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THE AFTERMATH OF BURNHAM v. SUPERIOR COURT: A NEW RULE OF TRANSIENT JURISDICTION?

I. INTRODUCTION

A resident of New Jersey travels to California and visits his children for the weekend. While in California, he is served with a court summons, compelling him to defend a lawsuit in that state. As a result, this man must travel to and from his home state of New Jersey in order to defend the action in this inconvenient forum. Although his initial purposes for visiting California are entirely unrelated to the lawsuit, the summons requires him to litigate in that state. This is the practical result of the "transient rule" of in personam jurisdiction, and these are the facts of the recent United States Supreme Court case, Burnham v. Superior Court. This 1990 decision appears to breathe new life into the traditional doctrine requiring mere presence as a basis for jurisdiction. In this decision, the Court upheld jurisdiction as it pertained to a nonresident defendant present in the state for purposes unrelated to the litigation.

In order to render a valid and binding judgment, a court must have personal jurisdiction over each party. Any judg-

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2. In personam jurisdiction refers to "the power which a court has over the defendant himself 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 791 (6th ed. 1990). See generally 7 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW 506 (1990); 16 CAL. JUR. 3D 63 (1990); JACk H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 3.1 (1985); ALBERT A. EHRENZWEIG, CONFLICT OF LAWS 88 (1969). See also Rhonda Wasserman, The Subpoena Power: Pennoyer's Last Vestige, 74 Minn. L. Rev. 37, 49-50 (1989) (general historical background of personal jurisdiction).


4. Id.

5. FRIEDENTHAL ET AL., supra note 2. See also Pennoyer v. Neff, 95 U.S. 714
ment rendered by a court lacking jurisdiction is void. A plaintiff voluntarily subjects himself to personal jurisdiction by filing the lawsuit. This comment focuses on the following question: At what point is the defendant subject to the court's jurisdiction?

Traditionally, a court's exercise of jurisdiction over a defendant was limited to the defendant's physical presence within geographical and territorial boundaries. This basis for jurisdiction was grounded on the concept of physical power. Once a court obtained physical power over a defendant, he would be amenable to a lawsuit in that jurisdiction. These concepts were immortalized in case law, and until the Burnham decision, were generally accepted.

The implications arising from the traditional rule are broad. If a defendant is in a forum for a brief period, and for reasons totally unrelated to the suit filed against him, the state is permitted to maintain power over him because he is within territorial boundaries. The rule provides an exception for defendants who are drawn into the state by force or fraud. However, the Supreme Court has questioned the continued validity of the transient rule in Burnham v. Superior Court.

7. FRIEDENTHAL ET AL., supra note 2.
8. Id. Actual physical control over the defendant resulted from the common law's quasi-criminal nature of personal actions. In most actions, a defendant was required to be brought before the court and was kept under physical control of the court. It is said that from this "power concept" emerged the concept of territoriality as the basis for jurisdiction. But see Albert A. Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens, 65 YALE L.J. 289 (1956) for an attack on the proposition that jurisdiction at common law was based on physical power.
9. See Pennoyer v. Neff, 95 U.S. 714 (1877) (a court could not render a judgment against a party who was not within the territorial boundaries of the state); McDonald v. Mabee, 243 U.S. 90, 91 (1915) ("the foundation of jurisdiction is physical power . . .").
10. See Wyman v. Newhouse, 93 F.2d 313 (2d. Cir. 1937). In this case, Wyman lured Newhouse to Florida, asserting that she wished to see him. When he came, he was served with process as he stepped off the airplane. The court held that Newhouse was induced to enter Florida by fraud, and this rendered the jurisdiction null and void. See also Wanzer v. Bright, 52 Ill. 35 (1869) (state statute exempting service of process to those brought to forum by force or fraud); Malloy v. Brewer, 64 N.W. 1120 (S.D. 1895); Burroughs v. Cockey & Willis, 156 P. 196 (Okla. 1916) (exempted service of process because presence unrelated to judicial proceedings).
In this plurality opinion, the Court was unable to agree on whether to completely discard the traditional rule of jurisdiction, or follow a new, less rigid approach. Justice Scalia, along with Justices Rehnquist and Kennedy, opted to stand behind the narrow traditional rule developed over the years from *Pennoyer v. Neff:* 11 that the criterion of presence is sufficient to comport with due process, as it always has been. 12

Justice White concurred with the majority of Scalia's opinion. 13 He believed that unless it could be shown that the transient rule is "so arbitrary and lacking in common sense," it should not be discarded. 14 One instance in which he believed this showing could be made was when someone's presence in the forum was unintentional. 15

Justice Brennan, along with Justice O'Connor and Justice Blackmun, viewed the transient rule as outdated and vulnerable to due process attacks. 16 Their approach was to formulate a safeguard which used presence as an important factor in examining the question of jurisdiction, but also required the application of minimum contacts to all defendants, whether present in the forum or not. 17

Justice Stevens, in his brief opinion, merely stated that this case was an easy one, clearly controlled by precedent. He believed that the simplicity in deciding a case such as this was obvious. He felt that the Justices were converting an easy issue into an ambiguous, complex problem. 18

All Justices, however, agreed in the final judgment. They decided that the defendant was served with process while knowingly and voluntarily in California, and should therefore be amenable to a lawsuit in that state. 19

11. 95 U.S. 714 (1877).
13. Id. at 2119-20.
14. Id. Justice White also stated that "he could not possibly" strike down a rule that has been so widely accepted in this country. Id. at 2119.
15. Id. at 2120.
16. Id.
17. Id. at 2122. This is a departure from traditional analysis, which applies minimum contacts to a defendant, usually a corporation, who is not present in the forum.
18. Id. at 2126.
19. Id. at 2105.
The judgment in *Burnham* actually created a new legal framework for determining personal jurisdiction. This judgment not only adheres to the traditional rules of *Pennoyer*, but extends in personam jurisdiction to those who are in the state for purposes totally unrelated to the suit. After *Burnham*, the Supreme Court would most likely approve of service of a defendant as a passenger on an airplane while it is flying over the forum, or merely passing through the forum state for reasons unrelated to the litigation. The question is, how far will *Burnham* go? What if the defendant was on the Four Corners National Monument, where one is able to walk across the borders of four states? What if the defendant is parachuting from the sky or in a hot air balloon? What about an astronaut? After *Burnham*, the limits are unclear.

This comment focuses on the scope of the *Burnham* decision and its aftermath. Section II discusses historical perspectives that provide the foundation for *Burnham*. This section also surveys how courts in the past have handled similar issues, and provides insight into the complexities posed in *Burnham*.

Section III analyzes the problem that is created by the Court's unwillingness to agree on one approach, while Section IV tackles this problem with a discussion about the doctrinal questions raised by *Burnham*. Section IV also critically analyzes the concurring opinions of Justices Scalia and Brennan, and in doing so, attempts to predict an alternative to the tangled solution the *Burnham* decision presents to the legal community.

