COMMENT

THE RULES OF TRANSIENT JURISDICTION: SHOULD WE *BURNHAM?*

First year law students are painfully familiar with *Pennoyer v. Neff*,[1] the granddaddy of American jurisdictional precedent. *Pennoyer's* principle, that a court could not obtain in personam jurisdiction over a person unless he was served with process within the forum state, approaches legendary status. The *Pennoyer* legend has not fallen into desuetude, however, as a recent Supreme Court case, *Burnham v. Superior Court of California*,[2] made clear. Through *Burnham*, the *Pennoyer* model has continued justification in modern jurisprudence.

The stability established by *Pennoyer* lasted for nearly seventy years. It was not until *International Shoe Co. v. Washington*[3] that *Pennoyer* was significantly reformulated. *International Shoe* is the seminal case allowing courts to exercise in personam jurisdiction over defendants *without* state borders.

From these two landmark cases and their progeny, two streams of thought have emerged. The first, embodied in *Pennoyer*, involves the traditional rule of transient jurisdiction,[4] which is

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1. 95 U.S. 714 (1878).

2. 110 S.Ct. 2105 (1990).

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

4. Several commentators describe the term "transient jurisdiction" to apply to actions that "may be brought in any court that has jurisdiction of the defendant, and anyone 'personally present' in a state is subject to its 'jurisdiction,' 'whether he is permanently or only temporarily there.'" Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 289 (1956) (quoting RESTATEMENT (FIRST) CONFLICT OF LAWS §§ 77-78 (1934)). Perhaps that idea is expressed most succinctly by Professor Maltz, who describes transient jurisdiction as "the theory that states may always exercise personal jurisdiction over a person served within its territorial boundaries." Maltz, *Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction*, 66 WASH. U.L.Q. 671, 671 (1988). Some commentators refer to the rule by other names. *See* Posnak, *A Uniform Approach to Judicial Jurisdiction After* Worldwide *and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729 (1981); Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 79 (1990) ("tag jurisdiction"); Bernstine, Shaffer v. Heitner: *A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38 (1979) ("catch-as-catch-can" jurisdiction). In *Burnham*, Justice Scalia calls it the "in-state-service rule." *Burnham*, 110 S.Ct. 2105 *passim* (1990).

based squarely on the "power" theory. Under this theory, service of process within the forum state is, by itself, sufficient to give a court in personam jurisdiction. The second stream, springing from *International Shoe,* requires that out-of-state defendants have such "minimum contacts"[5] with the state that a corresponding exercise of jurisdiction comports with "'traditional notions of fair play and substantial justice.'"[6] *Shaffer v. Heitner's*[7] rechanneling of *International Shoe,* however, requires that "*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[8] As a result of this obfuscatory language, the fate of the transient jurisdiction rule is uncertain. At the confluence of these two streams is *Burnham.*

This Comment plots the course of the streams to the watershed. Part I of this Comment briefly summarizes the facts and the various opinions of *Burnham.* Part II traces the development of personal service of process through *Pennoyer* to the current status. Part III examines the significant impact of *International Shoe* on in personam jurisdiction and the transient rule. Part III also describes the inconsistent application of the transient jurisdiction rule in the post-*Shaffer* era. Part IV analyzes in detail the reasoning of the justices in light of both historical precedent and established principles of law. This Comment concludes with the belief that while the transient jurisdiction rule continues to have modern justification, *Burnham* provides no principled justification for retention of the transient rule.

I. FACTUAL ANALYSIS

The petitioner, Dennis Burnham, married Francie Burnham in 1976 in West Virginia. The two moved to Virginia in 1977 and remained there until 1987, at which time they entered into a

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

6. *Id.*

7. 433 U.S. 186 (1977).

8. *Id.* at 212 (emphasis added). I refer to the quoted language as the *Shaffer* "crossroads." In virtually all post-*Shaffer* in personam actions, courts must decipher the meaning of the *Shaffer* Court: whether or not "all" means all assertions of jurisdiction, including in personam actions, or whether it contemplates something different—i.e., that it is limited to in rem and quasi in rem actions. Courts, including those deciding the *Burnham* case, have stood at these crossroads and traveled down divergent paths in a struggle to interpret this ambiguous language.

marital settlement agreement because of domestic disharmony.[9] The agreement provided, in part, that the petitioner would pay the relocation expenses for both his wife and their two minor children. On July 14, 1987, seven days after they signed the agreement, the wife departed for California along with the children. Mr. and Mrs. Burnham agreed that she would initiate a marital dissolution action based on "irreconcilable differences."[10] Notwithstanding this understanding, Mr. Burnham filed for divorce on October 21, 1987, in the state of New Jersey, on the ground of "desertion."[11] Unable to persuade her husband to abandon his action, Mrs. Burnham filed for legal separation in California on January 5, 1988.

Approximately three weeks later, while in California, the husband was personally served with summons to appear in a California court.[12] The husband returned to New Jersey and later made a special appearance in the Superior Court of California to contest its assertion of personal jurisdiction.[13] He argued that his contacts with California were insufficient to pull him within the purview of *International Shoe* and *Shaffer v. Heitner*. He also argued that an assertion of in personam jurisdiction based on mere presence alone does not comport with "fair play and substantial justice." Unpersuaded, both the California Superior Court and the Court of Appeal rejected his argument and held that the combination within the state of presence and service of

9. The validity of the settlement agreement was itself in dispute. The wife claimed at all times that the instrument, which was prepared by the husband's attorney, was procured through fraud and undue influence. The wife based her claim on an assertion that the husband threatened, on various occasions, to "'slap a restraining order' on her to prevent the wife and children from moving to California unless [she] signed the agreement." Brief on the Merits for Real Party in Interest at 6, Burnham v. Superior Court of Cal., 110 S.Ct. 2105 (1990) (No. 89-44) (LEXIS, Genfed library, Briefs file).

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

11. The husband did not serve his wife with summons. Petitioner's Brief on the Merits at 7, Burnham v. Superior Court of Cal., 110 S.Ct. 2105 (1990) (No. 89-44) (LEXIS, Genfed library, Briefs file).

12. The husband had, since 1976 (with the exception of 1984), traveled to California at least once a year on business. He claimed, however, that since the wife's relocation to California these business trips defrayed the costs of visiting his children. It was after such a California business event, while the husband was visiting with his children, that he was served with a California summons. The husband alleged that these meetings were insufficient contacts within the meaning of *International Shoe*. *Id.* at 9.

