Jurisdiction: Burnham v. Superior Court: Adding Confusion to Transient Jurisdiction

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I. Introduction

The long accepted transient rule of in personam jurisdiction has outlived its usefulness in light of modern methods of obtaining jurisdiction over defendants such as long-arm and nonresident motorist statutes. *Shaffer*’s pronouncement of new standards for quasi in rem jurisdiction and the existing *International Shoe* standards which apply to defendants not physically present in the state, also render continued application of the transient rule unfair and unnecessary.¹

The above excerpt illustrates the prevailing belief among commentators that transient jurisdiction, especially in light of *Shaffer v. Heitner*,² is an invalid method to obtain personal jurisdiction over a nonresident defendant.³ The doctrine of transient jurisdiction allows a state court to acquire personal jurisdiction over a nonresident defendant based solely on the physical service of process on the defendant while in the forum.⁴ A defendant, served with process while physically present in the forum, is subject to the personal jurisdiction of the forum, even though none of the parties to the action

may reside in the forum and even though the cause of action may be completely unrelated to the forum.5

In May 1990, the United States Supreme Court, in Burnham v. Superior Court,6 reaffirmed the validity of transient jurisdiction. Burnham, a landmark case destined for law school casebooks,7 held that the due process clause of the fourteenth amendment is not violated when personal jurisdiction is obtained over a nonresident defendant based solely on the doctrine of transient jurisdiction.8

This note will first offer a brief history of personal jurisdiction relating to the evolution of transient jurisdiction. Included will be the current status of transient jurisdiction as treated by American courts, commentators, and the American Law Institute. Second, this note will analyze the fragmented opinion of Burnham as the Court attempted to establish a basis for the doctrine of transient jurisdiction. Finally, this note will attempt to reconcile the results that Burnham’s confusing opinion will have on future transient jurisdictional disputes.9

II. History

A. Personal Jurisdiction

Pennoyer v. Neff,10 the seminal American case defining the two basic principles of jurisdiction, held that “every State possesses exclusive juris-

5. Id.; see also Burnham v. Superior Court, 110 S. Ct. 2105, 2120 n.1 (1990) (Brennan J., concurring) (defining transient jurisdiction as “jurisdiction premised solely on the fact that a person is served with process while physically present in the forum State”).

6. 110 S. Ct. 2105 (1990) (Scalia, J., announced the judgment of the Court and delivered an opinion in which Rehnquist, C.J., and Kennedy, J., joined, and in which White, J., joined as to parts I, II-A, II-B, and II-C. Brennan, J., filed an opinion concurring in the judgment, in which Marshall, Blackmun, and O’Connor, JJ., joined. White, J., filed an opinion concurring in part and concurring in the judgment. Stevens, J., filed an opinion concurring in the judgment).


8. Burnham, 110 S. Ct. at 2119.

9. This note will not include the related but separate issue of whether the presence of an agent or employee of a corporation in a forum will constitute presence of the corporation such that personal jurisdiction may be obtained over the corporation by service of process of the agent. One court specifically noted the significance of the distinction between the presence of an individual and the presence of a corporation in transient jurisdictional questions. Scholz Research & Dev., Inc. v. Kurzke, 720 F. Supp. 710 (N.D. Ill. 1989). Scholz held that physical service of an individual is sufficient to confer personal jurisdiction over an individual but physical service of an agent or officer of a corporation is insufficient to confer personal jurisdiction over the corporation. Id. at 713.

10. 95 U.S. 714 (1879). In Pennoyer, Neff brought an ejectment action against Pennoyer seeking to recover land held by Pennoyer. Pennoyer had purchased the land in a sheriff’s sale which was conducted to execute an earlier default judgment obtained in a suit against Neff by Mitchell. The suit by Mitchell was brought in an Oregon state court. At the time of the Mitchell suit, Neff was not a resident of Oregon, but an Oregon statute allowed service by publication on nonresidents who had property within the state. Mitchell served Neff by publication in an Oregon newspaper. The Supreme Court, ruling that the Oregon statute was
diction and sovereignty over persons and property within its territory."¹¹ The second principle of Pennoyer is that "no State can exercise direct jurisdiction and authority over persons or property without its territory."¹² Under Pennoyer, a defendant's physical presence within the forum is a prerequisite to the forum's ability to render a judgement personally binding on the defendant.¹³ The doctrine of transient jurisdiction evolved from the basic principles in Pennoyer.

Pennoyer illustrates the historic belief that all assertions of jurisdiction must be based on the physical power of a forum. The Pennoyer decision thus became known as the "power theory,"¹⁴ under which a court has the power to assert jurisdiction over an individual solely because the individual is served in the forum.¹⁵

Supreme Court decisions following Pennoyer have resulted in considerable weakening of the Pennoyer power theory.¹⁶ In International Shoe Co. v. State of Washington,¹⁷ for example, the Supreme Court recognized that the due process clause does not absolutely require that states follow strict territorial limits on jurisdiction.¹⁸ The Court held that a defendant need not be physically present in the forum for the forum to obtain personal jurisdiction over the defendant.¹⁹ As long as the defendant has minimum contacts with the forum such that the maintenance of the suit would be consistent with "traditional notions of fair play and substantial justice," no due process violation arises.²⁰

The effect of International Shoe on the power theory of Pennoyer is that a defendant's minimum contacts with the forum state substitute for the