Section V proposes a new approach to the views expressed in the *Burnham* decision. This moderate approach attempts

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20. See Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) where a federal district court upheld service of process on a defendant who was a passenger on an airplane flying over the forum state.

21. See Nielsen v. Braland, 119 N.W.2d 737 (Minn. 1963) (jurisdiction over defendant was valid when served while traveling through forum); Fisher, Brown & Co. v. Fielding, 34 A. 714 (Conn. 1895) (jurisdiction upheld over defendant served while in forum on business that was unrelated to the lawsuit).

22. Even Justice White in *Burnham* cautioned the use of the transient rule against those unintentionally present in the forum, but the Court as a whole did not put limits on its decision. See *Burnham*, 110 S. Ct. at 2120.

23. See infra text accompanying notes 27-121.

24. See infra text accompanying notes 122-23.

25. See infra text accompanying notes 124-74.

26. See infra text accompanying notes 175-81.
to fill in the gaps between the two extreme positions that were articulated in the plurality decision. It seeks a compromise by allowing the analysis to focus on both presence and minimum contacts, but also seeks to limit judicial discretion. Under the proposed approach, minimum contacts would be analyzed as a factor in determining jurisdiction, but the allowable minimum contacts would be defined and certain. This new approach would contain the traditional basis of transient jurisdiction, but would also assure compliance with due process based on an objective analysis limited to certain factors.

II. BACKGROUND

A. Traditional Transient Jurisdiction: Pennoyer v. Neff

Historically, a defendant was made amenable to in personam jurisdiction if voluntarily present and served with process within the forum. This transient theory of jurisdiction was first conceptualized in Pennoyer v. Neff, where physical presence in the forum was deemed the necessary basis of jurisdiction.

Pennoyer involved two actions between Neff, a resident of California, and Mitchell, a resident of Oregon. In 1866, Mitchell sued Neff in Oregon to recover legal fees due him. Mitchell, in accordance with a state statute, published notice of the action in an Oregon newspaper. Neff was never personally served, and as a result, was never made aware of the suit against him. Mitchell obtained a judgment in default, and Neff’s property was sold at a court auction to satisfy the judgment.

Nine years later, Neff brought an action against Pennoyer, Mitchell’s successor in the property. He contended that the sale was invalid because the Oregon court never obtained jurisdiction over him in the initial action. The Supreme Court

28. Id. See supra note 9 and accompanying text.
29. Pennoyer, 95 U.S. at 719.
30. Id. at 720-21.
31. Id. at 719-20.
33. Id. at 719-20.
agreed. Since Mitchell never personally served Neff in Oregon, he never obtained in personam jurisdiction.

The Court based its decision on state sovereignty. A state, at that time, was deemed to have complete power over persons and things within its borders. States were to maintain complete independence, except when such independence infringed on due process rights. Personal service was the vehicle to (1) assert the state's power over a defendant, and (2) to give the defendant notice of the action so as to comply with due process.

The Pennoyer decision is also recognized for its application of the then newly adopted due process clause of the Fourteenth Amendment. Although Pennoyer only briefly discussed the concept of due process, later courts have interpreted Pennoyer's language to stand for the principle that a judgment of a court lacking personal jurisdiction violates due process. This case established the significance that this principle enjoys today: that due process requires fairness at every stage of our judicial system.

Due process was defined in Pennoyer as "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the pro-

34. Id. at 736.
35. Id.
36. Id. at 722.
37. Id. at 720.
38. U.S. CONST. amend. XIV. ("... nor shall any State deprive any persons of life, liberty, or property, without due process of law."). Due process is generally defined as "law in its regular course of administration through courts of justice." BLACK'S LAW DICTIONARY 500 (6th ed. 1990). Although this definition is vague, Pennoyer broadened the definition and made it more concrete with respect to service and notice requirements.
39. The Fourteenth Amendment came into existence in 1868. It is interesting to note that the due process clause was enacted after the original default action between Mitchell and Neff (this action occurred in 1866). See Burnham v. Superior Court, 110 S. Ct. 2105, 2113-14 (1990) (Justice Scalia undermined the significance of the earliest interpretations of due process, stating that "Pennoyer v. Neff, while renowned for its statement of the principle that the Fourteenth Amendment prohibits [exercise of jurisdiction over a nonresident who had not been personally served in the forum], in fact set that forth only as dictum, and decided the case... under 'well-established principles of public law.'").
tection and enforcement of private rights." This included the "well-established principles of public law" that respected the jurisdiction of the states over persons and property. Thus, according to Pennoyer, due process required that the defendant be brought into the state to obtain jurisdiction over him, or that he be voluntarily present. These early, simplistic notions of due process requiring mere presence for jurisdiction began to erode in later years. Even so, they still remain the foundation for the exercise of jurisdiction.

B. The Weakening of Pennoyer v. Neff

The presence requirement of Pennoyer made a distinct impression on the American court system. State courts fervently began to adopt presence as the sole criterion for jurisdiction. Pennoyer's influence, however, began to diminish in the nineteenth century when the courts began to weaken its rigid rules. A new age of mobility for defendants, combined with the increase in corporations engaging in multi-state business,

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42. Id. at 722. Public law is concerned with the "organization of the state, the relations between the state and the people that compose it, the responsibilities of public officers to the state, to each other, and to private persons, and the relations of states to one another." BLACK'S LAW DICTIONARY 1230 (6th ed. 1990).
43. This is known as the "presence" requirement. In later years, the requirement was expanded to include exercise of jurisdiction over foreign corporations on the theory that "doing business" in a state mandated presence. The rationale behind this is that a corporation is a group given legal personality, and this group is present whenever it is carrying on authorized group activities. 1 JOSEPH H. BEALE, TREATISE ON THE CONFLICT OF LAWS 360, 384 (1935).
44. This is known as the "consent" requirement. This requirement from Pennoyer was also expanded in order to acquire jurisdiction over corporations. This theory is based on the fact that a corporation is organized in one state, and if they want to carry on business in another state, they need consent by that state. Under this theory, that state may impose conditions on the corporation, such as requiring it to submit to jurisdiction brought against it within the state.
46. Wasserman, supra note 2, at 52. Part C of this article emphasizes the changes that emerged in the nineteenth century that convinced courts to depart from the territorial limits imposed by Pennoyer. Included in this revolution were many modern inventions including the telephone and the automobile. In addition, the railroad construction boom also made for a more mobile society. Wasserman, supra note 2, at 52 n.75. The author also cites to Supreme Court cases that reflect this view of change: Helicopteros Nacionales de Columbia S.A. v. Hall, 466
made the Supreme Court aware of a need for a more flexible rule that did not require physical presence within the forum state.