13. The husband did not challenge the power of the California court to adjudicate the marital status of the relationship. Neither did the Supreme Court reach this issue in light of the well-established principle that "[t]he domicil of one spouse within a State gives power to that State ... to dissolve a marriage wheresoever contracted." Williams v. North Carolina, 325 U.S. 226, 229-30 (1945).

process is a "valid jurisdictional predicate for *in personam* jurisdiction."[14]

Justice Scalia announced the judgment of the Court.[15] Holding firmly to historical tradition, Scalia affirmed the transient jurisdiction rule as a continuing valid exercise of in personam jurisdiction.[16] In a strenuous concurrence, Justice Brennan rejected any attempt to validiate the rule solely on the basis of historical pedigree.[17] Brennan insisted that an "'independent inquiry into the ... fairness of the prevailing in-state service rule'"[18] is paramount.

II. THE ROAD TO *PENNOYER*

At common law, a court obtained personal jurisdiction through *capias ad respondendum*. The writ empowered the sheriff to bring a person physically before the court or to detain him until a trial could be organized. The only way a particular defendant could be released was by posting bond adequate to cover the costs of the potential lawsuit.[19] The court's use of physical power over a defendant provided the assurrance that he would not leave the authority of the court. This step was considered necessary because a defendant who was beyond the court's physical demarcations was also beyond its jurisdictional reach.

The capias writ eventually gave way to the personal service of process, a procedure that the American judiciary later adopted.[20] The rationale underlying the assertion of in personam jurisdiction remained intact, however. Personal service extended a court's reach to the geographic perimeter of the state in which it sat; every person and thing within the state was subject to the

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

15. Justice Scalia was joined by Chief Justice Rehnquist, Justice Kennedy, and in part by Justice White. Justice Brennan filed a concurring opinion in which Justices Marshall, Blackmun, and O'Connor joined. Justice Stevens wrote a brief concurring opinion.

16. "The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system...." *Burnham*, 110 S.Ct. at 2115.

17. "I do not perceive the need, however, to decide that a jurisdictional rule that 'has been immemorially the actual law of the land' automatically comports with due process simply by virtue of its 'pedigree.' Although I agree that history is an important factor ..., I cannot agree that it is the *only* factor such that all traditional rules of jurisdiction are, *ipso facto*, forever constitutional." *Burnham*, 110 S.Ct. at 2120 (Brennan, J., concurring) (citations omitted) (emphasis in the original).

18. *Id.*

19. R. CASAD, JURISDICTION IN CIVIL ACTIONS § 2.02[2][a] (1983).

20. International Shoe Co. v. Washington, 326 U.S. at 316.

authority of the court. This applied to both residents and nonresidents, without regard to either the length of time spent in the state or the fairness of such exercise. The defendant's "presence in the state, even for an instant [gave] the state judicial jurisdiction over him."[21]

The courts did not, however, always claim absolute authority over every person within the geographic limits of the state. The common law and early American jurisprudence provided exceptions to the transient presence approach. Under one exception, certain people were excused from service of summons while visiting a state.[22] This immunity classification included participants in legal proceedings, such as judges, attorneys, and witnesses. The rationale for this immunity was that an arrest of these persons would severely hamper the judicial process and would inhibit interstate travel. Courts also excepted those who were lured into a state by fraud, as well as those who were brought into a state by force.[23]

With the ratification of the fourteenth amendment, the courts began to determine under what circumstances exercise of in personam jurisdiction was consistent with due process. The seminal case was *Pennoyer v. Neff*. In *Pennoyer*, Mitchell, a resident of Oregon, brought an action in that state against a nonresident, Neff, in order to recover certain legal fees. The state court based its exercise of in personam jurisdiction not on personal service of process,[24] but on service by publication.[25] At the state trial, Mitchell prevailed by default judgment. A subsequent court order authorized the sale of property owned by Neff to satisfy the judgment,[26] and Pennoyer purchased the property. Responding with a suit to recover the property, Neff argued that since the Oregon court lacked in personam jurisdiction initially, any proceeding was necessarily invalid.

Finding for Neff, Justice Field relied on territorial sovereignty, the "well-established principles of public law respecting the jurisdiction of an independent State over persons and property."[27] First, Field said, "[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[28]

21. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 comment a (1971).
22. R. CASAD, *supra* note 19, at § 1.06.
23. *Burnham*, 110 S.Ct. at 2112.
24. *Pennoyer*, 95 U.S. at 720.
25. *Id.* at 716.
26. *Id.* at 720.
27. *Id.* at 722.
28. *Id.*

Second, "no State can exercise direct jurisdiction and authority over persons or property without its territory."[29] The case declared that an exercise of in personam jurisdiction over nonresident defendants can be based on one of three criteria: (1) "domicile,"[30] (2) "service of process within the State,"[31] or (3) "his voluntary appearance" within the state.[32]

Thus, *Pennoyer* set the standard upon which the exercise of in personam jurisdiction rested for several decades.[33] With the passage of time, however, rapid technological advances in transportation[34] and corresponding expansion of business vitiated the utility of the *Pennoyer* scheme.[35] Another obstacle facing *Pennoyer* was the seeming unfairness in hauling a person into court simply because he happened to be momentarily within a state's borders when served with process.[36] On the other hand, a nonresident defendant could deliberately remain outside a

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29. *Id.*

30. *Id.* "[E]very State has the power to determine for itself the civil *status* and capacities of its inhabitants...." *Id.* In addition, the court has power over "persons domiciled within its limits." *Id.* at 723. This has continued to remain a valid exception to the presence requirement. *See* Milliken v. Meyer, 311 U.S. 457 (1940) (domicile sufficient to convey jurisdiction regardless of presence).

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

32. *Id.* Since *Pennoyer*, long-arm jurisdiction, which is based on defendant's committing some act within the state, has been recognized as sufficient to confer in personam jurisdiction. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS 77 (1934); R. LEFLAR, AMERICAN CONFLICTS LAW 35-42 (3d ed. 1977).

33. Casad referred to *Pennoyer* as "the case that for a century was looked at as the basic statement of the limits on state court jurisdiction imposed by the fourteenth amendment Due Process." R. CASAD, *supra* note 19, at 2.02[1].

34. "The advent of automobiles, with the concomitant increase in the incidence of individuals causing injury in States where they were not subject to *in personam* actions under *Pennoyer*, required further moderation of the territorial limits on jurisdictional power." *Shaffer*, 433 U.S. at 202.

35. These sentiments were reflected by the Court:

> Looking back over this long history of litigation a trend is clearly discernable toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957).

36. *See* Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (Arkansas obtained jurisdiction over a nonresident defendant while flying in an airplane over Arkansas territory).

particular state, beyond the reach of any service of process, despite the nature of any illegal activity he may have perpetrated while in the state.[37] This "unfair" treatment was the seed for the expansion of jurisdictional exercise.