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¹¹ Id. at 722.
¹² Id.
¹³ Id. at 733-34 (emphasis added). Pennoyer held that a judgment by a court lacking personal jurisdiction violates the due process clause of the fourteenth amendment. Id. at 733.
¹⁴ See generally Ehrenzweig, supra note 3.
¹⁵ Brilmayer, supra note 3, at 748. Pennoyer apparently relied on Justice Story's statement that "[w]here a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him." Pennoyer, 95 U.S. at 724.
¹⁶ Bernstine, supra note 1, at 40.
¹⁷ 326 U.S. 310 (1945). International Shoe was incorporated in Delaware, but had its principle place of business in Missouri. International Shoe had no place of business in Washington, but it did employ residents in Washington who displayed samples and solicited orders for International Shoe. The state of Washington sued International Shoe to force it to make contributions to Washington's unemployment compensation fund. Washington served process on one of International Shoe's salesmen in Washington. International Shoe claimed there was no in personam jurisdiction because International Shoe was not a Washington corporation and was not doing business within Washington. The Court held that Washington had in personam jurisdiction over International Shoe. Id. at 320.
¹⁸ Id. at 319.
¹⁹ Id. at 316.
²⁰ Id. (quoting Milliken v. Meyer, 311 U.S. 457 (1940)).
defendant's physical presence. However, *International Shoe* did not change the applicability of the *Pennoyer* power theory when the defendant was physically present in the forum.21 Even after *International Shoe*, a defendant's physical presence in the forum was still a sufficient basis for personal jurisdiction regardless of whether the defendant had minimum contacts with the forum.22

In 1977, the Supreme Court case of *Shaffer v. Heitner*23 prompted commentators to reconsider whether a defendant’s physical presence in a forum, absent minimum contacts, is still sufficient as the sole basis in obtaining personal jurisdiction. Prior to *Shaffer*, a defendant's mere physical presence within a forum was sufficient under the power theory of *Pennoyer* to obtain personal jurisdiction.24 Justice Marshall, however, altered the concept that physical presence alone is sufficient for personal jurisdiction by stating in *Shaffer* that “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”25

The *Shaffer* holding, that a forum’s physical power over property is insufficient to justify in rem jurisdiction,26 clearly undermines the power theory of *Pennoyer*. In similar fashion, Justice Marshall’s broad statement27 implies that future assertions of in personam jurisdiction must also be based on the minimum contacts test of *International Shoe*. The question thus arose, after *Shaffer*, whether a nonresident defendant’s transient presence within a forum, absent any other contacts with the forum, is sufficient to establish in personam jurisdiction over the defendant.28

21. Id. *International Shoe* created an explicit exception to the minimum contacts test for situations when the defendant is present in the forum by stating that “due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with [the forum]. . . .” Id. (emphasis added).

22. Bernstein, supra note 1, at 45.

23. 433 U.S. 186 (1977). In *Shaffer*, the plaintiff filed a shareholder’s derivative suit against Greyhound Corporation, a Delaware corporation with its principle place of business in Arizona. The plaintiff, a nonresident of Delaware, filed the suit in Delaware. The Delaware court, pursuant to a state sequestration statute, acquired quasi in rem jurisdiction over Greyhound by sequestering Greyhound’s property. Greyhound’s property within the state consisted mostly of stocks and corporate options. Greyhound claimed that the sequestration statute violated due process because Greyhound’s contacts with Delaware were insufficient to constitute minimum contacts. The Court held that Delaware’s assertion of quasi in rem jurisdiction must satisfy the minimum contacts standard of fairness in *International Shoe*. Id. at 212.

24. See supra text accompanying notes 21-22.


26. In rem jurisdiction is defined as a “technical term used to designate proceedings or actions instituted against the thing, in contradistinction to personal actions, which are said to be in personam.” BLACK’S LAW DICTIONARY 713 (5th ed. 1979) (emphasis in original). Jurisdiction over property would be included as in rem jurisdiction.

27. See supra text accompanying note 25.

28. Commentators argue that the effect of *Shaffer* is to prohibit a state court from obtaining personal jurisdiction over a nonresident defendant based solely on the defendant’s transitory presence in the forum. See supra note 3.
B. Transient Jurisdiction

Commentators disagree about the common law history of transient jurisdiction.\(^{29}\) As to the modern concept of transient jurisdiction, the weight of judicial authority recognizes the validity of transient jurisdiction.\(^{30}\) A handful of modern cases, however, hold that transient jurisdiction is an invalid jurisdictional doctrine.\(^{31}\) The following three cases are illustrative of the varying approaches courts have used to disapprove of the doctrine of transient jurisdiction.

Bershaw v. Sarbacher\(^ {32}\) held that transient jurisdiction over a natural person is not a sufficient basis upon which to obtain personal jurisdiction. In Bershaw, the plaintiff and her minor daughter filed a paternity action in Washington against the defendant. The defendant was served while he was visiting Washington upon the request of the plaintiff. The court held that the defendant’s physical presence in Washington would not justify personal jurisdiction over the defendant because all assertions of jurisdiction

\(^{29}\) Compare Bernstine, supra note 1, at 44 (noting that the doctrine of transient jurisdiction has “so permeated” judicial reasoning that it has rarely been challenged) with Ehrenzweig, supra note 3, at 293-96 (noting that the doctrine of transient jurisdiction may not be as entrenched as many commentators believe). The dispute as to the history of transient jurisdiction was continued in Burnham between Justices Scalia and Brennan. See Burnham, 110 S. Ct. at 2110-13, 2122-25. A comprehensive analysis of the common law history of transient jurisdiction is beyond the scope of this note. For a detailed analysis of the common law history of transient jurisdiction, see Ehrenzweig, supra note 3, at 312; Werner, supra note 1, at 568-71.


must be evaluated according to International Shoe. The terse treatment of transient jurisdiction in Bershaw does not shed light on the justification for invalidating the doctrine of transient jurisdiction.

A more enlightening case, which disapproves of transient jurisdiction, is Harold M. Pitman Co. v. Typecraft Software, Ltd. In Pitman, an Illinois corporation brought an action against both a British corporation and a United Kingdom resident for breach of contract. The United Kingdom resident was personally served while in Illinois attending a business convention. Pitman held that mere service of process of the United Kingdom resident in Illinois does not vest Illinois with personal jurisdiction.