One way in which the state courts tried to circumvent the inflexibility of Pennoyer was to create legal fictions to deal with these new situations. The courts would attempt to uphold personal jurisdiction not by following the rule in Pennoyer, but by following their own ideas of what conduct should be the basis of jurisdiction, including “doing business” within the state and “implied consent” to jurisdiction.

The strict limits of Pennoyer were specifically set aside by a group of Supreme Court decisions that deviated from the presence rule. In St. Clair v. Cox, the Court upheld a Michigan statute providing that one condition of doing business in the state was that a state agent had to be appointed as a proxy for the company. This made the company amenable to any suit pursued in that state. In Hess v. Pawlowski, a Massachusetts statute providing for in-state “substituted service of process” for nonresident motorists who caused injuries in that state was upheld. In Kane v. New Jersey, the Court also upheld a New Jersey statute as a method to issue service of process to a nonresident. These cases were upheld during this period on the grounds that due process was not violated because the presence and consent requirements set forth in Pennoyer were satisfied.


47. See 1 Joseph H. Beale, Treatise on the Conflict of Laws 360, 382 (1935) (a comprehensive discussion on the presence and consent theories of jurisdiction, and the author’s criticism of these fictions).

48. Id.


50. 106 U.S. 350 (1882).

51. Id. at 353-57 (the statute authorized service of process on “any officer, member, clerk, or agent” of a foreign corporation doing business in the state to obtain personal jurisdiction). See also Lafayette Ins. Co. v. French, 59 U.S. 404, 408 (1856) (Ohio statute imposed service on a corporation’s agent as a substitute for personal service).

52. 274 U.S. 352 (1927).

53. Id. at 356-57. Substituted service refers to the fiction that a state may appoint an agent as a proxy for anyone entering the state, in order to obtain jurisdiction. Black’s Law Dictionary 1429 (6th ed. 1990).

During this period, courts were apprehensive in applying the presence rule too stringently since this would unduly place burdens on those corporations who were "physically present" in many states by nature of their business. This would also burden those individual defendants who traveled frequently from state to state. The courts instead chose to circumvent these problems by expanding the application of the presence rule for these mobile people. One such expansion was the "minimum contacts" test.

C. International Shoe and the Birth of Minimum Contacts

In *International Shoe v. Washington*, the Supreme Court rejected the legal fictions that were previously used and created a new, more flexible rule concerning in personam jurisdiction. In this case, the Court addressed the issue as to whether the State of Washington could assert in personam jurisdiction over a foreign corporation *not physically present* in the state, but still conducting business in Washington. Chief Justice Stone articulated the new test for obtaining jurisdiction to persons not physically present in the state. He stated:

>[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.”

This test entails a two-step inquiry. First, are there the requisite minimum contacts between the defendant and the forum state? Secondly, is due process violated by denying or granting jurisdiction in that particular forum?

55. 326 U.S. 310 (1945).
56. In *International Shoe*, taxes for unemployment compensation were assessed on International Shoe Co., a Delaware corporation with its principle place of business in Missouri. Some of the corporation's salesmen lived and worked in the state of Washington. When International Shoe Co. refused to pay the tax to the state of Washington, the state sued. The Washington statute provided that service of process could be performed by serving one of International Shoe's salesmen, who were considered agents of the corporation, in addition to sending a copy of the summons to the main office. The Supreme Court held that there were enough minimum contacts in Washington to assert jurisdiction. *Id.*
57. 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
In applying the minimum contacts test, the Court listed certain guidelines that had evolved from prior decisions. First, a defendant is subject to the forum state’s jurisdiction if its activities there had been systematic and continuous, and those activities were related to the present cause of action. Secondly, single, unrelated acts, or activity that is only casually related to the action, would not give rise to jurisdiction. Thirdly, even if the action is unrelated to the forum, continuous activity may make the defendant amenable to jurisdiction. Finally, a defendant’s casual or single act may make him amenable to jurisdiction if the action arose from the defendant’s activity in the forum.

In applying the second step concerning due process, courts are reluctant to provide guidelines. Since due process is a nebulous concept and entails a “totality of the circumstances,” each judge has his own idea as to how it should be applied.

Essentially, International Shoe stood for the notion that due process does not require states to adhere to the strict territorial limits placed on them by Pennoyer. The new “minimum contacts” test would, in effect, be a substitute for physical presence. The test for jurisdiction no longer focused upon the defendant’s physical relationship to the forum, but rather upon the defendant’s activity in relation to the forum. This

58. 326 U.S. at 317, 318.
59. Id. at 317.
60. Id. See, e.g., Hanson v. Denckla, 357 U.S. 235 (1958). See also text accompanying infra notes 79-85.
61. Id. at 318. See, e.g., Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952). See also text accompanying infra notes 73-78.
63. For the Court’s most recent analysis involving due process requirements for the minimum contacts test, see Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).
64. Rather than demand presence as the sole basis of jurisdiction, courts could now look at “the quality and nature of the [defendant’s] activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.” 326 U.S. at 319. Fairness now became the test, and a court could focus on factors of inconvenience when assessing in personam jurisdiction.
added dimension of inquiry more readily satisfied the pursuit of conforming with due process because it made in personam jurisdiction more flexible and more adaptable to societal needs.

D. Stretching Minimum Contacts to the Limit

After International Shoe, the Supreme Court struggled to define what "minimum contacts" actually entailed, since none of their previous opinions articulated a well-defined test. During this period, the Court provided no guidance other than the words of International Shoe. As a result, the courts were free to expand personal jurisdiction.

McGee v. International Life Ins. Co. was part of this expansion. In this case, the defendant, a Texas life insurance company, had issued a policy to the decedent, a resident of California. The insurance company billed the decedent in California and received her payments from California. When the decedent died, defendant refused to pay the claim made by the plaintiff. Plaintiff sued in California, and served defendant by mail, which was permitted by a state long-arm statute. The California court held for the plaintiff, but when plaintiff tried to enforce the judgment in Texas, Texas courts claimed lack of personal jurisdiction.

The Supreme Court upheld jurisdiction in California, based on the single contact of the insurance policy in that state. The Justices asserted that their decision complied with due process because of the substantial connection that the insurance policy had with the state. The Court reasoned that

66. Id.
67. Id.
68. Id.
69. Most states have long-arm statutes to obtain jurisdiction over a nonresident. Long-arm statutes provide for personal jurisdiction, via substituted service of process, over persons and corporations which are nonresidents of the state and which voluntarily go into the state, directly or by agent. BLACK'S LAW DICTIONARY 942 (6th ed. 1990). Discussion of such statutes, however, are beyond the scope of this comment.
70. McGee, 355 U.S. at 221.
71. Id. at 222. The McGee decision cited Pennoyer, and observed that in that case the due process clause limits the state courts from entering binding judgments against those who were not served within the forum's boundaries. This decision indicated the Texas court's belief that the jurisdictional basis is presence.
the policy was delivered to California, the premiums were paid from there, and the insured resided there. For these reasons, California had an interest in providing a forum for its citizens. Based on this rationale, a single transaction within the forum state became sufficient to establish jurisdiction based on minimum contacts.