III. THE EXPANSION OF *PENNOYER*

A. International Shoe

International Shoe was the first case to significantly reformulate the *Pennoyer* model.[38] This seminal case held that physical presence was no longer the only means to obtain in personam jurisdiction. The case involved a Delaware corporation, International Shoe Company, with its principal office in St. Louis, Missouri. Without an office in the state of Washington, International Shoe Company nevertheless solicited business there.[39] Washington law required employers to contribute to an unemployment insurance compensation fund, based on the employers' activities within the state.[40] In the event of a contribution deficiency, Washington law provided for notice in one of two ways: (1) "by personal service of notice upon the employer if found within the state" or (2) "by mailing the notice to the employer by registered mail at his last known address."[41]

The state of Washington initiated an action to recover compensation funds unpaid by International Shoe Company. An agent of International Shoe Company was personally served with process within Washington State borders. Corresponding notice of the suit was also sent to International Shoe Company's office in St. Louis. The question before the Court essentially was whether or not International Shoe Company, on the facts presented, was "present" or maintained a "presence" within the state of

37. *See* Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From* Pennoyer *to* Denckla: *A Review,* 25 U. CHI. L. REV. 569 (1958).

38. Professor Gottlieb noted, however, that the "sovereignty and inherent state powers" ideas solidified in *Pennoyer* "began to lose thier explanatory force" as early as 1937. Gottlieb, *In Search of the Link Between Due Process and Jurisdiction,* 60 WASH. U.L.Q. 1291, 1295 (1983). "It was in keeping with these developments that the Court in *International Shoe* expanded interterritorial state power at the expense of impermeable state boundaries." *Id.*

39. International Shoe Co. v. Washington, 326 U.S. 310, 313-14 (1945).

40. *Id.* at 311.

41. *Id.* at 312.

Washington. If the Court found such presence, then the state of Washington could exercise jurisdiction over the defendant.[42] In this situation, where a corporation engaged in business activities in numerous states, *Pennoyer's* objective physical presence test would no longer suffice.[43]

Writing for the majority, Justice Stone announced a new jurisdictional prescription. He did not execute a death warrant for the transient jurisdiction rule. Developed specifically with interstate corporate activities in mind, the new test required "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.'"[44] This constructive presence test permits courts to subjectively determine,[45] on a case-by-case basis, whether or not an exercise of jurisdiction would be fair and reasonable under the particular circumstances.[46]

Although *International Shoe* did not exactly replace *Pennoyer,* from *International Shoe* forward, the traditional rule began to

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42. The facts of *International Shoe* were as follows: International Shoe Company had no office in Washington, did not execute contracts there, and kept no stock in trade in Washington. International Shoe Company retained from eleven to thirteen sales representatives in Washington. These Washington domiciliaries carried on a substantial amount of solicitation in the state. Their activities resulted in significant commission payments. The Court also found that the representatives did, on occassion, rent sales rooms for displays and other business related activities. *Id.* at 313-14.

43. *Id.* at 316.

44. *Id.*

45. Here, Kurland correctly divines the trend that began to erode the federalist system as it existed in a post-*Pennoyer* climate.

> In matters of personal jurisdiction of state courts, no less than in matters of the jurisdiction of the federal courts, doctrines of federalism have been subordinated by the Supreme Court to concepts of *convenience.* The result is another major step ... toward the limitation of the federal principle. For state lines may be as easily erased by the enhancement of state power as by the expansion of national authority.

Kurland, *supra* note 37, at 569 (emphasis added).

46. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure....

> But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

International Shoe, 326 U.S. at 319.

wane.[47] Scholars began in earnest to doubt the validity of the rule.[48] The main criticism was that it is not fair to base an assertion of jurisdiction on mere physical presence alone—that in personam jurisdiction required something more. Fairness, many thought, and not mere presence, should be the new talisman for all jurisdictional exercise.

B. Shaffer

In 1977, the Supreme Court embraced the burgeoning commentary in *Shaffer v. Heitner*.[49] In *Shaffer*, a stockholder of the Greyhound Corporation, Heitner, brought a shareholder's derivative action in Delaware's Chancery Court against former corporate officers. None of the litigants was a resident of Delaware. Heitner simultaneously moved for sequestration of, *inter alia*, certain stock, options, and warrants owned by the officers. The officers argued that under *International Shoe*, they did not have the required "minimum contacts" necessary to establish jurisdiction.[50]

The state courts rejected the officers' arguments that the "statutory presence of appellants' property in Delaware"[51] was an inadequate basis for the exercise of quasi in rem jurisdiction. Also rejected was the contacts analysis, as the courts relied solely upon the traditional attachment process as conveying valid quasi in rem jurisdiction. On appeal, the Supreme Court reversed, relegating *Pennoyer* to little more than a historic relic.

Writing for the majority, Justice Marshall found *Pennoyer* no longer workable. The problem with *Pennoyer* was it "sharply limited the availability of *in personam* jurisdiction over defendants not resident in the forum State"[52] and therefore "could not accomodate some necessary litigation."[53] To accomodate this

47. In *McGee*, the Court wrote that the concept of inherent state sovereignty became "the subject of prolific controversy." McGee v. International Life Ins. Co., 355 U.S. at 222. Furthermore, the Court believed that *International Shoe* was a result of a "process of evolution" and change. *Id.* This trend cast doubt upon the efficacy of the *Pennoyer* paradigm. *See supra* note 35.

48. *See* Ehrenzweig, *supra* note 4; Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241 (1965); Kurland, *supra* note 37; Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Leflar, *Transient Jurisdiction—Remnant of* Pennoyer v. Neff: *A Round Table*, 9 J. PUB. L. 281 (1960).

49. 433 U.S. 186 (1977).

50. *Id.* at 193.

51. *Id.* at 213.

52. *Id.* at 199.

53. *Id.* at 201.

"necessary litigation" involving foreign corporations, Marshall relied heavily on the language of *International Shoe,* holding that the primary focus was no longer principles of territorial state sovereignty. Focusing instead on the "quality and nature"[54] of the relationship between tripartite interests: (1) the defendant, (2) the forum, and (3) the litigation,[55] the Court held that Delaware could not exercise jurisdiction over the defendant officers because their sole contact with the state was property that was "not the subject matter of the litigation."[56]

In Marshall's opinion, "*all assertions* of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[57] With this statement, the Court created the most ambiguous rhetoric to date. For this pronouncement left unclear whether or not "all" assertions included in personam exercises of jurisdiction. At first blush, it seemed this new formulation applied to jurisdictional assertions whether in personam, in rem, or quasi in rem. It also appeared that the transient jurisdiction rule was dealt a mortal blow, from which it would not likely recover.[58]

Shaffer left little hope for the transient rule. In a concurring opinion, however, Justice Stevens' suggested that notice through in-state service to a nonresident defendant would satisfy the minimum contacts analysis. "If I visit another State," he claimed, "I knowingly assume some risk that the State will exercise its power over my property or my person while I am there."[59] Embracing the transient rule, Stevens merely added a foreseeability component to the mechanical processes normally associated with service of process.

C. Interpreting the "Crossroads" Language of Shaffer

1. Post-*Shaffer* Cases Rejecting the Transient Jurisdiction Rule

After *Shaffer,* the uncertainty as to the proper application of the transient rule increased substantially.[60] Litigants defending

54. *Id.* at 204.