According to the court, none of the cases cited by the plaintiff in support of transient jurisdiction seriously considered the effect that Shaffer had on transient jurisdiction. The court emphasized that Shaffer expressed its preference for "assessing assertions of jurisdiction by a single standard." Relying on Shaffer, the court used the oft-quoted Shaffer statement that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." The Third Circuit's decision in Nehemiah v. Athletics Congress of U.S.A. is often quoted as supporting the proposition that transient jurisdiction is an invalid method to obtain personal jurisdiction. In Nehemiah, agents of the International Amateur Athletic Federation (IAAF), an unincorporated association, were personally served in New Jersey. The court held that

33. Id., 700 F.2d at 349. The court stated that the defendant's "transient presence in Washington was insufficient to require him to conduct his defense in Washington." Id.
34. 626 F. Supp. 305 (N.D. Ill. 1986).
35. Id. at 312.
37. Id. at 312 (quoting Shaffer v. Heitner, 433 U.S. 186, 209 (1977)). The court apparently interprets Shaffer as implying an intention to apply the minimum contacts test to all types of jurisdictional questions, presumably including in personam jurisdiction. Accordingly, applying the minimum contacts test to in personam jurisdiction would preclude the validity of the doctrine of transient jurisdiction.
38. Id. Pitman also emphasized the public policy effects of allowing transient jurisdiction: Under Shaffer, a court may not sequester a defendant's property and assert in rem or quasi in rem jurisdiction unless there are minimum contacts between the defendant, the litigation and the forum. Were the court to hold that minimum contacts need not be present for an exercise of in personam jurisdiction over a defendant present in the jurisdiction when served, the court would thereby accord less protection to an individual defendant than to his or her property within the state. Surely the Shaffer Court did not intend such an illogical and unfair result. (citation omitted). Moreover, transient jurisdiction may constitute an unwarranted and undesirable burden on commerce.
39. 765 F.2d 42 (3d Cir. 1985).
40. Purposefully excluded from this note are the facts concerning whether IAAF had minimum contacts with New Jersey. The court limited its analysis to the issue of whether personal service of process was sufficient to obtain personal jurisdiction because the lower
neither logic nor history supports the assertion of personal jurisdiction over an unincorporated association based solely on service of its agent within the forum.\textsuperscript{41} Because \textit{Nehemiah} focused mainly on the validity of obtaining personal jurisdiction over an unincorporated association through the physical service of one of the association's agents, the usefulness of \textit{Nehemiah} to the focus of this note is limited.\textsuperscript{42}

The Oklahoma Supreme Court has not specifically addressed the issue of transient jurisdiction.\textsuperscript{43} However, it is possible to predict from Oklahoma's treatment of personal service of process that Oklahoma would validate transient jurisdiction. On numerous occasions, the Oklahoma Supreme Court has held that personal service of process is void if the process is obtained by enticing the potential defendant into the territorial jurisdiction of the court by means of fraud, deceit, trick, or devise.\textsuperscript{44} Accordingly, Oklahoma implicitly recognizes the inherent power that service of process has to confer personal jurisdiction over the person served. There would be no compelling reason to void the service of process if the service of process did not itself confer personal jurisdiction.\textsuperscript{45} Thus, Oklahoma apparently would recognize the validity of transient jurisdiction as a method to obtain personal jurisdiction.\textsuperscript{46}

\begin{itemize}
\item[41.] Id. at 47.
\item[42.] Id. at 46. In \textit{Nehemiah}, the court stated in dicta that "[i]t is arguable that the transient presence basis for jurisdiction over any defendant, including an individual, is no longer viable." \textit{Id.} (emphasis added). Relying on \textit{Shaffer}, the court also stated that "[i]f the mere presence of property cannot support quasi \textit{in rem} jurisdiction, it is difficult to find a basis in logic and fairness to conclude that the more fleeting physical presence of a nonresident person can support personal jurisdiction." \textit{Id.} at 47 (emphasis in original).
\item[43.] An analysis of Oklahoma statutory law also fails to clearly answer the question of whether Oklahoma would recognize the validity of transient jurisdiction. The Oklahoma Pleading Code states that "'[a] court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States.' 12 \textit{Okla. Stat.} \textsection 2004(F) (Supp. 1989). Some states have statutes which specifically allow personal jurisdiction to be asserted over nonresident defendants based solely on the defendant's transient presence in the forum. \textit{See}, e.g., \textit{Alaska Stat.} \textsection 09.05.015(a)(1)(A) (1990); \textit{Mich. Comp. Laws Ann.} \textsection 600.701(1) (West 1981); \textit{N.C. Gen. Stat.} \textsection 1-75.4(1)(a) (1983); \textit{N.D. R. Civ. P. 4(b)(1)} (1990); \textit{Or. R. Civ. P. 4A.1} (1989); \textit{Wis. Stat. Ann.} \textsection 801.05(1) (West 1977).
\item[45.] \textit{See} \textit{Anderson v. Atkins}, 161 Tenn. 137, 29 S.W.2d 248 (1930).
\item[46.] \textit{But see} \textit{Barnes v. Wilson}, 580 P.2d 991, 993-94 (Okla. 1978) (there is no automatic formula which can be used to determine whether a court has in personam jurisdiction over a nonresident). \textit{Barnes} is apparently in conflict with the basic premise behind transient jurisdiction, which is that there is an automatic formula (physical presence = personal jurisdiction) if the person is physically served within the forum. \textit{Barnes} emphasizes the necessity in applying the minimum contacts test as a general guideline in determining questions of personal jurisdiction over nonresident defendants. \textit{Id.} at 993. The doctrine of transient jurisdiction does not utilize a minimum contacts test in its analysis. \textit{See supra} text accompanying notes 4-5.
\end{itemize}
The American Law Institute (ALI) has furthered the confusion as to whether transient jurisdiction is a valid basis for personal jurisdiction. Prior to Shaffer, the ALI clearly favored the validity of transient jurisdiction.\(^47\) However, following Shaffer, the ALI's staunch approval of transient jurisdiction lessened.\(^48\)