Another Supreme Court decision extending in personam jurisdiction for a cause of action arising out of remote activities in the forum occurred in 1952. In Perkins v. Benguet Consolidated Mining Co., the plaintiff was permitted to sue the defendant, the president of a Philippine company, in Ohio, even though the claim was unrelated to activities within that state.

The claim actually arose out of the company's activities by the company in the Philippines, where it company operated gold and silver mines. The president of the company, however, lived in Ohio and set up an office there. The president's activities in Ohio were supervisory, i.e., he attempted to rehabilitate the halted operations of the mines from that location. He also maintained correspondence and financed the operations from Ohio.

The Court upheld jurisdiction in Ohio, stating that these activities were systematic and continuous, and were substantial enough to create jurisdiction over the company. This broad application of the minimum contacts test took the Court "one step further to a proceeding in personam to enforce a cause of action not arising out of the corporation's activities in the state of the forum."

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72. Id. at 223.
73. 342 U.S. 437 (1952).
74. One reason for the Court's decision to uphold jurisdiction in Ohio may have been military outbreak in the Philippines. Since this made it impossible to sue there, the Court may have upheld jurisdiction under the guise of minimum contacts in order for the plaintiff to have his day in court.
75. Id.
76. Id. at 447-48.
77. Id. at 445-46. The court cited International Shoe, 326 U.S. at 318-19, where there were some circumstances in which continuous operations by a corporation "were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 342 U.S. at 445-46.
78. 342 U.S. at 446.
E. Limiting the Minimum Contacts Test

In *Hansen v. Denckla,* the Supreme Court started to impose limits on the newly expanded minimum contacts test. This case arose from the probate of a will. Dora Donner lived in Pennsylvania and executed a trust naming a Delaware company as trustee. She later moved to Florida, where she received income from the trust, and received information regarding the trustee's actions. After her death, her daughters sued in Florida, contesting the testamentary disposition.

The Supreme Court ruled that Florida did not properly obtain jurisdiction in this matter. It reasoned that the defendant must engage in some activity in the forum where he "purposely avails" himself of the privilege of conducting business within that state, "thus invoking the benefits and protection of its laws." The Court stressed that the defendant must somehow affiliate himself with the forum in order to coerce him to defend a lawsuit in that state. The Court found that the mere act of making trust payments to a resident of a state was not a sufficient contact to "affiliate himself" with the forum.

Another restriction on the minimum contacts test arose from the case of *Helicopteros Nacionales De Colombia, S.A. v. Hall.* This case distinguished general jurisdiction, in which the claim and the contacts are unrelated, from specific jurisdiction, in which the claim arises from the contacts. This case involved a helicopter crash in Peru. The defendant was a

80. The Court noted that the minimum contacts test should not preclude placing limits on state court jurisdiction. *Id.* at 251. This decision indicates that the Court is principally concerned with what contacts or activities are sufficient.
81. *Id.* at 238-39.
82. *Id.* at 240. Another action was brought in Delaware by the executrix of the will, seeking to determine who takes the trust assets. *Id.* at 242. The Delaware court and the Florida court reached different conclusions, with the Florida court validating jurisdiction over the Delaware trustees. *Id.* at 241.
83. *Id.* at 251.
84. *Id.* at 253.
85. *Id.*
88. 466 U.S. at 408.
corporation in Colombia, that owned and operated the helicopters. The activity in relation to Texas, the forum state, consisted only of the purchase in Texas of supplies, the acceptance of a check from that state, and the training of helicopter pilots there. The Supreme Court held that this was a case of general jurisdiction, and therefore could not uphold jurisdiction in the absence of continuous and systematic contacts. These single, unrelated incidents could not justify compelling a Peruvian corporation to defend a suit in Texas.

These cases established the state of the law during this period and further defined "minimum contacts." It became evident that the Court would not accept, as a substitute for presence, less than continuous and systematic contacts with the forum, or purposeful availment by the defendant of the benefits of the forum. Whether these tests were only to be applied to defendant corporations or extended to individual defendants not present in the forum was unclear until 1977.

F. In Rem Jurisdiction Distinguished: Shaffer v. Heitner

In 1977, the Supreme Court again addressed the application of the minimum contacts test in Shaffer v. Heitner. In one sweeping statement, the Court decided that the minimum contacts test was to be applied to "all assertions of state-court jurisdiction." At first glance, the decision seemed to challenge the means of obtaining personal jurisdiction by service of process set forth in Pennoyer v. Neff. However, courts have since distinguished this case on its facts, thereby preserving the

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89. Id. at 418.
90. Id.
91. Id. The Court, when analyzing the purchase of supplies from Texas, held that mere purchases, even if occurring at regular intervals, is not enough to satisfy jurisdiction over a defendant corporation in a cause of action unrelated to those purchase transactions. Commenting upon the training of the pilots in the forum as a basis of jurisdiction, the Court noted that brief presence in the state here was not a significant contact. Id.
93. Id. at 212 (emphasis added).
94. 95 U.S. 714 (1877). Prior to Shaffer v. Heitner, 433 U.S. 186, 212 (1977), the practical effect of the minimum contacts test was that it was only applied to corporations which were abstractly "present" in the forum. Shaffer was the first time the Court reviewed the question of an individual defendant who was present only by virtue of minimum contacts.
presence requirement set forth in traditional in personam cases.

_**Shaffer** involved quasi in rem jurisdiction._95 In this case, Heitner, a nonresident of Delaware, filed suit in a Delaware court against Greyhound Corporation and its directors and officers.96 Although Greyhound was incorporated in Delaware, its principal place of business was Arizona, and the act at issue occurred in Oregon.97 In addition, all individual defendants were nonresidents of Delaware.98 The only contact with the forum that any of the parties had was based on a Delaware law providing that the situs of the stock of an entity incorporated in that state is considered to be in Delaware.99 Under this law, Heitner filed to sequester the Delaware property belonging to the individual defendants.100

The defendants argued that Delaware courts lacked jurisdiction because they did not have minimum contacts with the forum,101 as required by _International Shoe v. Washington._102 Heitner, however, argued that this suit was brought under quasi in rem jurisdiction. He argued that this theory merely required a relationship between the property and the state, and not the defendants and the state.103

The Supreme Court held that Delaware’s assertion of jurisdiction violated due process.104 Jurisdiction based solely on presence of property could no longer be decisive. It must still satisfy due process.105 In order to satisfy due process, the Court concluded that _International Shoe’s_ minimum contacts test must be applied to every exercise of jurisdiction.106

The sweeping language used in this opinion107 broad-

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95. Quasi in rem jurisdiction is the “[t]ype of jurisdiction of a court based on a person’s interest in property within the jurisdiction of the court.” BLACK’S LAW DICTIONARY 1245 (6th ed. 1990).
96. _Shaffer_, 433 U.S. at 189.
97. _Id._
98. _Id._ at 186.
99. _Id._ at 190 n.4.
100. _Id._ at 190.
101. _Id._ at 193.
102. 326 U.S. 310 (1945).
103. _Shaffer_, 433 U.S. at 196.
104. _Id._ at 216-17.
105. _Id._ at 212.
106. _Id._
107. The _Shaffer_ Court stated that “all assertions of state-court jurisdiction must
ened the test articulated in *International Shoe*, namely that a court must look at a corporation’s minimum contacts with the forum. *Shaffer* indicated that minimum contacts were to be applied in all cases, including those of individual defendants.