55. *Id.*

56. *Id.* at 213.

57. *Id.* at 212 (emphasis added).

58. Casad believed that the new rule in *Shaffer* might well mean "that the assertion of personal jurisdiction solely on the basis of the physical presence of the defendant is no longer sufficient for due process." R. CASAD, *supra* note 19, at §2.04[2][c]. Elsewhere, Casad wrote that after *Shaffer* the Court seemed "willing to declare the territorial power theory obsolete." *Id. See also* Posnak, *supra* note 4; Maltz, *supra* note 4, at 674.

59. *Shaffer,* 433 U.S. at 218 (Stevens, J., concurring).

60. *See* Bernstine, *supra* note 4; Brilmayer, Haverkamp, Logan, Neuwirth & O'Brien,

a transient jurisdiction case could invariably count on one thing—inconsistency. The first case to reject the transient rule came one year after the *Shaffer* decision. In *Schreiber v. Allis-Chalmers Corp.*,[61] a Kansas resident filed a products liability suit in Mississippi against a Delaware corporation. The plaintiff sustained injuries in Kansas while working on equipment manufactured by the defendant corporation. The plaintiff filed the suit in Mississippi, rather than Kansas, because the Kansas statute of limitations had expired.[62] Agents of the corporation were served in Mississippi pursuant to a statute authorizing service upon any business operating in the state regardless of the origin of the cause of action.[63]

The district court asserted personal jurisdiction even though the defendant company conducted no substantial activities in Mississippi.[64] The defendant thereupon moved for a change of venue to Kansas,[65] which the court granted. The plaintiff argued that *Klaxon Co. v. Stentor Electric Manufacturing Co.*[66] required the federal court sitting in Kansas to enforce the Mississippi statute. The court ultimately rejected this argument, in part at least, because Mississippi lacked proper jurisdiction over the corporation. Following a strict contacts analysis, the court found the contacts insufficient to confer jurisdiction. In dictum, the court explicitly rejected the transient rule, stating that "[t]o the extent the ideas of 'presence,' 'implied consent,' and 'general jurisdiction to adjudicate' derive from a 'power' theory of a state's 'exclusive jurisdiction and sovereignty over persons and property within its territory,' we believe they are conclusively declared obsolescent by *Shaffer v. Heitner*."[67] The court made its position unequivocal by declaring:

> After *Shaffer*, plaintiff cannot rely solely on the asserted fact of "presence" to sustain an exercise of jurisdiction in Mississippi, for "physical presence is no longer either necessary

A General Look at General Jurisdiction, 66 TEX. L. REV. 723 (1988); Posnak, *supra* note 4.

61. 448 F. Supp. 1079 (D. Kan. 1978).

62. *Id.* at 1081.

63. *Id.*

64. "[N]o agricultural equipment of the type here at issue has ever been manufactured in whole or in part, designed, or tested in Mississippi." *Id.* at 1085.

65. See 28 U.S.C. §1404(a) (1988), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

66. 313 U.S. 487 (1941).

67. Schreiber, 448 F. Supp. at 1088 (citations omitted).

> *or sufficient* for in personam actions." Rather, the nature and quality of that "presence" must be evaluated, with an eye toward the interest of Mississippi in assuming jurisdiction and providing a forum for this particular action.[68]

The most important case after *Shaffer* to reject the transient rule was *Nehemiah v. Athletics Congress of the U.S.A.*[69] In *Nehemiah,* a champion hurdler sued the International Amateur Athletic Federation (IAAF) to compel arbitration after his disqualification from amateur athletics. Responsible for setting and enforcing the standards and eligibility requirements for competing in these sporting events, the IAAF had disqualified the hurdler based on his participation in an American professional football league. Legal action commenced when two agents, including the president of the IAAF, were served with process while attending cross-country championships in New Jersey. These events, in which the hurdler was not a participant, were neither organized nor funded by the IAAF. The IAAF only allowed the games to borrow its name.

Judge Sloviter's majority opinion focused on *International Shoe* and *Shaffer.* "If the mere presence of the property cannot support *quasi in rem* jurisdiction," Sloviter wrote, "it is difficult to find a basis in logic and fairness to conclude that the more fleeting physical presence of a non-resident person can support personal jurisdiction.... [N]either logic nor history supports personal jurisdiction over an unincorporated association solely on the basis of service on its agent within the forum."[70] Standing at the *Shaffer* "crossroads," Sloviter was unable to tell whether or not *Shaffer's* holding extended to "*in personam* jurisdiction based merely on service of process on a non-resident defendant within the forum state on a matter unrelated to the cause of action."[71] Notwithstanding *Shaffer's* equivocal language, Sloviter forged ahead and constructed his own expansive interpretation, labeling the language as "sweeping."[72] Thus earmarked, he was able to fit transient defendants under the expanding "minimum contacts" umbrella.

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68. *Id.* at 1089 (citations omitted) (emphasis supplied by the court).
69. 765 F.2d 42 (3d Cir. 1985).
70. *Id.* at 47.
71. *Id.*
72. *Id.*

2. Post-*Shaffer* Cases Affirming the Transient Jurisdiction Rule

Despite *Shaffer* and this interpretive progeny,[73] which seemed to sound the death knell for the transient rule, the rule survived in numerous lower court decisions.[74] The first post-*Shaffer* case to explicitly affirm the transient rule was *Oxmans' Erwin Meat Co. v. Blacketer*.[75] *Oxmans'* involved an Oklahoma-based corporation, Blacketer Restaurant Association, Inc. ("restaurant"), which was licensed to conduct business in Wisconsin. Opening a new store in Milwaukee County, Wisconsin,[76] the restaurant negotiated its meat supply with Oxmans' Erwin Co. ("Oxmans"), a Wisconsin corporation.[77] Blacketer, an agent of the restaurant, represented to Oxmans' that, as a general partner of the restaurant, he could personally guarantee payment to Oxmans' for any meat purchased from them.[78] Upon the restaurant's default, Oxmans' filed this action against the restaurant and against Blacketer while he was physically present in Wisconsin. Blacketer's answer denied Wisconsin's assertion of in personam jurisdiction.[79]

At trial, Blacketer argued that he did not have the required "minimum contacts" with Wisconsin. The Wisconsin Supreme Court rejected his argument and held that neither *International*

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73. *See* Harold M. Pitman Co. v. Typecraft Software Ltd., 626 F. Supp. 305, 312 (N.D. Ill. 1986) ("We now hold that, under *Shaffer*, mere service of process upon a defendant transiently present in the jurisdiction does not vest a state with personal jurisdiction over the defendant. Personal service within the jurisdiction is not the litmus test for proper in personam jurisdiction."); Bershaw v. Sarbacher, 40 Wash. App. 653, 657, 700 P.2d 347, 349 (1985) (defendant's "transient presence in Washington was insufficient" to confer in personam jurisdiction); Energy Reserves Group, Inc. v. Superior Oil Co., 460 F. Supp. 483, 504 (D. Kan. 1978) (stating that "presence is ... neither necessary nor always sufficient as a basis to support the exercise of jurisdiction" and that "jurisdiction over a non-resident cannot automatically be predicated on ... 'presence.'"); *see also* Oden Optical Co., Inc. v. Optique Du Mond, Ltd., 268 Ark. 1105, ____, 598 S.W.2d 456, 458 (Ark. App. 1980) (the transient jurisdiction idea "is a concept which may need reevaluation"); Mohler v. Dorado Wings, Inc., 675 S.W.2d 404, 405 (Ky. Ct. App. 1984) (an exercise of jurisdiction over a nonresident defendant must be determined in light of *International Shoe's* "minimum contacts" formulation).