Additionally, the revised Restatement (Second) of Conflict of Laws adds even more confusion by attempting to incorporate both physical presence and minimum contacts into a single proposition.\(^49\) The revision states that "[a] state has power to exercise judicial jurisdiction over an individual who is present within its territory unless the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable."\(^50\)

The ALI's attempt to reconcile Shaffer with the doctrine of transient jurisdiction is both unhelpful and inconsistent. By qualifying a state's power to exercise jurisdiction over a physically present individual, the ALI allows an individual who is personally served within a forum to escape jurisdiction if he can prove that jurisdiction would be unreasonable. The ALI's revision contravenes the basic premise of transient jurisdiction because the doctrine of transient jurisdiction is based solely on the presence of the individual, regardless of whether jurisdiction may be unreasonable.

III. Burnham v. Superior Court

A. Facts

Dennis Burnham and Francie Burnham married in 1976 in West Virginia. The following year, the couple moved to New Jersey, where their two children were born. In July 1987, the Burnhams separated. Mrs. Burnham took custody of the children and moved to California. Prior to Mrs. Burnham's departure for California, the couple agreed that they would file for divorce on the grounds of irreconcilable differences. Mr. Burnham continued to live in New Jersey after Mrs. Burnham moved to California.

47. See Restatement (Second) of Conflict of Laws § 28 (1971). "A state has power to exercise judicial jurisdiction over an individual who is present within its territory, whether permanently or temporarily." \textit{Id}. A defendant's "presence in the state, even for an instant, gives the state judicial jurisdiction over him." \textit{Id}. § 28 comment a.

48. Restatement (Second) of Judgments § 8 comment a (1982). The Restatement (Second) of Judgments comments that Shaffer seems to undercut the proposition that a defendant's presence gives the state jurisdiction. \textit{Id}. The comment states that "the effect of Shaffer v. Heitner is considerable. It would establish 'minimum contacts' in place of presence as the principle basis for territorial jurisdiction." \textit{Id}. 

49. Restatement (Second) of Conflict of Laws § 28 (proposed revisions 1986).

50. \textit{Id}. § 28 (emphasis added). Comment b also provides:

[C]onsiderations of reasonableness qualify the power of a State to exercise personal jurisdiction over an individual on the basis of his physical presence within its territory. Jurisdiction will exist in such a case if the individual's relationship to the state can justly be described as significant, which would be the case if he has been present there for a substantial period of time.

\textit{Id}. § 28 comment b (proposed revisions 1986) (emphasis added); see also \textit{Id}. §§ 16-17 (proposed revisions 1986).
In October 1987, Mr. Burnham filed for divorce in New Jersey state court. Mr. Burnham did not attempt to serve process on Mrs. Burnham. In January 1988, Mrs. Burnham filed for divorce in California state court. In the same month, Mr. Burnham travelled to California for three days to conduct business and to visit his children. Mr. Burnham was served in California while at his wife's home. Mr. Burnham then returned to New Jersey.

Mr. Burnham later returned to California and made a "special appearance" in the California Superior Court. Mr. Burnham moved to quash the service of process, claiming that the California court lacked personal jurisdiction over him. The California Superior Court upheld the service of process on Mr. Burnham. The California Court of Appeals denied Mr. Burnham's writ of mandamus. The United States Supreme Court granted Mr. Burnham's writ of certiorari in October 1989.

B. Holding

The issue presented to the Supreme Court was whether the due process clause of the fourteenth amendment allows a California court to assert personal jurisdiction over a nonresident individual based on personal service of process while the nonresident is temporarily in California on business unconnected with the cause of action. The Court was unanimous in its decision that the service of process in California was sufficient to allow California to assert personal jurisdiction over Mr. Burnham. Although the justices were unanimous in their decision, the justices split 4-4-1 in their reasoning.

C. The Burnham Opinions

1. The Scalia Alliance

Proposing that the validity of transient jurisdiction is proven by historical precedent, Justice Scalia cited English cases dating back to 1675 and Amer-

51. Burnham, 110 S. Ct. at 2109. During Mr. Burnham's visit to California, Mr. Burnham took his older child to visit San Francisco for the weekend. Apparently Mr. Burnham was served while returning the child to Mrs. Burnham's house.

52. Id. A "special appearance" is defined as a submission to the jurisdiction of a court for some specific purpose only, not for all purposes of the lawsuit. BLACK'S LAW DICTIONARY 89 (5th ed. 1979). A special appearance allows the defendant to object to the jurisdiction of the court without submitting to such jurisdiction. Id.

53. Burnham, 110 S. Ct. at 2109.

54. Id.

55. Id.

56. Id.

57. Id.

58. Id. at 2115.

59. For the composition of the Burnham Court, see supra note 6.

60. See Burnham, 110 S. Ct. at 2109-17. Justice Scalia's opinion announced the judgment of the Court. His opinion is divided into three parts. He was joined in parts I, II-A, II-B, and II-C by Chief Justice Rehnquist and Justices Kennedy and White. Chief Justice Rehnquist and Justice Kennedy joined in parts II-D and III. Justice White failed to join Justice Scalia's
ican cases dating back to 1793. According to Justice Scalia, the few American cases since 1978 which have invalidated the doctrine of transient jurisdiction are erroneous. Justice Scalia summarized his proposition with the broad statement that there is neither a state or federal statute nor a state judicial decision that has abandoned in-state service of process as a basis for jurisdiction.

