The more modern focus on defendants' rights . . . casts doubt upon the propriety of such naked territorial assertions of jurisdiction [as transient jurisdiction]."); Vernon, *supra* note 5, at 303 ("Because it was unfair to assert jurisdiction in *Shaffer*, it is unfair to assert jurisdiction in the transient defendant case."); Werner, *supra* note 5, at 602 ("There should be no code words such as . . . 'presence' that automatically result in a finding of jurisdiction without an evaluation of their significance in the context of the action in which jurisdiction is asserted."). But see Fyr, *supra* note 5, at 770-73 (expressing concern that abolishing transient jurisdiction could leave a plaintiff without a forum under certain circumstances); Maltz, *Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction*, 66 WASH. U.L.Q. 671, 697-701 (1988) (arguing that transient jurisdiction is consistent with the Court's characterizations of state sovereignty and that abolishing it would create an asymmetry because a transient defendant would be immune from jurisdiction while retaining the right to sue in the forum's courts).

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

140. The language relied on by Justice Brennan to reach this conclusion, *Burnham*, 110 S. Ct. at 2120 (Brennan, J., concurring in judgment), stated that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Shaffer*, 433 U.S. at 212. The standard as originally pronounced in *International Shoe*, however, required that "if he be not present within the territory of the forum, [the defendant] have certain minimum-contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (emphasis added). Thus, *Shaffer* arguably did not abolish transient jurisdiction explicitly.

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

142. See *Burnham*, 110 S. Ct. at 2121 (Brennan, J., concurring in judgment) (Before *Shaffer*, quasi in rem jurisdiction had been "dutifully accepted by the American courts for at least a century.").

owner¹⁴³ while the presence-based jurisdiction purports to be exactly what it is, in personam jurisdiction. This difference, however, is relevant only in considering the fairness of the respective practices, a step Justice Scalia never reached. Fiction or not, jurisdiction over property was an established tradition when *Shaffer* arose. The *Shaffer* Court held that it could re-examine this tradition.

If one accepts the notion that minimum-contacts analysis should replace transient jurisdiction, the question arises as to the weight a court should give the "contact" of presence in the forum. Justice Brennan and those joining in his concurring opinion took the approach that this contact alone, as a rule, would be sufficient to confer jurisdiction.¹⁴⁴ This position, however, is inconsistent with the Court's past application of the minimum-contacts test.

By traveling into a state, a defendant avails himself of certain state benefits and services; obviously this activity is a contact with the forum. Until *Burnham*, the Court had never even come close to suggesting that this type of contact is so significant that it alone could satisfy the minimum-contacts test.¹⁴⁵ Justice Brennan, however, inquired into no contacts other than the defendant's presence and found a sufficient connection between the defendant and the forum state for general jurisdiction under the minimum-contacts test. Prior to *Burnham*, for a state to claim general jurisdiction based on a trip by the defendant to the forum for purposes unrelated to the cause of action would have been unthinkable, unless through the "power" doctrine and transient jurisdiction. Yet, under Justice Brennan's approach, with the power theory of jurisdiction abolished once and for all, it would be possible.

One explanation could be that Justice Brennan believed that service of process in the forum somehow enhances the significance of the defendant's having traveled there. This explanation, however, is erroneous. The purpose of service is to provide notice; any suggestion that it has a talismanic capacity to assist in acquiring jurisdiction is a return to the power theory of *Pennoyer v. Neff*,¹⁴⁶ which Justice Brennan purports to reject completely.¹⁴⁷

If service of process in the forum is not what makes the contact significant, whether a defendant is served while in the forum state or the moment he sets

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

144. *Burnham*, 110 S. Ct. at 2125 (Brennan, J., concurring in judgment).

145. See, e.g., *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-18 (1984) (trips by the defendant corporation's officers and employees to the forum considered as contacts and rejected as insufficient to confer general jurisdiction); *Kulko v. Superior Court*, 436 U.S. 84, 93 (1978) (defendant had made two brief trips to forum state approximately seventeen years before attempted assertion of jurisdiction; Court stated that "[t]o hold such temporary visits to a State a basis for the assertion of *in personam* jurisdiction over unrelated actions arising in the future would make a mockery of the limitations on state jurisdiction imposed by the Fourteenth Amendment"); see also *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 518 (1923) (visits by officers of defendant corporation insufficient to "warrant the inference that the corporation was present within the jurisdiction").

146. 95 U.S. 714 (1878); see *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) ("*capias ad respondendum* has given way to personal service of summons or other form of notice").

147. *Burnham*, 110 S. Ct. at 2120 (Brennan, J., concurring in judgment) (after *Shaffer*, "[n]o longer were we content to limit our jurisdictional analysis to pronouncements that . . . 'every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory'" (quoting *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877))).

foot back in his home state should make no difference. His availment of the benefits and protection of the forum state would have occurred so recently that its value as a contact should not have diminished.

If there is indeed no difference between the two scenarios, however, the four members of Justice Brennan's camp must be amenable to a dramatic alteration in the significance of the contact of having visited a state.¹⁴⁸ Under the terms of this alteration, the act of entering a forum would establish a level of contacts sufficient to support general jurisdiction. The defendant would retain this level of contact for some unspecified period of time after leaving the forum.¹⁴⁹ In practical terms, the effect of this approach would be transient jurisdiction *plus* an additional susceptibility to the jurisdiction of the forum state that would remain even after a defendant left the forum state.