74. *See, e.g.*, Amusement Equipment Inc. v. Mordelt, 779 F.2d 264, 270-71 (5th Cir. 1985); Leab v. Streit, 584 F. Supp. 748 (S.D.N.Y. 1984); Aluminal Indus. v. Newton Commercial Assoc., 89 F.R.D. 326, 329-30 (S.D.N.Y. 1980); Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22 (1980); MacLeod v. MacLeod, 383 A.2d 39 (Me. 1978).

75. 86 Wis.2d 683, 273 N.W.2d 285 (1979).

76. *Id.* at 689, 273 N.W.2d at 286.

77. *Id.* at 689-90, 273 N.W.2d at 288.

78. Oxmans' examination of Blacketer's personal accounts revealed $3 million in total assets. *Id.* at 690, 273 N.W.2d at 288.

79. *Id.* at 686, 273 N.W.2d at 286.

Shoe nor *Shaffer* clearly decided the jurisdictional issue. Like the court in *Nehemiah,* the court in *Blacketer* was uncertain whether *Shaffer* extended the "minimum contacts" analysis to include in personam exercises. Standing at the crossroads, the court in *Blacketer* proceeded down a path different than the one taken in *Nehemiah.* The court reasoned that neither *Shaffer* nor *International Shoe* "addresses the issue of the constitutionality of the state's exercising jurisdiction based solely on the service of process upon an individual physically present within state borders."[80] The court continued, "[W]e do not today hold the 'minimum contacts' analysis rule of *International Shoe* to be applicable where the jurisdictional basis is physical presence of a natural person."[81]

Despite this pro-transient rule language, the court still analyzed contacts, concluding that the defendant's contacts fell within the purview of the *International Shoe/Shaffer* tests. The court was not speaking from both sides of its mouth, however, for it found that the defendant was not a "transient . . . momentarily within the state" and, therefore, met the requirements of "minimum contact" analysis.[82]

Humphrey v. Langford,[83] decided one year after *Blacketer,* also affirmed the transient rule. The Humphreys owned a business in South Carolina, which they later sold to Langford. Both parties were residents of South Carolina at the time a sales contract was executed.[84] After moving to Georgia the Humphreys found Langford there visiting the state on a one-day bowling trip and had him served with summons.[85] Langford moved to dismiss for lack of personal jurisdiction. He asserted that, since the mere presence of property was insufficient to confer in rem jurisdiction, by analogy, the mere physical presence of a person was likewise insufficient to confer in personam jurisdiction.[86]

Like the court in *Oxmans'* and *Nehemiah,* the Georgia Supreme Court faced the difficult judicial task of interpreting the ambiguous crossroads language of *Shaffer.* Justice Bowles, announcing the majority opinion, declared that "*Shaffer* does not tell us what the result would have been had any defendants been personally

80. *Id.* at 688, 273 N.W.2d at 287.
81. *Id.*
82. *Id.*
83. 246 Ga. 732, 273 S.E.2d 22 (1980).
84. *Id.* at ____, 273 S.E.2d at 22.
85. *Id.*
86. *Id.* at ____, 273 S.E.2d at 23.

served with process while in Delaware."[87] Bowles rejected the defendant's rationale, citing both *Pennoyer* and *International Shoe*. Of the latter he wrote, "*International Shoe* does not cast doubt on the notion that presence is still a sufficient basis for jurisdiction, it simply states a rule of 'minimum contacts' as an *alternative* to 'presence.'"[88]

Bowles made a crucial distinction between corporate and individual personalities, each requiring a different analysis. "Corporate presence can *only* be manifested by corporate *activity*," while, on the other hand, an individual served within state boundaries exhibits "*actual* presence."[89] His point, simply put, was that "activities" are not capable of absolute determination, at least not without some type of subjective, extrajudicial analysis. It is for this type of analysis that *International Shoe* provides. Actual presence, conversely, is capable of absolute and objective determination and therefore requires no contact or extrajudicial analysis.

A more recent case sustaining the transient rule is *Amusement Equipment, Inc. v. Mordelt.*[90] In *Mordelt,* the owner of Amusement Equipment, Inc. ("Amusement"), a Florida corporation, traveled to Germany to visit the Heimo Corporation ("Heimo"), an amusement products manufacturer.[91] As a result of this and other meetings, the parties executed a contract wherein Heimo sold certain equipment to Amusement.[92] Upon the failure of Heimo to timely deliver the goods, Amusement filed a suit in Louisianna against both Heimo and its general manager, Mordelt. The latter was personally served in New Orleans while attending the Sixty-Fifth Annual Convention and Trade Show, sponsered by the International Association of Amusement Parks and Attractions ("IAAPA"). The court noted that neither Mordelt nor Heimo had any prior connection with Louisianna.[93]

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87. *Id.*

88. *Id.* (emphasis added).

89. *Id.* (emphasis added).

90. 779 F.2d 264 (5th Cir. 1985).

91. *Id.* at 265.

92. Under the terms of the agreement, Heimo was responsible for shipping the equipment from Germany to Florida by November 12, 1983, so that Amusement could display the products at a New Orleans convention of the International Association of Amusement Parks and Attractions. *Id.*

93. Although Heimo was an IAAPA member in good standing, it, along with Mordelt, had no other ties with Louisiana. Neither party had representatives, advertised, paid taxes, held assets, nor were listed in any telephone directory in the state. Although Mordelt attended the convention, it did not display any of Heimo's products. *Id.* at 266.