Justice Scalia introduced the next part of his opinion by stating that Mr. Burnham’s reliance on the International Shoe standard for the assertion that there must be “continuous and systematic” contacts in all assertions of personal jurisdiction is incorrect. According to Justice Scalia, the International Shoe standard was developed to recognize the fact that due process does not necessarily require that states adhere to the strict territorial limits in Pennoyer. The minimum contacts test of International Shoe is not necessary in jurisdictional questions when the defendant is present in the forum. Rather, the minimum contacts test of International Shoe substitutes for the physical presence of the defendant as the basis for jurisdiction. Justice Scalia concluded that nothing in International Shoe or its progeny supports the proposition that a defendant’s presence in a forum is insufficient to establish personal jurisdiction.

The next part of Justice Scalia’s opinion addressed Shaffer’s effect on the doctrine of transient jurisdiction. Justice Scalia commented that Mr. Burnham’s strongest argument relied on Shaffer. Mr. Burnham offered the Shaffer statement that “all assertions of state-court jurisdiction must

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61. Id. at 2110-11. Justice Scalia stated:

Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State. The view developed early that each State had the power to hale before its courts any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the State could retain jurisdiction to enter judgment against him, no matter how fleeting his visit.

Id. at 2110. (emphasis added). Justice Scalia cited approximately forty cases to support his proposition. Id. at 2110-13. He also noted that Justice Story traced the doctrine of transient jurisdiction to Roman origins. Id. at 2111.
62. Id. at 2113.
63. Id.
64. See id. This is part II-C of the Justice Scalia opinion.
65. Id. at 2113. Mr. Burnham argued that the result of International Shoe was to change the focus in all personal jurisdiction questions to include the minimum contacts test.
66. Id. at 2114 (emphasis in original).
67. Id.
68. Id.
69. Id. at 2115. Justice Scalia also stated that the proposition that a defendant’s presence is insufficient to establish personal jurisdiction is “unfaithful to both elementary logic and the foundations of our due process jurisprudence.” Id.
70. See id. This is part II-D of Justice Scalia’s opinion.
71. Id.
be evaluated according to the standards set forth in *International Shoe* and its progeny as supporting the proposition that a defendant must have minimum contacts with the forum, even in cases of the defendant’s transitory presence, in order for the forum to obtain personal jurisdiction. Complex analysis was employed in disagreeing with Mr. Burnham’s proposition.

Justice Scalia initially reemphasized his argument that *Shaffer*, like *International Shoe*, involved an absent defendant and therefore “stands for nothing more than the proposition” that the minimum contacts standard is a substitute for physical presence. Justice Scalia maintained that when the *Shaffer* statement is read in context with its preceding two sentences, *Shaffer* indicates that the only categories of jurisdiction which are required to satisfy the minimum contacts test are those based on absent defendants, such as quasi in rem jurisdiction. The Court has traditionally treated the two classes of defendants, absent defendants and physically present defendants, separately. *Shaffer* cannot be read to signal an intention that physically present defendants must now be treated identically with absent defendants. Justice Scalia concluded that the minimum contacts test of *International Shoe* applies only to absent defendants and that nothing in *Shaffer* expands that requirement.

Finally, Justice Scalia refused to render an opinion as to whether the transient jurisdiction rule is fair or desirable, leaving that debate to state legislatures. Satisfied by his analysis that transient jurisdiction satisfies traditional notions of fair play and substantial justice, Justice Scalia left the door open to forthcoming disputes by stating that future procedures, unknown today, may require new analysis to determine whether traditional notions of fair play and substantial justice have been violated.

2. *The Brennan Alliance*82

Justice Brennan wrote the concurring opinion in *Burnham*. Brennan immediately expressed dissatisfaction with Justice Scalia’s extensive dependence on historical precedent. Relying on *Shaffer*, Brennan stated that “all

72. Id.
73. Id.
74. See supra note 25 and accompanying text.
75. The preceding two sentences of the *Shaffer* statement are “[t]he 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.” *Shaffer*, 433 U.S. at 212.
76. *Burnham*, 110 S. Ct. at 2116.
77. Id.
78. Id.
79. Id.
80. Id.
81. Id.
82. See id. at 2120-26. Justice Brennan was joined by Justices Marshall, Blackmun, and O’Connor. Notably, Justice O’Connor, normally part of the conservative majority, joined Justice Brennan.
83. Id. at 2120 (Brennan, J., concurring).
rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process." Even ancient doctrines may violate due process when new procedures, unknown when the ancient doctrines were widely accepted, are adopted. The crux of Brennan's position was that the doctrine of transient jurisdiction, even if based on historical precedent, should not automatically be exempt from the requirement that it satisfy contemporary notions of due process.

Justice Brennan agreed with Justice Scalia that the holding in *Shaffer* may have been limited to quasi in rem jurisdiction, but refused to concede that the analysis in *Shaffer* is as limited as Justice Scalia suggested. Brennan stressed the fact that *Shaffer* was a reexamination of the appropriateness of the quasi in rem jurisdiction rule, a rule faithfully condoned in American courts for one hundred years; therefore, *Shaffer* characterizes the Court's willingness to disregard historical precedent when due process requires. Summarizing, Justice Brennan stated that every assertion of jurisdiction, including transient jurisdiction, even if entrenched in judicial precedent, must comport with contemporary notions of due process.

Next, responding to Justice Scalia's assertion that transient jurisdiction is ingrained in American jurisprudence, Justice Brennan cited cases from the seventeenth century which demonstrated a judicial unwillingness to accept transient jurisdiction. Brennan conceded that transient jurisdiction was widely accepted following *Pennoyer*. However, Brennan utilized the prevalence of transient jurisdiction following *Pennoyer* to support his proposition that a defendant who enters a forum has notice and a reasonable expectation that he may be subject to the jurisdiction of the forum.

84. *Id.* (emphasis added).
85. *Id.* at 2121.
86. *Id.*
87. *Id.* Justice Brennan also noted that Justice Scalia admitted that historical precedent may be disregarded when historical precedence conflicts with contemporary notions of due process:

Even Justice SCALIA's opinion concedes that *sometimes* courts may discard "traditional" rules when they no longer comport with contemporary notions of due process. For example, although, beginning with the Romans, judicial tribunals for over a millennium permitted jurisdiction to be acquired by force, (citation omitted) by the 19th century, as Justice SCALIA acknowledges, this method had largely disappeared. (citation omitted). I do not see why 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.