Many courts and commentators have subsequently interpreted the language in *Shaffer* to mean that the transient rule is no longer viable. This application of minimum contacts in all cases, however, has been attacked, because *Shaffer* involved quasi in rem jurisdiction and is arguably distinguishable.

As a result, the outcome of this decision became a matter of interpretation. The only thing that was clear was that this decision attacked the rationale in *Pennoyer* by stating that presence of *property* alone may not be sufficient to comply with due process. This application of minimum contacts in all cases, however, has been attacked, because *Shaffer* involved quasi in rem jurisdiction and is arguably distinguishable.

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The battle in *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990) centers around this controversy. The judgment of the *Burnham* Court asserts that *Shaffer* means that minimum contacts do not have to be applied every time jurisdiction is evaluated, but only in limited circumstances, such as when the defendant is not present in the forum. *Id.* at 2121-22. Brennan’s concurring opinion interprets *Shaffer* to mean just what it says: that minimum contacts are to be applied always, even when the defendant is present.


109. See *supra* note 107 and accompanying text.


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.
G. A Return to Transient Jurisdiction?

1. Burnham v. Superior Court: The Issues Involved

The case of Burnham v. Superior Court,\footnote{110 S. Ct. 2105 (1990).} to some extent, reinstates the "transient rule" of personal jurisdiction. The case deserves attention because of the split among the Supreme Court Justices. Although all Justices agreed in the final judgment, four Justices were anxious to revert back to the rigidity of Pennoyer,\footnote{Id. at 2109-15.} while four other Justices pursued the application of the International Shoe\footnote{Id.} minimum contacts test. This, they believed, was the only way due process could be achieved, since the defendant's presence was unrelated to the litigation.

2. The Factual Context of Burnham

Mr. and Mrs. Burnham and their children lived in New Jersey.\footnote{Id. at 2120-25.} Upon separation, they decided that Mrs. Burnham would have custody of the children and would move to California.\footnote{Id. at 2109.} Mrs. Burnham and petitioner husband agreed that she would file in California for the uncontested divorce on the grounds of "irreconcilable differences."\footnote{Id.}

After Mrs. Burnham and the children moved to California, Mr. Burnham, reneged on the agreement and filed for divorce in New Jersey, not for irreconcilable differences, but for desertion.\footnote{Id. In New Jersey, Mr. Burnham would have received the benefits of its desertion statutes, in that he could have been able to ask for support from his spouse. Additionally, he would benefit from forum shopping (choosing the New Jersey forum rather than California) by not having to travel to defend a suit.} However, he did not attempt to serve Mrs. Burnham with process or obtain an issuance of summons against her.\footnote{Id.} Mrs. Burnham brought suit for divorce in California when he refused to adhere to the prior agreement.\footnote{Id.}

When Mr. Burnham came to California for business and to visit his children, he was served with a California court

\begin{footnotes}
\item[110] 110 S. Ct. 2105 (1990).
\item[112] Id. at 2109-15.
\item[115] Id. at 2120-25.
\item[114] Id. at 2109.
\item[115] Id.
\item[116] Id.
\item[117] Id. In New Jersey, Mr. Burnham would have received the benefits of its desertion statutes, in that he could have been able to ask for support from his spouse. Additionally, he would benefit from forum shopping (choosing the New Jersey forum rather than California) by not having to travel to defend a suit.
\item[118] Id.
\item[119] Id.
\end{footnotes}
summons.\textsuperscript{120} He later moved to quash the service of process for lack of personal jurisdiction because he did not have the requisite “minimum contacts” with the state. He contended that his trip to California was unrelated to the pending suit.\textsuperscript{121} Thus, the Court was asked to decide whether due process requires any connection between defendant’s contacts with the forum and the pending litigation when the defendant is physically present within the state.

III. THE LEGAL PROBLEM

Prior to \textit{Burnham v. Superior Court},\textsuperscript{122} service of process was the accepted, nationwide formula for exercising in personam jurisdiction over nonresidents within the forum. It took just four concurring opinions in \textit{Burnham} to shatter this traditional view of transient jurisdiction. In doing so, the Court failed to reconstruct a single, applicable jurisdictional theory.

After this decision, there is no black letter law for courts to apply.\textsuperscript{123} The argument between the Justices leaves only obscure nuances about ways in which the state courts may wish to handle jurisdiction. Uniformity will be sacrificed and contradictory holdings will be the result of the Supreme Court’s unwillingness to articulate and enforce one particular approach to the problem.

The very purpose of rules governing jurisdiction is to ensure an adherence to due process. Due process concerns

\textsuperscript{120} Id. The use of California’s long-arm statute to obtain jurisdiction over Mr. Burnham is questionable. The statute provides that “[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” CAL. CIV. PRO. CODE § 410.10 (West 1973). Finding no answers to the proper exercise of jurisdiction, the parties were eventually forced to ask the Supreme Court to determine jurisdictional requirements.

\textsuperscript{121} \textit{Burnham}, 110 S. Ct. at 2109.

\textsuperscript{122} 110 S. Ct. 2105 (1990).

\textsuperscript{123} After \textit{Burnham}, the question of personal jurisdiction is unsettled. Which of \textit{Burnham}’s four opinions a state court may follow is unknown. In terms of numbers, Brennan’s approach prevails, with three other Justices firmly behind him (Scalia’s opinion is backed by three other Justices also, but Justice White concurs only in part). With the induction of Justice Souter to fill Brennan’s position in late 1990, and Justice Thomas replacing Marshall in 1991, no predictable results can be discerned. The question of jurisdiction is not a question of conservative or liberal viewpoints, as evidenced by Justice O’Connor’s concurrence with Justice Brennan here. However, the present make-up of the Court leaves only Justices O’Conner and Blackmun to uphold Brennan’s position.
have become the cornerstone of every jurisdictional inquiry. With this in mind, how can due process possibly be met after the Burnham case? We are left with no established rule and no guidance as to when a defendant makes himself amenable to a lawsuit.