Judge Goldberg, writing for the Fifth Circuit majority,[94] began his analysis by stating that the transient jurisdiction rule has been both "undermined by *Shaffer*,"[95] and "much maligned by the commentators."[96] Goldberg tied this trend to the crossroads language of *Shaffer*.[97] This "sweeping" language, the judge said, undermines the very foundation of a transient rule built on the concept of state sovereignty. "If there is anything that characterizes sovereignty, it is the state's dominion over its territory and those within it."[98] While the court went on to uphold the exercise of in personam jurisdiction over Mordelt,[99] proclaiming that "the rule of transient jurisdiction has life left in it yet,"[100] it did not, however, use a pristine approach. *Mordelt* retained one vestige of the *International Shoe* analysis by affirming that even in assertions of personal jurisdiction, the suit must "not offend 'traditional notions of fair play and substantial justice.'"[101]

In a purely traditional approach, a court could exercise in personam jurisdiction if predicated on both physical presence and appropriate notice within a state's borders. Any fairness inquiry was irrelevant. *Mordelt* modified this traditional approach, however, to include *International Shoe's* fairness requirement. The court concluded that *presence itself* has been a "traditional notion of fair play and substantial justice," and is therefore "sufficient to support personal jurisdiction."[102]

These cases reveal the quagmire surrounding the transient jurisdiction rule. Vacillating between a minimum contacts/fairness analysis and a strict application of the traditional rule, with an apparent judicial and academic preference for the former, the Supreme Court met this issue head on in *Burnham*.

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94. In an eloquent introduction, Judge Goldberg suggested that "[p]erhaps with visions of *Grace v. MacArthur* dancing through its corporate head, Amusement hunted Mordelt down, found him at the Marriot Hotel, served him and Heimo with process, and plunged the district court and us into the purgatory of transient jurisdiction." *Id.* at 265.

95. *Id.* at 267.

96. *Id.* at 268.

97. Judge Goldberg astutely observed that "[t]he source of the commentators' gloom rests principally on the following statement in *Shaffer*. 'We therefore conclude that *all* assertions of state-court jurisdiction must be evaluated according to the standard set forth in *International Shoe* and its progeny.'" *Id.* (emphasis supplied by the court).

98. *Id.* at 270.

99. Due to a lack of precedent, the court was unable to reach the same result with respect to Heimo. The court stated, "[W]e have found no cases holding one way or the other that service of process upon an agent of the corporation temporarily present within the state is sufficient to establish jurisdiction over the corporation." *Id.* at 267.

100. *Id.* at 271.

101. *Id.* at 270.

102. *Id.*

IV. ANALYSIS OF *BURNHAM*

A. The Battle of Historical Interpretation

After presenting the basic issue[103] and briefly describing the facts, Scalia laid the foundation upon which his ultimate conclusion rested.[104] Scalia began his analysis by examining the historical application of in personam jurisdiction in America. To Scalia, a correct reading of history shows that the American judiciary has persistently recognized the power of a state over people who are present within its borders.[105] In support of this proposition, Scalia enumerated a litany of pre-*Pennoyer* cases that either directly affirmed or otherwise supported the transient rule.

Justice Brennan took issue with this point, however. His interpretation of history yielded a different result. To Brennan, the rule of transient jurisdiction was never settled in the American judiciary, nor was it applied with predictability either prior to or after the early American experience.[106]

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103. Scalia stated the broad issue thus: "[W]hether the Due Process Clause of the Fourteenth Amendment denies California courts jurisdiction over a nonresident, who was personally served with process while temporarily in that State, in a suit unrelated to his activities in the State." *Burnham*, 110 S.Ct. at 2109. After this initial expression, however, Scalia noted the principal cases that have shaped personal jurisdiction. These include a brief mention of *Pennoyer* and *International Shoe* that "a State court's assertion of personal jurisdiction satisfies the Due Process Clause if it does not violate '"traditional notions of fair play and substantial justice."' *Id.* at 2110. He noted that, until Burnham, the minimum contacts analysis required by *International Shoe* was applied only to defendants who were served *without* state borders. Scalia then honed the issue to: "[W]hether due process requires a similar connection between the litigation and the defendant's contacts with the State in cases where the defendant is physically present *in the State* at the time process is served upon him." *Id.* (emphasis added).

104. Scalia affirmed the transient jurisdiction rule by stating that physical presence alone is enough to give a court the power to adjudicate the rights of an individual. *See supra* note 16.

105. Scalia asserted that "[a]mong 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." *Burnham*, 110 S.Ct. at 2110. In support of this proposition, Scalia observed that Justice Story, among others, espoused this principle: "'[B]y the common law[,] personal actions, being transitory, may be brought in any place, where the party defendant may be found' for 'every nation may . . . rightfully exercise jurisdiction over all persons within its domain.'" *Id.* at 2111 (quoting J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 554, 543 (1846)).

106. "The rule was a stranger to the common law and was rather weakly implanted in American jurisprudence . . . ." *Burnham*, 110 S.Ct. at 2122-23 (Brennan, J., concurring). Brennan later cradled his interpretation of history in terms of how "murky the jurisprudential origins of transient jurisdiction" were in America. *Id.* at 2124.

Scalia, though doubting Brennan's interpretation,[107] provided for this possibility. Scalia pointed out that even if history is not as settled as it appears, the belief in a transitory rule nevertheless was the "understanding ... shared by American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted."[108] Scalia also noted that no American court had ever suggested the invalidity of the transient jurisdiction rule until after *Shaffer*.[109] Scalia labeled the post-*Shaffer* cases that rejected the transient rule as "erroneous."[110] Based on this "formidable body of precedent,"[111] Scalia concluded that the "validation" of the transient jurisdiction rule "is its pedigree, as the phrase '*traditional notions* of fair play and substantial justice' makes clear."[112]

Scalia, while brilliantly charting the course of the rule, never provided a basis other than tradition for the transient jurisdiction rule. While history may serve as a valid basis for a rule, it would be regrettable if law were to satisfy itself with mere tradition and cease to seek principled bases upon which to rest its rules. Indeed, recognition and usage of a particular rule does not *ipso facto* validate that rule.[113] Such a practice is little more than *ipse dixit* backed by custom and observance. A rule justified by "we've always done it that way" should not be sustained in an environment that no longer profits from its existence.[114]

History alone cannot validate the transient jurisdiction rule. It is vitally important to provide other bases for legal rules.[115]

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107. Justice Scalia found case precedent to be so telling that "one can only marvel at Justice Brennan's assertion that the rule 'was rather weakly implanted in American jurisprudence' and 'did not receive wide currency until well after our decision in *Pennoyer v. Neff*.'" *Burnham*, 110 S.Ct. at 2112 n.3 (citations omitted).

108. *Id.* at 2111.

109. *Id.* at 2112.

110. *Id.* at 2113.

111. *Id.*

112. *Id.* at 2116 (emphasis the Court's).

113. Brennan's naked statement that "[a]lthough ... history is an important factor in establishing [the validity of the transient jurisdiction rule], it is [not] the *only* factor" to consider, is therefore not wholly without merit. *Burnham*, 100 S.Ct. at 2120 (Brennan, J., concurring).

114. Brennan gave credence to this supposition by asserting that "'ancient forms without substantial modern justification'" should be discarded. *Id.* at 2121.