*Id.* at 2121 n.3 (emphasis in original).
88. *Id.* at 2121-22.
89. *Id.* at 2122-24. In complete disagreement with Justice Scalia, Justice Brennan stated that the rule of transient jurisdiction was "a stranger to the common law" and "weakly implanted in American jurisprudence" at the time that the fourteenth amendment was adopted. *Id.* at 2122-23.
90. *Id.* at 2123-24.
91. *Id.* at 2124. Justice Brennan also cited Justice Stevens' concurrence in *Shaffer* in support of the proposition that the rule of transient jurisdiction is consistent with reasonable expectations of defendants. *Id.* at 2124. Justice Stevens states in *Shaffer* that "[i]f I visit another State, . . . I knowingly assume some risk that the State will exercise its power over
The final portion of Justice Brennan's concurring opinion is undoubtedly the most controversial. Brennan declared:

By visiting the forum State, a transient defendant actually "avail[s]" himself of significant benefits provided by the State. His 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.92

According to Justice Brennan, Mr. Burnham's ability to utilize the above stated benefits while in California supplies the minimum contacts with California such that jurisdiction over Mr. Burnham comports with contemporary notions of due process. Brennan does not concede that Mr. Burnham's presence in California is singly sufficient to allow California to obtain personal jurisdiction. Rather, Brennan's position is that, on the facts of this case, Mr. Burnham's presence in California satisfies contemporary notions of due process.

Finally, Justice Brennan preempted the argument that a transient defendant may be burdened by the requirement that the defendant litigate in a forum in which his only contact may be his momentary presence.93 Brennan remarked that modern transportation and communications lessen this potential burden.94 Additionally, the fact that the defendant was in the forum on at least one previous occasion, presumably when the defendant was served, indicates to Brennan that a suit in the forum would not be "prohibitively inconvenient."95

3. The Stevens Opinion96

Justice Stevens, who was not joined by any other justice, concurred in the judgment of the Court. Stevens' brief concurrence stated, without further explanation, that both the Scalia and Brennan opinions are too broad.97 Stevens approved of both Justice Scalia's use of historical precedent and Brennan's considerations of fairness.98

4. The White Opinion99

Justice White acknowledged that the rule of transient jurisdiction is "widely accepted throughout this country."100 White maintained that until

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92. *Burnham*, 110 S. Ct. at 2124-25 (Brennan, J., concurring) (citation omitted).
93. Id. at 2125.
94. Id.
95. Id.
96. Id. at 2126 (Stevens, J., concurring).
97. Id.
98. Id.
99. See id. at 2119-20. Justice White joined Justice Scalia in part I, parts II-A, II-B, and II-C.
100. Id. at 2119.
it can be shown that the rule of transient jurisdiction is "so arbitrary and lacking in common sense in so many instances that it should be held violative of Due Process in every case," the Court should not entertain claims of nonresident defendants subject to the rule.101

5. Justice Scalia’s Response to the Brennan Concurrence102

Justice Brennan’s concurrence prompted a fervent response from Justice Scalia. Scalia disagreed with Brennan’s proposition that satisfying contemporary notions of due process requires that transient jurisdictional disputes be evaluated according to each justice’s subjective assessment of what is fair.103 Justice Scalia warned that Justice Brennan’s proposed requirement, that the justices utilize their own notions of fair play and substantial justice, would contravene the International Shoe test, which requires the consideration of traditional notions of fair play and substantial justice.104

Justice Scalia’s main disagreement with Justice Brennan’s opinion was that Brennan did not establish a standard which could be easily applied.105 Scalia complained that Brennan’s conclusion — that jurisdiction over Mr. Burnham is appropriate — is based solely on the specific facts of the case.106 In fact, Justice Scalia objected to Brennan’s use of the word “rule” to describe Brennan’s proposition.107 Justice Scalia characterized Brennan’s approach as a “totality of the circumstances” test which guaranteed litigation and uncertainty, the same problems that traditional territorial rules of jurisdiction were originally designed to avoid.108 Justice Scalia pondered how the Brennan opinion would change if, for example, Mr. Burnham was in California for only fifteen minutes, as opposed to three days.109

D. Analysis of the Burnham Opinions

Justice Scalia unequivocally supported the traditional rule that mere service of process on a nonresident defendant is a valid method to assert personal jurisdiction over a defendant. Justice Scalia relied heavily on historical precedent as a basis for his opinion.

101. Id. at 2119-20.
102. See id. at 2117-19.
103. Id. at 2117. Justice Brennan, in apparent response to this assertion by Justice Scalia, noted that he intimated that each justice’s inquiry should be guided not by subjective intent, but by International Shoe and its progeny. Burnham, 110 S. Ct. at 2122 n.7. Brennan stated that the Court’s experience with the International Shoe approach demonstrates the Court’s competency in employing it. Id.
104. Id. at 2117.
105. Id. at 2118.
106. Id. at 2118-19.
107. Id.
108. Id. at 2119.
109. Id. at 2118. Justice Scalia also questioned whether Justice Brennan’s opinion that jurisdiction over Mr. Burnham was “fair” would still be considered fair if Mr. Burnham was in California to visit a sick or dying child. Id.
The advantage of Justice Scalia's opinion is certainty in application of the doctrine of transient jurisdiction. Scalia supported the assertion of personal jurisdiction over a defendant who is served within the forum, regardless of contacts or lack of contacts with the forum. Thus, personal jurisdictional disputes in cases when the defendant is served in the forum would be reduced to the simple inquiry of whether the defendant was actually served during a moment in time when the defendant was physically within the boundaries of the forum. Under Justice Scalia's proposition, the minimum contacts test is inapplicable in situations when a defendant is physically served in the forum.