Although these concerns may not be answered by examining the four opinions in detail, these varying viewpoints can provide insight as to the reasons the Court chose to review the case, why there was such a conflict between the Justices, and where this decision will lead us in the future.

IV. ANALYSIS

In one of the concurring opinions in Burnham v. Superior Court, Justice Stevens referred to the case as an "easy" one. He announced: "Perhaps the adage about hard cases making bad law should be revised to cover easy cases."

This section discusses whether Burnham really is an "easy" case and why it was chosen among thousands of cases to be reviewed by the highest court of the land. This section also questions whether this decision sets a bad precedent, regardless of the agreement in judgment. For these purposes, each opinion by the Justices is analyzed to achieve a more comprehensive understanding of the inconsistencies in this opinion.

A. A Critical Analysis of the Opinion

1. Locked Into Tradition: The Judgment of the Court

The judgment of the Court in Burnham was announced by Justice Scalia, and supported by Justice Rehnquist, Justice Kennedy, and in part, by Justice White. This opinion firmly indicates their support for the traditional transient rule of jurisdiction that originated in Pennoyer v. Neff and also marks their unwillingness to depart from precedent.

Scalia's opinion resorted to the traditional norm that due process is not violated when one is personally served with process in a state, even when the suit is unrelated to activities in

125. Id.
126. Id. at 2109-19.
127. Id. at 2119-20.
128. 95 U.S. 714 (1877).
that forum. The three Justices supporting this view relied upon this ancient rule solely because of its historical following.\textsuperscript{199} Their only justification that this rule was presently consistent with societal demands was their assertion that "traditional notions of fair play and substantial justice," the test used to determine the viability of due process, would change along with society and the American people.\textsuperscript{190}

Scalia saturated his opinion with case precedent justifying the traditional rule. He argued that this principle developed from early English common law\textsuperscript{191} and that these common law roots should be adhered to. He cited to Justice Story,\textsuperscript{192} the man responsible for implanting these roots into American society, and tried to persuade us that the views which are so heavily ingrained in American tradition should not be altered.

After this elaborate portrayal of the influence this traditional rule has had on our judicial system, Scalia did admit that the English use of this rule of transient jurisdiction had been criticized and might not even be accurate, but nonetheless, American courts have adopted it and followed it for many years.\textsuperscript{193}

Scalia supported his argument by citing to numerous decisions upholding his view of tradition, and stated, "[a]lthough research has not revealed a case deciding the issue in every State's courts, that appears to be because the issue is so well settled that it went unlitigated."\textsuperscript{194} His reliance on the traditional rule was further justified, he argued, because of the fact that no case until 1978 even suggested that service of process was insufficient to confer jurisdiction.\textsuperscript{195} Thus, Scalia's overriding rationale was that since the traditional rule based on physical presence alone had never been questioned, then it must comport with due process.

\begin{itemize}
\item \textsuperscript{129} 110 S. Ct. at 2116-17.
\item \textsuperscript{130} Id. at 2110.
\item \textsuperscript{131} Id. at 2110-11.
\item \textsuperscript{132} Id. at 2112. See infra note 167.
\item \textsuperscript{133} Id. at 2111. “Recent scholarship has suggested that English tradition was not as clear as Story thought . . . . Accurate or not . . . . one must conclude that Story's understanding was shared by American courts . . . .” Id.
\item \textsuperscript{134} Id. at 2111-12.
\item \textsuperscript{135} Id. at 2112. Justice Scalia failed to mention which 1978 case challenged this use of service of process.
\end{itemize}
After an analysis of the early case law in this area, Scalia tried to reconcile the case of *Shaffer v. Heitner*, which focused on the minimum contacts test. He said that the petitioner in *Burnham* went too far in his assertion that there cannot be jurisdiction over an individual defendant unless the litigation arises from his activities within the state. Scalia made a distinction between the facts in *Shaffer* and the facts in the present case by recognizing that *Shaffer* involved an absent defendant, rather than one present in the forum. His logic was that the holding in *Shaffer* "does not compel the conclusion that physically present defendants must be treated identically to absent ones."

Scalia also attempted to distinguish *Shaffer* because it involved quasi in rem jurisdiction. For this reason, Scalia concluded that the holding in that decision must be narrowly construed. He believed that *Shaffer* stands for nothing more than the proposition that "when the 'minimum contact' that is the substitute for physical presence consists of property ownership, it must, like other minimum contacts, be related to the litigation." Scalia had no interest in treating the language in *Shaffer* as a vehicle to apply minimum contacts in all situations, whether the defendant is present or absent in the forum.

In Scalia's view, a state has power over anyone or anything physically present within that state. Neither *Shaffer* nor *International Shoe* was intended to change the traditional notion of transient jurisdiction.

2. Brennan's Contemporary Notions of Due Process Test

In his opinion, Justice Brennan sought to solve the inconsistencies created when a defendant's presence subjects him to jurisdiction, even when his presence is unrelated to the litigation. His approach, the "contemporary notions of due process test," carries forth the principles articulated in *Shaffer v.*

137. *Burnham*, 110 S. Ct. at 2115.
138. *Id.*
139. *Id.* at 2116.
140. *Id.* See supra note 95 (defining quasi in rem jurisdiction).
141. *Burnham*, 110 S. Ct. at 2115.
142. *Id.* at 2120.
In his opinion, Brennan stated that: "The critical insight of Shaffer is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process." What Brennan added to the Shaffer test is a more concrete notion of what due process requirements entail.

Brennan's approach evaluates factors of fairness to ensure that the defendant is fairly subject to a legal suit in a far away forum. Under this approach, a defendant becomes amenable to service of process if: (1) he has had the requisite amount of minimum contacts with that state and (2) these contacts are sufficient to comply with contemporary notions of due process. In an examination of the contacts with the forum, the Court is permitted to subjectively analyze factors of fairness, i.e., any exigent circumstances that could render jurisdiction more or less fair in relation to the defendant's activities.

The aim of the contemporary notions of due process test is to comport with due process in all exercises of jurisdiction. This goal can be more readily achieved by Brennan's test than by a rule based on presence alone, because all relevant factors are taken into account by the judges on an ad hoc basis. This allows fairness to play a significant role.