115. History does play an essential function in our legal system, however, particularly through *stare decisis*, which indicates that a rule should be kept unless there are adequate grounds for abandoning it. Nevertheless, one should inquire into whether there are any other bases for the rule that would provide it with a principled rationale. While it is adequate jurisprudence to rely solely on history, it is preferable to buttress the rule with sound reasoning whenever possible.

With the transient jurisdiction rule, there is such a basis. John Locke's (1632-1704) statehood paradigm is illustrative.[116] Locke believed that the most basic element of statehood is ownership of real property.[117] With the establishment of property ownership and territorial demarcations, a nation could not exercise power outside its own borders, but with respect to people within a state's borders, state power "reach[ed] as far as the very being of any one within the territories of that government."[118]

A comtemporary of Locke, Ulric Huber (1636-1694) also played a significant role in establishing the rationale for transient jurisdiction.[119] His three propositions regarding the sovereign nature of states and their power were:

> 1. The laws of each state have force within the limits of that government and bind all subject to it, but not beyond.
> 2. All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.
> 3. Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.[120]

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116. Locke, more than any other commentator, directly influenced the philosophical foundations upon which our government is based. "The Lockean system was dominant at the time when the Constitution was adopted." R. EPSTEIN, TAKINGS 16 (1985). *See also* Siegan, *The Law and the Land,* in PRIVATE RIGHTS AND PUBLIC LANDS 9, 10 (P. Truluck ed. 1983). "The United States Constitution was written at a time when ideas of natural law and social contract were accepted widely and were highly influential.... John Locke, probably the most influential philosophical commentator during the revolutionary and constitutional periods, provided an intellectual basis for these ideas about natural law." *Id.*

117. Locke theorized that a state, or "political society," begins with the union of one man's possessions with those of other members within a community. J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 63-64 (C. Macpherson ed. 1980). Locke believed that without this merger, a nation could not exist.

118. *Id.* at 64.

119. Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America,* 38 AM. J. COMP. L. 73 (1990).

120. U. HUBER, DE CONFLICTU LEGUM para. 2 (1684), quoted by Weinstein, *supra* note 119, at 77. Borrowing from Huber, Justice Story announced two analogous principles:

> I. The first and most general maxim or proposition is ... that every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it, whether natural-born subjects or aliens....
>
> ....
>
> II. Another maxim or proposition is, that no state or nation can, by its

Huber harmonized the proposition that a government had physical control over the people within its geographic boundaries with the nature of state sovereignty. Huber proclaimed that the "proposition that all within the boundaries of a govenment are deemed subjects thereof ... is in conformity ... with the nature of a state and the custom of subjecting all found therein to its sovereignty."[121]

The ideas of Locke and Huber are commensurate with the theories of statehood as developed and recognized in the field of international law. It is well known among international scholars that one of the indespensible prerequisites to the formation of a nation is land ownership.[122] In addition to territory being the basis for the existence of a nation in fact, it is also "the basis for the excercise of its legal powers."[123] Thus, state sovereignty flows from the possession of land.

> The description of states and of the ways in which they are established and organized has shown that sovereignty and territory are essential parts of any state; and not only are they inextricably linked and set bounds to each other, but it is a prime function of the law of nations to define those bounds.[124]

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laws, directly affect, or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or others.

J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19-20 (7th ed. 1872). Justice Story, in one opinion, stated commensurate principles in a discussion that concentrated on state court jurisdiction.

> Whatever might be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, that jurisdiction is available only within the limits of the district. The courts of a state, however general may be their jurisdiction, are necessarily confined to the territorial limits of the state. Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them, would be deemed an usurpation of foreign sovereignty, not justified or acknowledged by the law or nations. Even the court of king's bench in England, though a court of general jurisdiction, never imagined, that it could serve process in Scotland, Ireland, or the colonies, to compel an appearance, or justify a judgment against persons residing therein at the time of the commencement of the suit. This results from the general principle, that a court created within and for a particular territory is bounded in the exercise of its power by the limits of such territory. It matters not, whether it be a kingdom, a state, a county, or a city, or other local district.

Picquet v. Swan, 19 F. Cas. 609, 611 (C.C. Mass. 1828). Justice Field also adopted Huber's propositions in Pennoyer. *See supra* text accompanying notes 27-32.

121. U. HUBER, DE CONFLICTU LEGUM para. 2 (1684), quoted by Weinstein, *supra* note 119, at 80.

122. D. GREIG, INTERNATIONAL LAW 94 (2d ed. 1976).

123. *Id.* at 155.

124. J. FAWCETT, THE LAW OF NATIONS 54 (1968).

The theories of Huber and Locke, in addition to those established rules of international law, demonstrate that a state has the physical power and authority to adjudicate the rights of the people and things within its borders. The transient rule is therefore justified by the inherent nature of the state—sovereignty over its territory.

The jurisdictional issue in *Burnham*, however, also requires a second step. Not only must transient jurisdiction be a valid exercise of the inherent power of an independent state, but the states must have retained this power under the Constitution and its amendments. In other words, the inquiry is whether the states, in forming this nation, surrendered this inherent power to the national government. The Court in *Pennoyer* recognized this possibility:

> The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. *But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them.*[125]

Scalia indicates that the states have not surrendered this inherent power to excercise jurisdiction over persons within their borders. He asserts that the crucial time at issue was 1868—when the fourteenth amendment was adopted[126] and indicates that the exercise of transient jurisdiction was an accepted practice at that time. It follows, therefore, that the states, in ratifying the fourteenth amendment, did not intend the due process clause of that amendment to limit this inherent power.

B. Battle at the Shaffer *"Crossroads"*

Notwithstanding the underlying bases for the transient jurisdiction rule, the Court faced the very real problem of applying its precedents to the *Burnham* case. Thus, the real battle in *Burnham* centered over the interpretation of the crossroads language in *Shaffer*.[127] The controversy was whether or not "all"

125. Pennoyer v. Neff, 95 U.S. at 722 (emphasis added).

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

127. "[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Shaffer*, 433 U.S. at 212.

includes the exercise of in personam jurisdiction as well as that of in rem and quasi in rem. Scalia asserted that the word "all," as used in *Shaffer,* does not necessarily include *all* exercises of in personam jurisdiction. His rationale was that "*Shaffer,* like *International Shoe,* involved jurisdiction over an *absent defendant,* and it stands for nothing more than the proposition that when the 'minimum contact' that is a substitute for physical presence consists of property ownership it must, like other minimum contacts, be related to the litigation."[128]