An objection to the Justice Scalia opinion is the same objection that commentators have long had with the doctrine of transient jurisdiction — forcing a transient defendant to litigate a claim in a forum in which his only contact was his momentary presence is unfair. Scalia sacrificed the possible inequitable results of forcing a transient defendant to litigate in the state in which the defendant has no other contacts except for the physical service of process for the advantage of the simplistic rule that physical service of process automatically confers personal jurisdiction.

Justice Brennan's opinion, however, focused more on the possible inequities of transient jurisdiction than on the appeal of a simple standard. Brennan supported the proposition that the minimum contacts test of International Shoe must be applied in all assertions of personal jurisdiction. Consequently, the mere service of process of a transient defendant may be insufficient as a basis for personal jurisdiction if the defendant's contacts with the forum are so minimal that the assertion of jurisdiction would violate notions of fair play and substantial justice.

IV. The Ramifications of Burnham

The effect that Burnham will have on the doctrine of transient jurisdiction remains unclear. Undoubtedly, courts will be confused by the badly fractured assortment of opinions. The obvious effect of Burnham will be to quell commentators' opinions that the doctrine of transient jurisdiction is dead. Many courts will question whether Burnham adopted a "sweeping rule" that transient jurisdiction is valid in all instances or merely offered another situation in which to apply the minimum contacts test.

110. See Bernstine, supra note 1, at 60-62; Ehrenzweig, supra note 3, at 289-90; Werner, supra note 1, at 588.
111. See Smith v. Smith, 459 N.W.2d 785 (N.D. 1990). Smith, one of the first courts to address Burnham, stated:

Because Joan [the defendant] was not served personally in North Dakota, we need not struggle to analyze or apply the various opinions in Burnham. Those opinions, although reaching the same result, take differing views of the effect of Shaffer, and whether or not personal service is, alone, a valid predicate for in personam jurisdiction in the forum State. Presumably, we will be further enlightened as to the Supreme Court's position in future decisions.

Id. at 788 n.3 (citation omitted).
112. See supra note 3.
The Scalia alliance would obviously support an absolute rule, based on the Pennoyer power theory. The alliance reasoned that service of process over the defendant will be effective in obtaining personal jurisdiction over the defendant in all conceivable instances. The Brennan alliance opposed an absolute rule and, accordingly, criticized Justice Scalia for advocating

113. See supra text accompanying notes 64-69. Surprisingly, not even the attorney representing Mrs. Burnham supported the adoption of an absolute rule that transient jurisdiction was valid in all situations. The following colloquium between the attorney and the Court is enlightening:

   Attorney: The father's presence in California was not transient; he had been in the state over 20 times before.
   Justice White: Can he be served in New York?
   Attorney: My personal view is that he could.
   Justice O'Connor: Is it okay if he were served while flying over a state?
   O'Connor: What about service while changing planes in an airport?
   Attorney: I'd have a harder time justifying that, but it isn't necessary to resolve that situation.
   O'Connor: But the power theory would resolve that, would it not?
   Attorney: Yes.
   O'Connor: And is that the theory you espouse?
   Attorney: No. The ALI rule [Restatement (Second) of Conflict of Laws § 28 (1989)] is eminently reasonable; there is no need for the court to issue a sweeping rule.


The Brennan alliance represents the position of Mr. Burnham's counsel, that service of process in and of itself is insufficient to base personal jurisdiction. One would assume the Justice Scalia alliance would represent Mrs. Burnham's position, that service of process is sufficient to confer jurisdiction. It is clear, however, from the above colloquium, that the Justice Scalia alliance adopted a rule even broader than proposed by Mrs. Burnham.

There are four interesting points in the above colloquium. First, the attorney for Mrs. Burnham stated that Grace does not lead to a fair result. Clearly, if the attorney was proposing a rule as broad as adopted by Justice Scalia, the attorney would have answered that the ruling in Grace, regardless of its inequity, was proper because the only relevant inquiry, according to Justice Scalia, would be whether the defendant in Grace was actually physically served while in the forum. Second, the attorney shied away from the question about service of process while a defendant was changing planes in an airport. Under the Scalia approach, the service of process in that instance would be sufficient to confer personal jurisdiction, regardless of the defendant's momentary presence within the territorial boundaries of the forum. Third, the attorney's answer that he does not support the power theory completely contradicts the very theory upon which Justice Scalia's entire opinion was subsequently based.

The final point is the most interesting. The attorney expressed approval of section 28 of the Revised Restatement of Conflicts. See supra note 49. The ALI's opinion is the exact position espoused by Justice Brennan — that physical presence will be sufficient as a basis for personal jurisdiction only if the assertion of jurisdiction over the defendant would be fair. Justice Scalia clearly would disapprove of the ALI's opinion because it does not allow personal jurisdiction in all instances in which the defendant was physically served with process in the forum. Under the Justice Scalia analysis, the concept of fairness is completely excluded.

The importance of this is that the Scalia opinion, even though ruling in favor of Mrs. Burnham, adopted a rule which Mrs. Burnham's counsel did not even support. Justice Scalia's reasoning that transient jurisdiction is based solely on the power theory, with no place for the International Shoe standard, was completely unexpected.
an absolute rule which excludes the minimum contacts analysis. Justice Brennan's alliance viewed transient jurisdiction as valid only in situations in which the defendant's contacts, in addition to the actual service of process, make the assertion of personal jurisdiction over the defendant consistent with notions of fair play and substantial justice.