In order to achieve due process, Brennan relied upon the doctrine set forth in International Shoe v. Washington. Brennan proposed to apply the minimum contacts test to non-resident defendants who are present in the forum. He be-
lieved that *Shaffer v. Heitner*\(^{150}\) called for this application to all defendants, regardless of presence or absence in the forum.\(^{151}\) This is contrary to the presence rule because under that theory, there is no need to inquire into other factors since presence alone comports with due process. Brennan believed that an application of minimum contacts is necessary because that is the only way that due process could be served.\(^{152}\)

Brennan was also opposed to Scalia’s deference to historical pedigree. He did not agree with the reasoning that the traditional rule is constitutional merely because it always has been.\(^{153}\) He was concerned that this ancient rule is too narrowly focused and does not take into account changes that occur in modern society.\(^{154}\) He believed that tradition hides progress, and that due process may be violated when following a rule that has only a traditional foundation.\(^{155}\)

The transient rule, however, is not totally discarded by the contemporary notions approach.\(^{156}\) Brennan explained that presence does raise a strong presumption for complying with due process,\(^{157}\) not because of its historical pedigree, but because the rule is consistent with reasonable expectations.\(^{158}\) For example, contacts with the state give rise to certain risks, one of which is defending a suit in that forum. In conjunction with this, Brennan believed that voluntary presence will sometimes comport to due process under limited circumstances, as a result of the “purposeful availment test” from *Hanson v. Denckla*.\(^{159}\) Brennan explained that when a defendant avails himself of significant benefits provided by the state, this justifies the exercise of jurisdiction by that state.\(^{160}\) He included within those benefits the fact that the defendant’s “[h]ealth

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151. 110 S. Ct. at 2105.
152. *Id.*
153. *Id.* at 2120.
154. *Id.* at 2120-21.
155. *Id.*
156. *Id.* at 2124.
157. He stated that the historical background “is relevant because [it] provides a defendant voluntarily present in a particular State today ‘clear notice that [he] is subject to suit’ in the forum,” (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)). 110 S. Ct. at 2124.
158. 110 S. Ct. at 2124.
160. 110 S. Ct. at 2124-25 n.12.
and safety are guaranteed by the State’s police, fire, and emergency services; he is free to travel on the State’s roads and waterways; and he likely enjoys the fruits of the State’s economy as well.”

A major criticism of Brennan’s contemporary notions of due process test is that it leaves too much discretion with the judges. They are allowed to determine whether due process has been met, and which factors to include and exclude in assessing fairness. The criticism, for all practical purposes, is without merit. This discretion is not new to the judicial system. Discretion has always been left to judges to make such determinations; the only difference with this approach is that it is straightforward in its subjectivity rather than hidden. In fact, making such determinations are part of their judicial duties.

In Brennan’s application of the contemporary notions test, however, little judicial discretion is actually being exercised. He found that the requisite minimum contacts were present in *Burnham* because when the defendant stepped foot in California, he enjoyed the benefits of that state. It is argued that his test adds little to the traditional rule because as soon as the defendant is physically present, jurisdiction will automatically adhere because he immediately enjoys the benefits of the forum state. An application of the contemporary notions of due process test does, however, force the reviewing court to look beyond whether the defendant is present or absent in the forum. The test would essentially require an added dimension of fairness, which is a monumental change from the traditional view.

B. *Burnham’s Reflection on the Certiorari Policy*

When such a fragmented decision is handed down by the Supreme Court, the initial response is confusion as to why the case was reviewed by the Court at all. When over ninety-eight percent of all petitions for certiorari are denied by the Court

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161. *Id.* at 2125.
162. *See id.* at 2117. Justice Scalia criticizes Brennan’s test in that it “measures state-court jurisdiction . . . against each Justice’s subjective assessment of what is fair and just.” *Id.*
163. *Id.*
164. *Id.* at 2124-25, 2126.
165. *See text accompanying infra* note 175.
when the United States is not a party, it is curious to see that they chose a divorce case.

One reason may be that they were seeking to overturn or modify the age-old precedent concerning in personam jurisdiction. The Court's intent may have been to demonstrate their concerns about possible due process challenges resulting from the rigidity of the transient rule, and in so doing, to suggest a doctrine for state courts to follow.

Unfortunately, the Supreme Court's inability or unwillingness to hand down a majority opinion, combined with the fragmented viewpoints of the Justices, leaves only confusion. The Supreme Court seems to be delegating these issues to the state courts, since it obviously cannot agree on a single standard.

C. Hostilities Among the Justices

The written opinions generated by this case alluded to open hostilities between the Justices on the Court. This opinion is unusually graphic in its harsh reference towards the "other" viewpoint, and in its questionable professionalism when criticizing the other side. Scalia spent nearly three pages in this opinion attacking Brennan's approach to the problem. These concerns merit analysis.

Scalia made his initial assault on Brennan's use of a broad interpretation of the language in *Shaffer* as a justification for discarding the presence requirement. He announced that the use of the minimum contacts test in the present context misinterpreted the prior case law, and that the phrase in *Shaffer* that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International..."
Shoe and its progeny” had been clearly misunderstood. In criticizing Brennan for undertaking this approach, Scalia failed to recognize that prior case law had never prohibited the use of minimum contacts for individual defendants who are physically present in the forum. In doing so, Scalia failed to give credit to Brennan’s inventive use of minimum contacts, which may have some value.

Justice Scalia next denounced Brennan’s proposal of applying contemporary notions of due process. He stated that this new approach was an unnecessary extension of the traditional rule, because the traditional rule will satisfy due process by its very nature. He believed that the “traditional notions of fair play and substantial justice” that are to be applied in assessing the validity of due process would change as the American people change and as society grows. Scalia would rather have the American people be the force behind the meaning of due process, rather than have the Justices make that decision. He declared that the courts cannot compel states to limit or abandon the presence requirement based on the individual Justice’s perception of fairness.

An analysis of this opinion demonstrates not only Scalia’s firm reliance on precedent and his resistance to change, but also, the contrasting personalities which are magnified when Scalia resorts to open hostilities to make the better of the argument. It is ironic that a neutral subject matter such as jurisdiction creates such a heated argument, when we expect this type of disagreement only on emotional issues, i.e., abortion, the right to die, and the death penalty.

D. The Value of this Opinion

Burnham is a significant decision because it was the first time the Supreme Court reviewed the question of nonresident defendants whose presence is unrelated to the litigation. How-

170. Id. at 2116.
171. Id. at 2117.
172. Id. at 2119. When explaining the difference between his viewpoints and Justice Brennan’s, Scalia stated that this case stands for “whether changes are to be adopted as progressive by the American people or decreed as progressive by the Justices of this Court.” Id.
173. Id.
174. Id.
ever, because it is a plurality decision, its precedential value is weakened. Even so, this decision can be employed in many ways. The legal community can choose to discard it, and treat it as useless; they can choose to adopt one of the viewpoints and make it applicable in state courts; or they can pick and choose from the various opinions and extract a better approach for courts to follow. Thus, the different approaches for the exercise of jurisdiction could prove to be extremely beneficial, regardless of the lack of a majority opinion.

These opinions, however, certainly do provide guidance on the state of the law. Every Justice relied on the transient rule to some extent, thereby confirming the value of this ancient rule. In addition, Brennan opened the door for the application of minimum contacts in new circumstances, such as individual defendants and defendants physically present in the forum.