Thus, unlike either *Shaffer* or *International Shoe, Burnham* involved a defendant who was *present* within the state when served with process. It is therefore logical to assume that the standards of application will differ between in personam and in rem or quasi in rem actions. The disputed language of *Shaffer* applies to quasi in rem actions, which are fictive actions based on the ownership of property and designed to hail out-of-state defendants into the forum of the locus of the *res.* It is *this* exercise that must comport with the *International Shoe* "minimum contacts" test. The statements of *Shaffer,* therefore, were not intended to subsume in personam actions. Thus, Scalia stated that *Shaffer* "does not compel the conclusion that physically present defendants must be treated identically to absent ones."[129] Scalia then proceeded to define two nonresident defendant classes to which the service of process rules apply: (1) those nonresidents who are served within the state and (2) all other nonresidents that a court desires to bring before its forum.[130] The first class is subject to a court's jurisdiction based on the long-standing transient service rule. The second class is the type to which "*International Shoe* confined its 'minimum contacts' requirement."[131] Scalia maintained that "it is unreasonable to read *Shaffer* as casually obliterating that distinction."[132]

In his concurring opinion, Brennan made no such distinction between types of defendants. He simply asserted that "*every* assertion of state-court jurisdiction, even one pursuant to a 'traditional' rule such as transient jurisdiction, must comport with contemporary notions of due process."[133] This statement reveals

128. *Burnham,* 110 S.Ct. at 2115 (emphasis supplied by the Court).

129. *Id.* at 2116.

130. *Id.*

131. "*International Shoe* confined its 'minimum contacts' requirement to situations in which the defendant 'be not present within the territory of the forum,' and nothing in *Shaffer* expands that requirement beyond that." *Id.* (citations omitted).

132. *Id.*

133. *Burnham,* 110 S.Ct. at 2122 (Brennan, J., concurring) (emphasis in original).

Brennan's jurisprudential presupposition—that the Constitution is evolving *ad infinitum* toward some purer form. Brennan faulted Scalia for assuming 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."[134] It is also Brennan's predilection that it is the obligation of the judiciary, and the Supreme Court in particular, to expedite this evolutionary process by "discard[ing]" whatever rule the *Court* deems void of "substantial modern justification."[135]

To Brennan, the evolution of due process through *International Shoe, Shaffer,* and their scion requires an independant fairness inquiry in *all* exercises of jurisdiction. Whether or not an exercise of jurisdiction is ultimately fair, therefore, turns on a "minimum contacts" inquiry. In *Burnham,* Brennan concluded that it is fair for California to exercise in personam jurisdiction over the nonresident husband. Unremarkably, Brennan reached this decision by counting contacts. If scrutinized closely, however, Brennan's tabulation exhibits the very thing of which he accused Scalia: "nimble gymnastics."[136] Even if *arguendo,* Brennan's fairness/contacts formulation should be applied in all exercises of jurisdiction, his analysis in *Burnham* is unfaithful to his own standard.

In *Burger King v. Rudzewicz,*[137] Brennan earlier defined minimum contacts. Here, Brennan wrote that "'deliberate[]'"[138] actions, "significant activities,"[139] "'purposefully directed'" acts,[140] or acts that "create a 'substantial connection' with the forum

134. *Id.* at 2121 n.3. Apparently Brennan drew this conclusion from Scalia's statement thet "the crucial time for present purposes" is "1868, when the Fourteenth Amendment was adopted." *Burnham,* 110 S.Ct. at 2111. It does not follow, however, that Scalia assumed that no further progress can be made in our legal system. Scalia would recognize the progress made by the fourteenth amendment. Rather, it is a question of whether the Court, responsible for interpreting the law, should be bringing about the change, or whether that function is limited to the people in their sovereign capacity. Scalia recognized that "[n]othing we say today prevents individual States from limiting or entirely abandoning the in-state-service basis of jurisdiction." *Id.* at 2119. Scalia obviously would have no problem with state legislatures or state courts reaching their own determinations, through, *inter alia,* forum non conveniens and venue transfers, that the exercise of in personam jurisdiction over transients is unfair. "But the states," Scalia observed, "have overwhelmingly declined to adopt such limitation or abandonment, evidently not considering it to be progress." *Id.*

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

136. *Id.* at 2122.

137. 471 U.S. 462 (1985).

138. *Id.* at 475-76.

139. *Id.* at 476.

140. *Id.*

State"[141] are typical indicia of minimum contacts. Furthermore, Brennan noted that a state is without power to adjudicate the personal rights of a defendant where the defendant's contacts with the state are "'so attenuated as to make the exercise of such jurisdiction unreasonable.'"[142]

In *Burnham,* the meager contacts that Brennan included are: police and fire protection, the right of access to state highways, and the freedom to enjoy "the fruits of the State's economy as well."[143] Given the facts in *Burnham,* the husband's three-day tenure in the state of California before being served with process hardly rises to the level of deliberate, significant, or purposefully directed actions that, by Brennan's own analysis, are required for all assertions of jurisdiction. These attenuated contacts are therefore not fair, as Brennan insisted, but are "powerfully inadequate to establish, as an abstract matter, that it is 'fair' for California to decree the ownership of all Mr. Burnham's worldly goods acquired during the ten years of his marriage, and the custody over his children."[144]

CONCLUSION

In the end, neither Justice Brennan nor Justice Scalia adqeuately supports the position each espouses. Brennan's belief that all defendants should be subject to a specious contacts counting exercise leaves the defendant vulnerable to the whims of a subjective decision maker.[145] Such peripatetic analysis, as Brennan's opinion demonstrates, brings neither certainty nor uniformity to these troubled jurisdictional issues.

Similarly, Scalia fails to adequately support his belief in the transient jurisdiction rule by presenting only half of the jurisprudence necessary for its validation. By relying solely on adjudicative pedigree to justify the rule, Scalia ignores the real basis for the existence of and modern justification for the rule.

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141. *Id.* at 475.

142. *Burnham,* 110 S.Ct. at 2124 (Brennan, J., concurring) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 at 39 (1986)).

143. *Id.* at 2125.

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

145. Justice Scalia notes that Brennan's concurrence requires more than "'contemporary notions of due process.'" *Id.* Scalia continues, it "requires more: it measures state-court jurisdiction not only against traditional doctrines in this country, including current state-court practice, but against each Justice's subjective assessment of what is fair and just." *Id.*

This missing portion is that state sovereignty in a federalist structure demands that each state has exclusive control over those things and persons within its borders.

Despite Scalia's imperfect analysis of the transient jurisdiction rule, he nevertheless accomplishes one very crucial task in *Burnham*. In the past, courts have been divided as to the exact meaning of the word "all" as used in *Shaffer*. After Scalia's analysis in *Burnham*, there can be no doubt but that the prescriptive language in *Shaffer* applies *only* to defendants who are outside a state. As to those defendants who are present within a state's borders, some other rule of application applies. Scalia correctly asserts that this other rule is the transient jurisdiction rule.

Whether or not courts in the future will respond by following this clear interpretation of the *Shaffer* language is uncertain. One thing is certain, however: the ideas surrounding the transient jurisdiction rule are alive and well and continue to have valid modern justification.

SHAWN PATRICK MCLAUGHLIN