The other element on which Justice Brennan relied in finding contact with the forum state is the notion that an asymmetry arises because a defendant is guaranteed access to the forum's courts as a plaintiff.¹⁵⁰ This too is vulnerable to attack. Under the privileges and immunities clause of article IV of the United States Constitution, a state must provide to citizens of other states the same access to its courts that it provides to its own citizens.¹⁵¹ Therefore, as Justice Scalia pointed out, this element of Justice Brennan's argument justifies a forum's assertion over "*everyone, whether or not he ever comes to California.*"¹⁵² In the concept that a contact arises because a visitor's health and safety are guaranteed and because he is free to use the forum's roads, an affirmative act of availment is always present, however negligible the Court traditionally has viewed it under minimum-contacts analysis.¹⁵³ With the "asymmetry" argument, however, no act of availment arises at all.¹⁵⁴ Not until the defendant actually files suit in a forum state's court should this issue become a factor in contacts analysis. In short, Justice Brennan's approach to the minimum-contacts test seeks to attach tremendously exaggerated significance to an act that, if treated under the normal analysis, simply might or might not be evidence of substantial contact with the forum.

The facts of *Burnham* do not make its result seem particularly unfair. Given that the case involved a mother busy raising two young children and an independent father who apparently can travel across the continent with some regularity and write it off as a business expense, few will raise cries of outrage on behalf of Dennis Burnham. Perhaps this reason explains why the Court—

148. See *supra* note 145 and accompanying text.

149. See *Burnham*, 110 S. Ct. at 2117-18 (Justice Scalia argued that the result reached under Justice Brennan's approach would mean that it would also be possible for California to assert general jurisdiction by serving process on Dennis Burnham after he returned home, "which we *know* does not conform with 'contemporary notions of due process.'").

150. *Id.* at 2125 (Brennan, J., concurring in judgment).

151. See *id.* (Brennan, J., concurring in judgment).

152. *Id.* at 2117.

153. See *supra* note 145 and accompanying text.

154. The defendant must purposefully avail herself of the forum state's benefits and protections for "minimum-contacts" to arise. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *supra* text accompanying notes 87-89.

clearly sympathetic to the practice of transient jurisdiction, but seemingly unable to provide a coherent rationale for it—decided to explore the question at this particular moment. Consider the case, however, if Dennis had moved to California, leaving his wife and children in New Jersey and if Francie had been the one served with process while she happened to be in California on some matter unrelated to her marital situation. The arguments all would have been the same, but many would have perceived an equivalent result as being arbitrary and unreasonable because of the personal situations of the litigants.

Not long ago the Court stated that “[t]he Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”¹⁵⁵ Continued existence of transient jurisdiction, whether in the traditional form advocated by Justice Scalia or in the bizarre kind of minimum-contacts analysis proposed by Justice Brennan, means that wherever one travels, one may be forced to defend a lawsuit, regardless of where the activity that prompted the claim occurred.

What makes the Court’s affirmation of transient jurisdiction most objectionable is that a solution that would not extract a prohibitive cost is immediately at hand. Minimum-contacts analysis has succeeded for forty-five years in determining assertions of jurisdiction over absent defendants. Extending this test to instances where service occurs in the forum state would be simple, just as *Shaffer* extended the test to instances where the defendant owns property in the forum state. Replacing transient jurisdiction with minimum-contacts analysis would eliminate a bright-line rule and would certainly result in added litigation over the sufficiency of contacts. Claims of fraudulent inducement into the forum would no longer burden courts, however. Also, the number of motions either to dismiss based on forum non conveniens¹⁵⁶ or, in the federal courts, for change of venue, likely would be reduced.

The simple fact that courts have used minimum-contacts analysis to resolve non-transient-jurisdiction questions for the past four decades renders unfounded the prediction that abandoning transient jurisdiction would mean “endless” litigation.¹⁵⁷ Admittedly, as is the case whenever a fact-specific inquiry is substituted for a rule carved in stone, replacing transient jurisdiction with minimum-contacts analysis would lead to greater “uncertainty and litigation over the preliminary issue of the forum’s competence.”¹⁵⁸ The *Shaffer* Court, however, explicitly held that this consequence is acceptable if it will ensure jurisdictional due process in the form of fairness to defendants:

It might . . . be suggested that allowing *in rem* jurisdiction avoids the uncertainty inherent in the *International Shoe* standard We believe, however, that the fairness standard of *International Shoe* can be easily applied in the vast majority of cases. Moreover, when the exist-

155. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

156. See Posnak, *supra* note 5, at 766-67.

157. *Burnham*, 110 S. Ct. at 2120 (White, J., concurring in part and in judgment).

158. *Id.* at 2119 (White, J., concurring in part and in judgment).

ence of jurisdiction in a particular forum under *International Shoe* is unclear, the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of "fair play and substantial justice." That cost is too high.¹⁵⁹

In-forum service of process is an inadequate indicator of contacts between the defendant and the forum state; moreover, the practice of transient jurisdiction can place unreasonable burdens on defendants arbitrarily. When one considers these criticisms in light of the Court's contacts-oriented due process model and its repeated emphasis on fairness to defendants in jurisdictional matters—as well as the role *Shaffer* plays as a justification for abolishing traditional but outmoded practices—*Burnham* makes no sense. It would have been both simple and consistent for the Court to rule that service of process on a defendant within a forum is no longer a basis for personal jurisdiction, and that the same minimum-contacts test now used to evaluate all other jurisdictional assertions applies also when service occurs in the forum. Unfortunately, the Court instead chose to issue a pair of contradictory and internally inconsistent rationales that failed to produce a majority rule. The *Burnham* Court's schizophrenia undoubtedly will leave the status of transient jurisdiction in confusion for years to come.

DOUGLAS A. MAYS

159. *Shaffer v. Heitner*, 433 U.S. 186, 211 (1977).