In addition to the uncertainty as to the rule of law established by Burnham, the Brennan opinion leaves many questions unanswered. Brennan's disapproval of Justice Scalia's sweeping rule sacrifices certainty in future application of the Burnham decision. In future cases, courts attempting to apply the Brennan position will be confronted with the task of applying the minimum contacts standard. Brennan announced no clear standard, except for International Shoe, to assist courts faced with transient jurisdictional questions. Obviously, a case presenting Burnham-like facts would lead to the conclusion that service of process, in addition to the defendant's contacts, is a sufficient basis to assert personal jurisdiction. The real problem arises when the facts of a future case suggest that the defendant, who was served within the forum, had fewer contacts with the forum than Mr. Burnham had with California.

The Scalia position equally creates confusion. Justice Scalia agreed with Justice Brennan on one point — that the doctrine of transient jurisdiction is invalid in cases in which the defendant was not in the forum "voluntarily" when service was made on the defendant.114 This agreement by Justice Scalia creates more problems than it solves.

First, the fact that Justice Scalia would invalidate transient jurisdiction when the defendant is not voluntarily in the forum undermines Scalia's power theory. Scalia's premise is that a forum has jurisdiction over a physically present defendant, without regard to International Shoe. However, by creating an exception to the power theory in cases in which the defendant is forced or fraudulently enticed into the forum, Justice Scalia is impliedly stating that it would be unfair to subject a defendant to the jurisdiction of the court.

Justice Scalia certainly proposed this exception to avoid the potential situation in which a process server could forcibly detain a potential defendant and transport the defendant into the forum in order to serve process. Few people will question the necessity for this exception in a civilized society.

The problem remains, however, that the exception is not justified under the traditional power theory upon which Justice Scalia so heavily relies. Under the traditional power theory, the only question is whether the defendant was physically served within the boundaries of the state.115 When Scalia abandoned this traditional theory in favor of an exception which Scalia believed to be equitable, Scalia was yielding to the same "fairness" evaluation that he criticized Justice Brennan for employing.

114. Burnham, 110 S. Ct. at 2118.
115. See supra notes 12-15 and accompanying text. Justice Brennan noted that the Roman tribunals, for more than a millennium, allowed jurisdiction to be acquired by force. Id. at 2121 n.3.
The second problem in the exception agreed upon by Justices Scalia and Brennan lies in the vagueness of the concept of “voluntarily.” Obviously, instances in which actual force or fraud are used to obtain service over a defendant are not the problem. The problem lies in defining when a defendant is “voluntarily” within the forum. Consider the following hypothetical situations:

(1) the defendant is injured in an automobile accident; the defendant is transported from the accident site to a hospital in the forum state;

(2) the defendant is flying in a plane which is forced to land in the forum state; the plane’s original flight plan was not over the forum state;

(3) the defendant is fulfilling a military commitment; the defendant’s original military assignment was not in the forum state; the defendant is transferred to the forum state.

In each of the above examples, the defendant is physically within the forum when served with process. Justice Brennan would not allow the service of process to confer personal jurisdiction over the defendant because the defendant’s contacts with the forum are so attenuated. Brennan would undoubtedly reason that the assertion of jurisdiction over such a defendant would not comport with the *International Shoe* standard of fair play and substantial justice.

Justice Scalia, however, would be in a difficult position. The fact that the defendant was actually within the borders of the forum state suggests that Scalia would support jurisdiction, regardless of the situation surrounding the defendant’s presence. However, Justice Scalia would be forced to reconcile the fact that the defendant’s presence within the state was not as voluntary as Mr. Burnham’s presence in California. If Scalia failed to find that there was proper personal jurisdiction over the defendant, Scalia would be creating yet another exception to his absolute power theory.

The policy effects of the confusing *Burnham* opinion are significant. Modern technology promotes commerce by allowing business travelers to commute throughout the country on a daily basis. A divorced parent, similar to Mr. Burnham, who yearns to visit his children in another state must weigh the probability of being forced to litigate a claim thousands of miles from his residence against his desire to visit his children. In other words, *Burnham* may have a chilling effect on nationwide travel, resulting in far reaching consequences.

Admittedly, transient jurisdiction is not the most common method to obtain personal jurisdiction. However, in cases of “high stakes” and “big dollars,” the Justice Scalia position will introduce a new concept in service of process. Process servers involved in big cases will become infinitely wise in the daily travel schedules of airlines. Planning a trip will require pre-departure evaluations of the flight plans of the airplane. In cases of divorced parents, the parent’s ability to visit his children in other states may depend on the parent’s ability to avoid process servers.

116. All the examples presented assume that the defendant’s only contact with the forum state is the given situation.
V. Conclusion

Following the Supreme Court decision in *Shaffer*, commentators were of nearly unanimous opinion that the rule of transient jurisdiction was dead. The Supreme Court decision in *Burnham* resurrected this dead rule. *Burnham* will be hailed as a landmark decision in the sphere of jurisdiction. The polar positions taken by the two alliances of Justices Scalia and Brennan result in the Court's announcement of two standards concerning transient jurisdiction. Justice Scalia proposes that the power theory control transient jurisdiction; Justice Brennan proposes that transient jurisdiction, although valid, must be buffered by the minimum contacts test.

Courts will be confronted with the question of which position to follow. Ultimately, courts are likely to utilize the Justice Brennan position as the lesser of two evils. Justice Scalia's opinion is based on outdated concepts of fairness and equity. Moreover, Scalia is unwilling to accept that people of the 1990s are more migratory than people were in the 1877 days of *Pennoyer*.

No absolute rule can account for all contingencies and, hence, the disadvantage of Justice Scalia's proposition. Justice Brennan's proposition to use the minimum contacts test in all instances of transient jurisdictional disputes may be current, but it remains more unpredictable than the absolute rule proposed by Scalia. Brennan's proposition should not be disregarded simply because of the difficulty in its application. The value of Brennan's position lies in its considerations of fair play and substantial justice in all transient jurisdictional disputes. Utilization of Brennan's position will not disrupt the justice system; rather, it will insure that the results of jurisdictional disputes are compatible with society's current concepts of equity and fairness.

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