A major inconsistency in the *Burnham* case concerns the final judgment. All the Justices agreed that Mr. Burnham may be served with process within California, and that his presence there complied with due process requirements. The fact that Brennan joined in the final judgment may mean that Brennan's contemporary notion's test is not such a radical departure from the traditional rule of jurisdiction. Indeed, Scalia points out that:

Justice Brennan's long journey is a circular one, leaving him, at the end of the day, in complete reliance upon the very factor he sought to avoid: The existence of a continuing tradition is not enough, fairness also must be considered; fairness exists here because there is a continuing tradition.\(^{175}\)

One reason, however, why Brennan may have voted in favor of jurisdiction may be based on public policy. The fact that Mr. Burnham was forum shopping to receive the benefits of New Jersey law may have influenced Brennan in his decision.

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175. *Burnham*, 110 S. Ct. at 2118.
V. PROPOSAL: THE DISTANT FORUM ABUSE TEST

In the *Burnham v. Superior Court* opinion, Justice Scalia and Justice Brennan demonstrated two contradictory viewpoints. Scalia's adoption of the traditional rule, although clear and unambiguous, merely defers to geographical preference, and comports to due process simply because it always has comported to due process. Conversely, Brennan proposes a subjective analysis inquiring into the particular circumstances of the case to determine if due process has been met. Their extremist positions in this plurality decision are undoubtedly going to cause jurisdictional problems within the legal community. The enormous gap between their views is too wide and much too vulnerable for the state courts to reconcile.

It is imperative that the Supreme Court adopt a firm rule of in personam jurisdiction, and even more essential that they stand by it, since this type of jurisdiction is a prerequisite to any lawsuit. All potential litigants deserve to know when they make themselves subject to suit in a foreign state, but the *Burnham* decision leaves them only with uncertainty. It is not clear at what point a potential defendant crosses the line and makes himself amenable to a lawsuit.

After *Burnham*, it is evident that the Supreme Court Justices need to compromise and adopt an approach to in personam jurisdiction that fills in the gap left by that decision. This can be achieved by the Distant Forum Abuse Test. This test would combine the two opposing opinions in *Burnham* by utilizing both presence and minimum contacts, but also requires the contacts to be defined and certain.

The basic rationale for the Distant Forum Abuse Test derives from the fact that notions of territoriality and state sovereignty, which justify a state's control within its borders, have diminished as a result of a more mobile society. This trend explains why presence alone should not be the influential factor in conferring jurisdiction on a nonresident individual.

The application of this test only seeks to alter procedure when the nonresident defendant is not a corporation. A nonresident individual and a nonresident corporation possess obvi-
ous inherent differences. These differences justify the use of different rules for granting jurisdiction.

The jurisdiction of a corporation should continue to be evaluated according to the minimum contacts test set forth in *International Shoe v. Washington,* but that test alone is much too burdensome on an individual defendant. A corporation bears an infinite measure of power and influence, and in addition, consumes tremendous amounts of resources within the state. An individual, on the other hand, will be more heavily burdened by traveling to the distant forum and will consume far less of the state's resources.

The transient rule, in which presence is the sole factor, cannot alone meet constitutional standards for either defendants or corporations. A tremendous strain would be imposed on all aspects of interstate travel if a state could subject an individual to suit by virtue of geography. Travel between states would become infrequent if an individual were compelled to answer to a suit for reasons unrelated to his activities while in that state. The presence rule could arguably deter all types of contacts with other states, since a potential defendant would be apprehensive in entering another state for fear of being served with process. Situations arise where gross injustice would occur if the defendant were made amenable to jurisdiction based solely on presence, i.e., an unconscious man who is flown to the forum state to receive medical attention, or a professional athlete who travels to participate in his sport.

The Distant Forum Abuse Test takes all of these factors into account. Under this proposal, a nonresident defendant becomes amenable to service of process when present in the state if:

1. The contact with the state is *directly* related to the suit; and
2. The defendant himself has proximately caused the contact to be related to the forum.

No other factors may be considered. This would eliminate consideration of the following: the "burden on defendant," the

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177. 326 U.S. 310 (1945).
178. This proposal seeks to alleviate the uncertainty of when jurisdiction attaches. The *Burnham* court never addressed this problem.
179. One example would be when the defendant in a divorce suit travels to the forum to seek custody or to reconcile a property settlement.
"forum state's interest in adjudicating the suit," the "plaintiff's interest in obtaining convenient and effective relief," or the "interstate judicial system's interest in obtaining the most efficient resolution of controversies."\(^{180}\)

This test is similar to Brennan's contemporary notions test\(^{181}\) because both presence and minimum contacts are utilized, although limitations are imposed on both. This test would create uniformity and would provide defendants with absolute foreseeability as to when they subject themselves to jurisdiction. These equitable considerations are part of the safeguards that are necessary for this test to comport with due process requirements.

An application of this test to the facts in *Burnham* would conclude that a California court would not have jurisdiction over Mr. Burnham because Part One of the test is not satisfied. The contact is not directly related to the divorce suit. The reason Mr. Burnham was in California was for business purposes and to visit his children. The basis of their suit was an agreement concerning the *grounds* for divorce. Even though custody is often an important consideration in divorce cases, it is incidental to determining the basis for a divorce.

Under these facts, the analysis ceases and there can be no jurisdiction. Part Two of the analysis applies when the contact with the forum is directly related, but the defendant did not *cause* the contact to be related to the forum. This prevents any possibility that a defendant is fortuitously or fraudulently induced into a state for purposes of service of process.

VI. CONCLUSION

This comment has focused on the development of in personam jurisdiction, which has recently become a complex issue as a result of the 1990 Supreme Court decision, *Burnham v. Superior Court.*\(^{182}\) Furthermore, this discussion analyzed the four opinions that were handed down in this confusing case in order to discern the Court's perceptions on in personam juris-

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Transitory Jurisdiction and to provide insight as to the current state of the law.

*Burnham* has not conclusively solved the problem of an application of transitory jurisdiction. There is a need for the Supreme Court to choose an agreeable standard to follow to provide uniformity and clarity, so that potential defendants can foresee the possibility of defending a lawsuit in a distant forum. One proposal to alleviate these problems is the use of the Distant Forum Abuse Test for individual defendants. This test is a viable alternative because it combines the extreme proposals in *Burnham*, but adds an element of certainty. Under this test, due process would presumably be satisfied because certain definite factors of fairness would be influential in assessing jurisdiction, and subjectivity would be minimized. This test poses an appropriate solution to the problem created by the *Burnham* decision.

Whatever test is chosen, it is essential that the Court choose the test which best complies with due process considerations. Each Justice on the Supreme Court, however, has a different idea of what due process entails. Therefore, the Court's agreement on a test for in personam jurisdiction may not be reached until far in the future.

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